IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGE SAMMA *et al*., on behalf of themselves and others similarly situated, Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE *et al*., Defendants.	Civil Action No. _____

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Plaintiffs hereby move this Court to certify a class pursuant to Rule 23 of the Federal Rules of Civil Procedure and Local Rule 23.1 and to appoint class counsel. In support of this motion, Plaintiffs rely on the accompanying memorandum, declaration, and exhibits. A proposed order is attached for the Court's convenience.

STATEMENT PURSUANT TO LOCAL RULE 7(m)

Plaintiffs' counsel has not conferred with Defendants' counsel to determine if Defendants would consent to the relief requested in this motion because there is currently no counsel of record for Defendants in this action as this motion is filed concurrently with the complaint.

Dated: April 28, 2020

Respectfully submitted,

/s/ Jonathan Hafetz

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Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE *et al*.,

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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INTRODUCTION

Plaintiffs file this class action to challenge a Department of Defense ("DoD") policy ("N-426 Policy") pursuant to which Defendants have refused to certify the honorable service of non-citizen service members in the United States Armed Forces, thereby blocking their ability to apply for naturalization as Congress has provided for them. In *Kirwa v. U.S. Department of Defense*, 285 F. Supp. 3d 21 (D.D.C. 2017), this Court preliminarily enjoined the same Defendants from applying the N-426 Policy to non-citizens serving in the Selected Reserve of the Ready Reserve ("Selected Reserve") who enlisted under the "Military Accessions Vital to the National Interest" ("MAVNI") program. Defendants did not appeal the preliminary injunction in *Kirwa*, but they continue to apply the unlawful N-426 Policy to other non-citizens outside the *Kirwa* class, including active duty MAVNI service members as well as lawful permanent residents serving active duty and in the Selected Reserve. Plaintiffs seek a declaration that the N-426 Policy is unlawful, and an injunction requiring Defendants to certify the honorable service of each class member so that they may apply for naturalization.

Plaintiffs' proposed class of non-citizen service members who remain subject to the N-426 Policy consists of all individuals who: (a) are non-citizens serving honorably 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. The proposed class satisfies all of the requirements of Federal Rule of Civil Procedure 23(a). *First*, the class members are numerous, consisting of several thousand non-citizen service members. *Second*, the class members share common questions of fact, as they are all subject to the same policy depriving them of certifications of honorable service. They also share common questions of law, including concerning the legality of Defendants' N-426 Policy. *Third*, the class representatives are subject

to the same policy as all class members and therefore assert claims typical of the claims asserted by the class. *Fourth*, the class representatives and their experienced counsel will fairly and adequately protect class interests and will vigorously prosecute the action on behalf of the class.

Certification of Plaintiffs' proposed class is warranted under both (1) Rule 23(b)(1) because separate actions by class members would risk creating inconsistent outcomes and incompatible standards of conduct for Defendants, and (2) Rule 23(b)(2) because Defendants have acted on grounds generally applicable to the class through the N-426 Policy, such that a declaration and injunction with respect to the whole class is appropriate. Courts, including this one, have certified at least three separate class actions challenging the same or other DoD policies that harm non-citizen service members. *See Nio v. U.S. Dep't of Homeland Sec.*, 323 F.R.D. 28 (D.D.C. 2017) (certifying class of Selected Reserve MAVNIs challenging DoD's decertification of N-426 certifications pursuant to N-426 Policy); Mem. Op., *Kirwa v. U.S. Dep't of Def.*, No. 17-cv-01793-ESH-RMM (D.D.C. Dec. 1, 2017), ECF No. 47 (certifying class of Selected Reserve MAVNIs challenging DoD's refusal to issue N-426 certifications pursuant to N-426 Policy); Order Granting Class Certification, Denying Mot. to Dismiss, & Granting Prelim. Inj., *Kuang v. U.S. Dep't of Def.*, No. 18-cv-03698-JST (N.D. Cal. Nov. 16, 2018), ECF No. 68 (certifying class of lawful permanent resident enlistees subject to separate DoD enhanced screening policy). Plaintiffs' proposed class is not covered by rulings issued in these or any other prior cases. Plaintiffs are not Selected Reserve MAVNIs and therefore are not covered by *Kirwa* or *Nio*, and they challenge a different DoD policy from that at issue in *Kuang*.

