

**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. 20-cv-01104-PLF

[Oral Argument Requested]

PLAINTIFFS' MOTION TO ENFORCE COURT ORDER

Plaintiffs, on behalf of themselves and the certified class of non-citizens serving in the United States Armed Forces who wish to become United States citizens, respectfully move to enforce this Court's Order and Judgment dated August 25, 2020 ("Order"), ECF No. 47, granting Plaintiffs' motion for summary judgment and entering a permanent injunction. That Order held unlawful a Department of Defense policy that required class members to meet certain durational and type-of-service requirements (together, the "Minimum Service Requirements") before they could obtain a certification of honorable service ("N-426 certification") necessary for them to seek U.S. citizenship on the basis of their military service. The Order vacated the Minimum Service Requirements, enjoined Defendants from withholding N-426 certifications from any class member based on a failure to meet these requirements, and ordered Defendants to process class member requests for N-426 certifications within 30 days.

As set forth in the accompanying Memorandum, Defendants—in particular, the Department of the Army—have failed to comply with the Order despite Plaintiffs' repeated

attempts to call compliance failures to their attention and Plaintiffs' specific requests for individual and class-wide remediation. Instead, Defendants have in many cases continued to impose the Minimum Service Requirements vacated in the Order, and have defied this Court's injunction prohibiting them from withholding N-426 certifications from any class member because he or she does not meet these Requirements. Defendants have also failed in many cases to process class member requests for N-426 certifications within the 30-day time frame required by the Order.¹

In support of this Motion, Plaintiffs rely upon the accompanying Memorandum, declarations, and exhibits. For the reasons discussed, Plaintiffs respectfully request the Court grant their Motion and provide relief as follows:

- (1) An order compelling Defendants to show cause why the Court should not find that Defendants have failed to comply with the Order;
- (2) An order compelling Defendants to file and serve a report of their efforts to comply with the Order, including:
 - (a) copies of all instructions for effectuating the Order issued to military personnel and documentation of the transmission of all such communications; and
 - (b) copies of all communications issued to class members to explain the Order, and documentation of the transmission of all such communications;
- (3) An order compelling Defendants to identify a point of contact in the Army, with authority to take appropriate action, for class members who experience problems submitting their N-426

¹ In accordance with Rule 7(m) of the Local Civil Rules, class counsel have met and conferred with Defendants' counsel several times since June 29, 2021, in a good faith effort to narrow or resolve this dispute prior to filing but were unable to do so. Defendants have provided their position on the motion as follows: "Without waiving any defenses, Defendants are willing to stipulate, as an exercise of their discretion, to: (1) providing Class Counsel with a summary of Defendants' efforts complying with the order; (2) certifying or denying N-426 certification requests for any class member in the Army that Class Counsel identifies as having been pending for over 30 days; and (3) directing Army O-6 Commanders to review the requirements of complying with the *Samma* order and directing them to confirm that all subordinate command teams have read and understood their obligations. Defendants oppose all other requests for relief including any Court-ordered relief."

certification requests to their commands or who have not received their N-426 certification or denial within 30 days of submission to their commands;

- (4) An order compelling Defendants to serve a list containing the names of all class members in the Army who have requested an N-426 certification, the dates they submitted their requests, and the dates (if any) on which they received their N-426 certifications;
- (5) An order compelling Defendants to certify or deny N-426 certification requests for all class members in the Army whose requests have been pending for over 30 days;
- (6) An order compelling Defendants to serve monthly status reports on the Army's compliance with the Order, including a list containing the names of all class members in the Army who have requested an N-426 certification since the previous report, the dates they submitted their requests, and the dates (if any) on which they received their N-426 certifications;
- (7) An order compelling Defendants to require all O-6 commanders at the Army's basic training bases and at other installations where class counsel have identified cases of non-compliance to confirm receipt of the September 3, 2020 Army implementing memorandum and to confirm that all officers below them in their chains of command have read and understood their obligations under the memorandum;
- (8) An order compelling Plaintiffs and Defendants to file a proposed joint communication, to be approved by the Court and distributed to all class members and relevant military personnel, explaining class members' rights under the Order, and providing that the communication distributed to class members in the Army shall include the relevant point of contact established pursuant to (3) above;
- (9) An order compelling Defendants to distribute the Court-approved joint communication on a monthly basis to individuals who have become class members since the previous distribution; and
- (10) An order compelling Defendants to update all public materials on their websites describing the Minimum Service Requirements to reflect that the Requirements have been vacated by the Order.