Plaintiffs seek class certification to challenge Defendants' unlawful N-426 Policy on behalf of all impacted non-citizen service members who are not involved in other litigation. Their claims are not dependent on an individualized assessment of honorable service or an

individualized determination of eligibility for naturalization. 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 simply due to their status as non-citizens. Thousands of service members are being or will be subjected to the N-426 Policy, are experiencing or will experience delays in obtaining certifications of honorable service, and are or will be suffering similar harms as a result of the delay. This Court should therefore certify the proposed class and appoint Plaintiffs' counsel as class counsel.

FACTUAL BACKGROUND

8 U.S.C. § 1440 expressly provides that any non-citizen who has served honorably in the U.S. military during a designated period of military hostilities is eligible for expedited naturalization. This provision further mandates that DoD provide non-citizens who have served honorably with a certification of honorable service. U.S. Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security ("DHS") responsible for processing and adjudicating naturalization applications, requires DoD to certify honorable service using USCIS Form N-426. Once DoD has certified their honorable service using Form N-426, service members may proceed to submit their naturalization applications to USCIS.

Plaintiffs are non-citizen service members eligible to apply for naturalization pursuant to 8 U.S.C. § 1440, but for DoD's unlawful refusal to certify their honorable service.[1] They have signed enlistment contracts and taken the Oath of Enlistment. They are serving during a designated period of military hostilities, and have done so honorably since they entered service.

[1] The facts relating to named Plaintiffs in this paragraph have been set forth in Plaintiffs' declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction. *See* Samma Decl. ¶¶ 5–6, 8–16, 20, 22; Bouomo Decl. ¶¶ 4–5, 7–11, 14, 16; Isiaka Decl. ¶¶ 9–10, 13, 16, 18; Perez Decl. ¶¶ 4–5, 7–12, 15, 17; Park Decl. ¶¶ 4–5, 8–11, 14, 16; Lee Decl. ¶¶ 5–6, 9, 13, 15.

Each Plaintiff has requested from the military, some on multiple occasions, an N-426 certification of honorable service, but has been unsuccessful in obtaining the certification.

DoD's refusal to certify Plaintiffs' honorable service arises from a DoD memorandum issued on October 13, 2017, establishing new criteria and a new process for non-citizen service members to obtain an N-426 certification. *See* Memorandum from Off. of Under Sec'y of Def. for Secretaries of Mil. Dep'ts & Commandant of Coast Guard, *Certification of Honorable Service for Members of the Selected Reserve of the Ready Reserve and Members of the Active Components of the Military or Naval Forces for Purposes of Naturalization* (Oct. 13, 2017), Ex. 1 ("N-426 Policy"). Among its criteria, the N-426 Policy requires service members to complete additional DoD background screening, a "military service suitability determination," and a minimum period of service (180 days for active duty service members or one year for service members in the Selected Reserve) before they may obtain their N-426 certification. *Id*. at 2–3. In addition, the N-426 Policy requires the Secretary of the applicable service, or a commissioned officer serving at pay grade O-6 or higher designated by the Secretary, to certify the N-426. *Id*. at 1.

Previously, DoD's longstanding practice was to issue N-426 certifications to non-citizens who had served honorably, without requiring a minimum period of service or fulfillment of any additional criteria. Moreover, a broad range of military personnel with access to an individual's service records could certify the N-426, and would typically do so within days of receiving it. However, as a result of the N-426 Policy, Plaintiffs are experiencing significant delays in obtaining N-426 certifications and are unable to apply for naturalization under 8 U.S.C. § 1440 even as they continue to serve honorably in this nation's military. Plaintiffs allege that this policy is unlawful and seek declaratory and injunctive relief.

LEGAL STANDARD

Federal Rule of Civil Procedure 23 sets forth the requirements for certification of a class action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14 (1997); *J.D. v. Azar*, 925 F.3d 1291, 1312 (D.C. Cir. 2019). First, Plaintiffs must satisfy the four Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate."). Second, Plaintiffs must demonstrate the case meets the requirements of one of Rule 23(b)'s subsections. Rule 23(b)(1) requires a showing that "prosecuting separate actions by . . . individual class members would create a risk of . . . varying adjudications . . . that would establish incompatible standards of conduct." Fed. R. Civ. P. 23(b)(1); *see also Amchem*, 521 U.S. at 614. Alternatively, Rule 23(b)(2) requires a showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also Wal-Mart*, 564 U.S. at 360.

ARGUMENT

I. The Proposed Class Satisfies the Rule 23(a) Requirements.

A. The Proposed Class Satisfies the Numerosity Requirement.

The proposed class satisfies the requirement that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This requirement "imposes no absolute limitations" and is determined on a case-by-case basis. *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 51 (D.D.C. 2010) (quoting *Gen. Tele. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980)); *see also Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*,

239 F.R.D. 9, 25 (D.D.C. 2006) ("There is no specific threshold that must be surpassed in order to satisfy the numerosity requirement; rather, each decision turns on the particularized circumstances of the case."). However, this Court has "generally found that the numerosity requirement is satisfied . . . where a proposed class has at least forty members." *Radosti*, 717 F. Supp. 2d at 51 (citing *Bynum v. District of Columbia*, 214 F.R.D. 27, 32 (D.D.C. 2003); *Thomas v. Christopher*, 169 F.R.D. 224, 237 (D.D.C. 1996)); *see also In re APA Assessment Fee Litig.*, 311 F.R.D. 8, 14 (D.D.C. 2015). "[A] plaintiff need not provide the exact number of potential class members in order to satisfy this requirement," *Bynum*, 214 F.R.D. at 33, "[s]o long as there is a *reasonable basis* for the estimate provided," *Kifafi v. Hilton Hotels Ret. Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999) (emphasis added).

"Demonstrating impracticability of joinder . . . does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *DL v. District of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013) (quotation marks omitted). Factors relevant to impracticability include the "financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." *Id.* (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). They also include the geographic distribution of class members. *See Lewis v. Nat'l Football League*, 146 F.R.D. 5, 8–9 (D.D.C. 1992) (finding numerosity requirement satisfied where approximately 250 professional football players were members of the class and geographical dispersion of potential class members rendered joinder "clearly impracticable"); *Pigford v. Glickman*, 182 F.R.D. 341, 348 (D.D.C. 1998) (certifying class, in part, because members were located throughout the country).

The proposed plaintiff class satisfies the numerosity requirement because it will

comprise, at minimum, several thousand service members. Defendants' own statements and policy documents make this plain. With respect to lawful permanent resident service members alone, DoD has represented that "about 5,000 legal permanent resident aliens (green card holders) enlist each year." Dep't of Def. Fact Sheet, *Military Accessions Vital to National Interest (MAVNI) Recruitment Pilot Program*, Ex. 2. This DoD memorandum establishes that, at the very least, there are thousands of service members who are or will be subject to Defendants' N-426 Policy. Thus, there is a "reasonable basis" for estimating that the proposed class will exceed the general benchmark of forty by orders of magnitude. *Kifafi*, 189 F.R.D. at 176.

Joinder is also impractical for other reasons. First, the class seeks declaratory and injunctive relief for future class members. Joinder is inherently impracticable where "the class seeks prospective relief for future class members, whose identities are currently unknown and who are therefore impossible to join." *DL*, 302 F.R.D. at 11. Moreover, the putative class members are enlisted in the military—in training, assigned to military units, and in some cases deployed outside the country—making it extremely difficult for them to institute individual suits.[2] Finally, because proposed class members are also widely dispersed, training at bases throughout the country or assigned to military units located domestically or abroad, joinder is impracticable.

Accordingly, the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

[2] These facts have been set forth in Plaintiffs' declarations submitted in support of Plaintiffs' Motion for Preliminary Injunction. *See* Samma Decl. ¶ 12; Bouomo Decl. ¶ 10; Isiaka Decl. ¶¶ 10-11; Perez Decl. ¶ 10; Park Decl. ¶ 9; Lee Decl. ¶ 10.

B. The Proposed Class Satisfies the Commonality Requirement.

Rule 23(a)(2), which requires that there be "questions of law or fact common to the class," is likewise satisfied. Fed. R. Civ. P. 23(a)(2). The key to commonality is that class members' claims must depend on "a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. "[E]ven a single [common] question" will support a commonality finding, *id.* at 359 (second alteration in original) (citation omitted), so long as its resolution will "generate common answers for the entire class," *Thorpe v. District of Columbia*, 303 F.R.D. 120, 146–47 (D.D.C. 2014).

Commonality is satisfied where there is a single or "uniform policy or practice that affects all class members." *DL v. District of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013); *see also Huashan Zhang v. U.S. Citizenship & Immigration Servs.*, 344 F. Supp. 3d 32, 63–64 (D.D.C. 2018) (finding commonality satisfied where plaintiffs mounted facial challenge to USCIS' interpretation of its own regulation); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 332 (D.D.C. 2018) (finding commonality satisfied and provisionally certifying class where plaintiffs alleged certain Immigration and Customs Enforcement ("ICE") Field Offices were contravening agency directive); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (finding commonality satisfied and provisionally certifying class where ICE was acting pursuant to a uniform policy requiring it to consider deterrence of mass immigration in custody determinations). "[F]actual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Bynum*, 214 F.R.D. at 33.