Dated: August 17, 2021

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO
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INTRODUCTION

This case involves a certified class of non-citizens serving in the United States Armed Forces who wish to become United States citizens, and who are entitled by law to naturalize expeditiously because of their military service. On August 25, 2020, this Court issued an Order and Judgment (“Order”), ECF No. 47, holding unlawful a 2017 Department of Defense policy that required class members to meet certain durational and type-of-service requirements (together, the “Minimum Service Requirements”) before they could obtain a certification of honorable service (“N-426 certification”). Service members must obtain an N-426 certification before they can apply to U.S. Citizenship and Immigration Services for expedited naturalization on the basis of their military service. In addition to vacating the Minimum Service Requirements, this Court enjoined Defendants from withholding N-426 certifications from any class member based on a failure to meet those requirements and ordered Defendants to process class member requests for N-426 certifications within 30 days.

After this Court issued the Order, military officers at multiple Army installations, including at several of the Army’s training bases, have continued to impose the vacated Minimum Service Requirements, in direct violation of the Order. Class members seeking N-426 certifications have been repeatedly turned away by their chains of command and told that they must first complete the Minimum Service Requirements, which this Court has enjoined Defendants from enforcing, before requesting their certifications and applying for naturalization. In some cases, class members have even received guidance documents from their chains of command stating in writing that before seeking an N-426 certification, they must first complete the vacated Minimum Service Requirements.

Moreover, even where class members have been able to submit their N-426 forms for certification, many have had to wait well beyond the 30-day window required by the Order for Defendants to issue an N-426 certification (or to deny their request if they fail to qualify for certification for some reason other than the Minimum Service Requirements). In some instances, class members have waited for months while awaiting their N-426 certifications. For example, one class member waited for ten months, the last eight of which he was deployed overseas. Even though Plaintiffs informed Defendants in October 2020 of this class member's inability to obtain his N-426 certification, he did not receive it until July 2021—and only after Plaintiffs had notified Defendants of their intent to file this motion. Together with Defendants' continued imposition of the vacated Minimum Service requirements, these delays mean that Defendants continue to deny class members the path to U.S. citizenship that Congress has long promised to non-citizens serving in the military and that this Court restored in its Order.

For *eleven months*—since September 2020—class counsel have repeatedly brought cases of non-compliance to Defendants' attention in an effort to resolve these issues without the Court's involvement. From the outset, Defendants have insisted on addressing cases of non-compliance individually, even where Plaintiffs have provided evidence of a more systemic refusal to comply with the Order at a particular Army installation. Moreover, until late June 2021, when Plaintiffs first notified Defendants of their intent to file this motion, Defendants had rectified only *one* of the numerous individual cases of non-compliance Plaintiffs had brought to their attention. In most cases, Defendants refused to assist class members in obtaining their N-426 certifications and instead suggested that class members pursue impractical and futile avenues for seeking their certifications—like continuing to press their chains of command after their superiors have refused to help them—that have only further delayed their attempts to obtain their

certifications and naturalize as U.S. citizens. For over two months—from April to June 2021—Defendants failed entirely to respond to Plaintiffs’ communications regarding non-compliance.

On June 25, 2021, following Defendants’ longstanding refusal to comply with the Order, Plaintiffs notified Defendants of their intent to file this motion. In response, Defendants represented that they were escalating non-compliance issues to leadership levels of the Departments of Justice and Defense to ensure they received appropriate attention, and requested that Plaintiffs postpone filing the motion to give Defendants additional time to redress their non-compliance. For the last seven weeks, Plaintiffs have met and conferred with Defendants in good faith in repeated attempts to resolve Defendants’ non-compliance without the Court’s involvement.

To say that Defendants’ actual efforts during this extended meet-and-confer period have resulted in disappointment is a vast understatement—particularly in light of their promises to prioritize persistent non-compliance issues they had effectively ignored for many months while defying this Court’s Order. During this period, Defendants have rejected Plaintiffs’ proffered and reasonable solutions while counter-proposing unrealistic ones. Rather than take responsibility for redressing non-compliance with the Order, they have insisted that when class members encounter non-compliance by their chains of command, class members themselves must pursue increasingly unrealistic avenues for relief—such as defying their chains of command and directly approaching the highest-level military officers at their installations or bringing a complaint through the military justice system against their commanding officers. To date, Defendants have done little more than facilitate a handful of delayed N-426 certifications. All the while, over the course of the parties’ negotiations, Plaintiffs have continued to bring to Defendants’ attention a

steady stream of new cases of non-compliance, both at installations Plaintiffs previously flagged as problematic and at new installations. Many of these cases remain unresolved.

Seeing no alternative, Plaintiffs now return to this Court seeking enforcement of the Order.

BACKGROUND

A. Procedural History

On April 28, 2020, Plaintiffs filed a class action complaint challenging Defendants' refusal to provide N-426 certifications to Plaintiffs and thousands of other non-citizens serving in the U.S. Armed Forces, based on the Minimum Service Requirements imposed by Defendants contrary to an Act of Congress. ECF No. 1. Federal law expressly provides, in 8 U.S.C. § 1440, that non-citizens who have served honorably in the U.S. military during a period of armed conflict are eligible for expedited naturalization. *Samma v. U.S. Dep't of Def.*, 486 F. Supp. 3d 240, 247–49 (D.D.C. 2020). This provision further mandates the Department of Defense (“DOD”) to provide service members with a certification of honorable service so that they can seek expedited naturalization. *Id.* For many years, pursuant to the statute, non-citizens could request an N-426 certification almost immediately upon entering service and Defendants would promptly fulfill this request, with the goal of naturalizing service members by the time they graduated from basic training. *Id.* at 250, 265–68; *see also Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 28–29 (D.D.C. 2017).¹ On October 13, 2017, the Trump administration abruptly changed this practice by implementing the Minimum Service Requirements, which required active duty service members to serve a minimum period of 180 days and service members in the

¹ Citizenship granted pursuant to 8 U.S.C. § 1440 may be revoked “if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years.” 8 U.S.C. § 1440(c).

Selected Reserve of the Ready Reserve (“Selected Reserve”) to serve a minimum period of one year and in an active duty status before they could seek an N-426 certification. *Samma*, 486 F. Supp. 3d at 252–53.

On August 4, 2020, this Court granted Plaintiffs’ Motion for Class Certification and Appointment of Counsel. ECF No. 44. The Court certified a class of all individuals who: (1) are non-citizens serving in the U.S. military; (2) are subject to the Minimum Service Requirements; (3) have not received an N-426 certification; and (4) are not in the class certified in the related action of *Kirwa v. U.S. Dep’t of Def.*, No. 17-cv-1793 (D.D.C.).² Plaintiffs brought this action to challenge Defendants’ withholding of N-426 certifications from non-citizens outside the *Kirwa* class—lawful permanent residents (“LPRs”) serving active duty and in the Selected Reserve and non-citizens serving active duty who enlisted through the Military Accessions Vital to the National Interest (“MAVNI”) program.³

On August 25, 2020, this Court vacated the Minimum Service Requirements pursuant to the Administrative Procedure Act (“APA”), finding them arbitrary and capricious and contrary to law, and finding Defendants’ refusal to issue N-426 certifications to class members to constitute agency action unlawfully withheld. ECF No. 47 at 2; 486 F. Supp. 3d at 264–80. The Court enjoined Defendants from withholding N-426 certifications from any class member based on a

² *Kirwa* was a class action challenging the Minimum Service Requirements on behalf of a subset of non-citizens serving in the military—service members in the Selected Reserve who enlisted through the Military Accessions Vital to the National Interest program.

³ As a general matter, LPRs or persons from the Marshall Islands, Micronesia, and Palau may enlist in the U.S. military. 10 U.S.C. § 504(b)(1)(B)–(C). In addition, the Secretary of Defense and the Secretaries of the military service departments are authorized to enlist persons who do not fall into these categories if their enlistment is “vital to the national interest.” *Id.* at § 504(b)(2). In November 2008, the Secretary of Defense authorized the MAVNI program, which permitted certain foreign nationals, who are not LPRs or persons from the Marshall Islands, Micronesia, or Palau, to enlist if they possessed specialized skills deemed critical to the U.S. military. *See* 285 F. Supp. 3d at 21, 29.

failure to complete the Minimum Service Requirements and ordered Defendants to certify or deny a submitted N-426 form within 30 days. ECF No. 47 at 2–3.