Here, proposed class members have the following key *facts* in common:

- All class members are non-citizen service members serving honorably in the U.S. military;
- All class members are subject to the N-426 Policy;
- All class members have requested N-426 certifications; and
- Defendants have not issued N-426 certifications to any of the class members.

In addition, the following *legal* questions are common to all proposed class members:

- Whether it is unlawful for Defendants to withhold N-426 certifications for any non-citizen service member who is serving honorably and who has requested one;
- Whether it is unlawful for Defendants to condition certification of honorable service for any non-citizen service member seeking naturalization under 8 U.S.C. § 1440 on satisfaction of the criteria and process laid out in the N-426 Policy; and
- Whether the N-426 Policy is arbitrary and capricious, and was issued without the required public notice and opportunity to comment under the Administrative Procedure Act.

The class members all challenge Defendants' issuance and implementation of the N-426 Policy, which constitutes a "uniform policy or practice." *R.I.L-R*, 80 F. Supp. 3d at 181. The N-426 Policy applies uniformly and systematically to all class members; it does not arise out of circumstances unique to each member. The new criteria and process set forth in the N-426 Policy will also result in "common harm[s]," by preventing or delaying Plaintiffs from obtaining the N-426 certifications required to apply for naturalization under 8 U.S.C § 1440. *DL v. District of Columbia*, 860 F.3d 713, 724 (D.C. Cir. 2017) (alteration in original).

The class members all challenge the legality of the N-426 Policy on the same grounds. They all allege that the N-426 Policy violates the Immigration and Nationality Act and the

Administrative Procedure Act. They all seek declaratory and injunctive relief to prevent Defendants from implementing the N-426 Policy and allow non-citizen service members to exercise their statutory right to seek naturalization under 8 U.S.C. § 1440. The Court's determination of the legality of the N-426 Policy on one or more of the grounds alleged by class members will resolve all class members' claims "in one stroke." *Wal-Mart*, 564 U.S. at 350.

Presented with proposed class actions challenging the same or similar policies, this Court has found commonality to be satisfied. In *Nio*, Selected Reserve MAVNIs challenged, *inter alia*, a section of the N-426 Policy requiring the recall and de-certification of N-426 certifications issued prior to the implementation of the policy. *See* 323 F.R.D. at 32. The Court held that the proposed class met the commonality requirement because "[i]ndividuals in the proposed class share key factual characteristics"—such as being "subject to some or all of DoD's [N-426 Policy]"—that "make this case amenable to class-wide resolution." *Id*. This Court relied on this reasoning in *Kirwa* to provisionally certify a proposed class of Selected Reserve MAVNIs challenging DoD's refusal to issue N-426s pursuant to the N-426 Policy. *Kirwa*, 285 F. Supp. 3d at 44; *see also* Order at 11, *Kuang*, ECF No. 68 (finding commonality satisfied in challenge by lawful permanent resident enlistees to validity of new DoD enhanced screening policy). The *Kirwa* defendants subsequently did not oppose final certification of the class. *See* Notice of Defs.' Non-Opp. to Pls.' Mot. for Class Certification, *Kirwa* (D.D.C. Nov. 28, 2017), ECF No. 40.

Accordingly, the proposed class satisfies the commonality requirement of Rule 23(a)(2).

C. The Proposed Class Satisfies the Typicality Requirement.

Plaintiffs' claims are also "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). Typicality means that "a class representative must . . . 'possess the same interest and suffer the

same injury' as the [other] class members." *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982); *see also Afghan & Iraqi Allies v. Pompeo*, 2020 WL 590121, at *10 (D.D.C. Feb. 5, 2020) ("Unlike commonality, which is concerned with the similarity of class members' injuries, the typicality requirement 'focuses on whether the representatives of the class suffered a similar injury from the same course of conduct'" (quoting *Bynum*, 214 F.R.D. at 34)); *Radosti*, 717 F. Supp. 2d at 51 (finding typicality satisfied where claims of named plaintiffs and absentee members "involve the same legal theory and elements of proof"). The typicality and commonality requirements "often overlap because both serve as guideposts" in determining "whether a class action is practical and whether the representative plaintiffs' claims are sufficiently interrelated with the class claims to protect absent class members." *R.I.L-R*, 80 F. Supp. 3d at 181 (quotation marks and citation omitted).

Courts liberally construe the typicality requirement. *See Bynum*, 214 F.R.D. at 34. As with commonality, "typicality is not destroyed merely by factual variations." *Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) (quotation marks omitted). "Rather, if the named plaintiffs' claims are based on the same legal theory as the claims of the other class members, it will suffice to show that the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Bynum*, 214 F.R.D. at 35; *see also Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013) ("[C]ourts have found the typicality requirement satisfied when class representatives suffered injuries in the same general fashion as absent class members." (quotation marks omitted)).

Plaintiffs are typical of the proposed class. As explained above, Plaintiffs' claims arise from the same conduct by Defendants—withholding of N-426 certifications pursuant to the N-426 Policy—that provides the basis for all class members' claims. They therefore "arise from the

same course of conduct that gives rise to the other class members' claims," and are based on the same legal theories as all class members. *Bynum*, 214 F.R.D. at 35. Moreover, the injuries that Plaintiffs have suffered and will continue to suffer—namely, their inability to obtain an N-426 certification and therefore to apply for naturalization under 8 U.S.C. § 1440—arise from this same course of conduct and are typical of the injuries of the class as a whole. Notwithstanding any individual or factual differences that may exist among members of the proposed class, Plaintiffs' claims "are sufficiently interrelated with the class claims to protect absent class members." *R.I.L-R*, 80 F. Supp. 3d at 181.

Accordingly, Plaintiffs' claims satisfy the typicality requirement of Rule 23(a)(3).

D. The Proposed Class Satisfies the Adequacy Requirement.

The proposed class also satisfies the requirement that the class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To establish adequacy, "(1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575–76 (D.C. Cir. 1997).

Plaintiffs satisfy both criteria. First, Plaintiffs' interests are not antagonistic to those of the class. Plaintiffs and class members have suffered the same injuries: they have been denied N-426 certifications pursuant to the N-426 Policy and have therefore been unable to apply for naturalization. They assert the same legal claims, seek the same litigation outcomes, and would benefit from the same declaratory and injunctive relief. Moreover, Plaintiffs are not seeking monetary relief, so no financial conflict can arise between the claims of Plaintiffs and those of other class members. Thus, there is no conflict between Plaintiffs and unnamed class members.

Second, Plaintiffs' counsel are competent to represent the class and prepared to vigorously defend the interests of the class as a whole. They have devoted considerable time and resources to this case over the last several months, and will continue to do so. Kaufman Decl. ¶ 8. Plaintiffs' counsel are qualified and possess the requisite motivation and resources to zealously represent the class and litigate this case. Kaufman Decl. ¶¶ 3–9. They have extensive experience litigating complex public interest cases in federal court, including litigation against the federal government involving immigration law, military law, and national security matters. Kaufman Decl. ¶¶ 5–7.

Accordingly, the proposed class satisfies the adequacy requirement of Rule 23(a)(4).

II. Class Certification is Appropriate Under Rule 23(b)(1), Rule 23(b)(2), or Both.

In addition to satisfying the four criteria of Rule 23(a), the proposed class must also fall into one of the three categories outlined in Rule 23(b). This class action qualifies for certification under either Rule 23(b)(1) or Rule 23(b)(2). See *Wal-Mart*, 564 U.S. at 361–62 ("Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class.").

Rule 23(b)(1) permits class certification where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class . . . ." Fed. R. Civ. P. 23(b)(1)(A). Certification under Rule 23(b)(1)(A) "is appropriate when the class seeks injunctive or declaratory relief to change an alleged ongoing course of conduct that is either legal or illegal as to all members of the class."

Adair v. England, 209 F.R.D. 5, 12 (D.D.C. 2002) (citing 5 James W. Moore et al., *Moore's Federal Practice* § 23.41[4] (3d ed. 2000)).

Plaintiffs easily satisfy this standard. If several thousand individual class members were to bring separate suits challenging the N-426 Policy, the adjudication of these actions would risk creating inconsistent decisions that would establish varying standards to which Defendants would have to adhere. Plaintiffs seek declaratory and injunctive relief that is applicable to all class members, and certification pursuant to Rule 23(b)(1) is therefore appropriate.

Additionally, Rule 23(b)(2) permits class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Supreme Court has explained that

> [t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.

Wal-Mart, 564 U.S. at 360 (quotation marks and citation omitted). Courts in this District have interpreted Rule 23(b)(2) to impose two requirements: "(1) the defendant's action or refusal to act must be generally applicable to the class, and (2) plaintiff must seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Steele v. United States*, 159 F. Supp. 3d 73, 81 (D.D.C. 2016); *Bynum*, 214 F.R.D. at 37–41; *R.I.L-R*, 80 F. Supp. 3d at 182.

Rule 23(b)(2) may be satisfied where plaintiffs are "challenging the application of standardized policies that generally apply to the class." *Nio*, 323 F.R.D. at 34; *see also Kirwa*, 285 F. Supp. 3d at 44; *R.I.L-R*, 80 F. Supp. 3d at 182 (certifying class under Rule 23(b)(2) where plaintiffs sought declaratory and injunctive relief against ICE policy "generally applicable to all class members"); *Afghan & Iraqi Allies*, 2020 WL 590121, at *13 (certifying class under Rule

23(b)(2) where defendants "unreasonably delayed the adjudication of all putative class members' [Special Immigrant Visa] applications" and "a single injunction or declaratory judgment would provide relief to each member of the class"); Order at 13, *Kuang*, ECF No. 68 (finding proposed class of lawful permanent resident enlistees seeking "unitary declaratory and injunctive relief" from DoD enhanced screening policy satisfied Rule 23(b)(2) because "this relief, if granted, would be appropriate to the class as a whole").

Here, Plaintiffs are challenging the N-426 Policy, which is preventing Plaintiffs and the class members from exercising their statutory right to apply for naturalization under 8 U.S.C. § 1440. The N-426 Policy applies to all class members by virtue of their non-citizen status, without regard to the individual circumstances of their cases or any other differences among them. All class members seek the same declaratory and injunctive relief requiring that N-426 certifications be issued in compliance with the law. Thus, Plaintiffs and other class members challenge a policy generally applicable to the class and seek declaratory and injunctive relief that will benefit the class as a whole. Certification pursuant to Rule 23(b)(1) is therefore also appropriate.

III. The Court Should Designate Plaintiffs' Counsel as Class Counsel.

Upon certifying the class, the Court must also appoint class counsel. Fed. R. Civ. P. 23(c)(1)(B), (g). Rule 23(g) requires the Court to consider the following four factors:

i. "the work counsel has done in identifying or investigating potential claims in the action;

ii. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

iii. counsel's knowledge of the applicable law; and

iv. the resources that counsel will commit to representing the class."

Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv). The Court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Plaintiffs' counsel satisfy all four criteria. Kaufman Decl. ¶¶ 5–9. Counsel from the American Civil Liberties Union, the American Civil Liberties Union of Southern California ("ACLU SoCal"), and the American Civil Liberties Union of the District of Columbia (collectively, the "ACLU") jointly represent Plaintiffs. Counsel from the ACLU are experienced litigators, who have been involved in multiple complex class actions and other important and complex federal court cases against the Government. They also have specific expertise in handling immigration law, national security, and military law matters. *See, e.g.*, *Nio*, 323 F.R.D. at 33–34 (appointing class counsel with "experience in immigration law, military law, complex civil litigation, federal court litigation, and class-actions"). For example, counsel from ACLU SoCal's experience includes acting as class counsel in *Kuang*, securing a preliminary injunction on behalf of lawful permanent resident enlistees challenging a separate DoD policy. *See* Order, *Kuang*, ECF No. 68.

To date, the ACLU has devoted hundreds of hours and expended substantial resources on investigating the factual and legal issues in this case, and will continue to do so throughout the pendency of the litigation. For example, counsel conducted extensive outreach to potential plaintiffs, undertook factual research on the background of this case and other related actions, and researched and developed actionable legal theories. *See, e.g.*, *Little v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 426 (D.D.C. 2017) (appointing class counsel who "have demonstrated experience in handling class action claims, knowledge of the law at issue in this case, and diligence in pursuing the class claims to this point"); *Encinas v. J.J. Drywall Corp.*,

265 F.R.D. 3, 9 (D.D.C. 2010) ("Counsel have already committed substantial time and resources to identifying and investigating potential claims in the action."). Accordingly, the Court should appoint Plaintiffs' counsel as class counsel in this case.

CONCLUSION

For the reasons stated above, Plaintiffs' motion should be granted. Plaintiffs respectfully request that the Court:

(1) certify the proposed class, consisting of all individuals who: (a) are non-citizens serving honorably 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; and

(2) appoint undersigned counsel to represent the class.

Dated: April 28, 2020

Respectfully submitted,

/s/ Jonathan Hafetz

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