On October 29, 2020, Defendants filed a notice of appeal to the U.S. Court of Appeals for the District of Columbia Circuit from the Court’s August 25, 2020 Order and Judgment. Notice of Appeal, *Samma v. U.S. Dep’t of Def.*, No. 20-5320 (D.C. Cir. Oct. 29, 2020). After receiving several extensions of time, Defendants filed a motion on June 29, 2021, requesting the D.C. Circuit to hold the appeal in abeyance, because “the Department of Defense ‘is currently reconsidering’ the relevant issue” and “to allow the Department of Defense sufficient time to engage in its reconsideration process and to determine the appropriate steps moving forward.” Consent Mot. for Abeyance, *Samma v. U.S. Dep’t of Def.*, No. 20-5320 (D.C. Cir. June 29, 2021). On June 30, 2021, the D.C. Circuit granted the motion to hold the appeal in abeyance, with status reports due at 60-day intervals. Order, *Samma v. U.S. Dep’t of Def.*, No 20-5320 (D.C. Cir. June 30, 2021).

B. Defendants’ Issuance of Implementing Memoranda Concerning the Order

On August 31, 2020, the Under Secretary of Defense for Personnel and Readiness issued a memorandum to the Secretaries of the Military Departments directing them to comply with the Order (“DOD Implementing Memo”). Ex. 2. On September 3, 2020, the Assistant Secretary of the Army for Manpower and Reserve Affairs issued a memorandum on compliance with the DOD Implementing Memo (“Army Implementing Memo”), Ex. 3. The Army Implementing Memo instructs:

[T]he . . . time in service requirements are suspended. Soldiers are authorized to request certification of honorable service for purposes of naturalization immediately upon entering active duty or attending drill with their Selected Reserve unit. The approval authority must certify or deny a Soldier’s certification request, and return it to the Soldier, within 30 days of submission.

Ex. 3 at 1. The Navy, Air Force, and Marine Corps issued similar implementing memoranda to their respective services. Ex. 4–7. On June 17, 2021, DOD issued another memorandum reiterating that the services must comply with the Order and rescinding the Minimum Service Requirements while the agency reconsiders “its policy on required service in order to certify honorable service for the purpose of applying for naturalization.” Ex. 16. However, despite these memoranda, Defendants have not complied with the Order.

DEFENDANTS’ NON-COMPLIANCE WITH THIS COURT’S ORDER

A. Defendants’ Imposition of the Minimum Service Requirements Vacated by the Order

Since this Court’s Order on August 25, 2020, military officers at multiple Army installations have unlawfully imposed the vacated Minimum Service Requirements, in direct violation of the Order.

1. Non-Compliance at Army Training Bases

By vacating the Minimum Service Requirements, the Court enabled class members to seek an N-426 certification and apply for citizenship almost immediately upon entering service, as intended by Congress during a period of armed conflict and as facilitated by Defendants for years prior to their imposition of the vacated Minimum Service Requirements. *See Samma*, 486 F. Supp. 3d at 250, 265–68; *Kirwa*, 285 F. Supp. 3d at 28–29. Class members serving active duty begin their service by shipping to basic training and are therefore entitled to request an N-426 certification while at basic training. *See* Plaintiffs’ Opp. to Gov’t Mot. for Summ. J., *Samma*, No. 20-cv-1104, ECF No. 21, 7 (“Pls.’ Opp.”).⁴ However, class members serving at numerous Army

⁴ Class members in the Selected Reserve begin their service once they complete a drill or by shipping to basic training, whichever comes first. Pls.’ Opp. 7–8. Thus, class members in the Selected Reserve are also entitled to request an N-426 certification while at basic training.

training bases have reported Defendants’ continued imposition of the vacated Minimum Service Requirements.

a. Fort Jackson

Fort Jackson is the Army’s largest training base; it “trains roughly 50 percent of all soldiers.” U.S. Army, *Fort Jackson*, <https://home.army.mil/jackson/index.php> (last visited Aug. 17, 2021). On October 22, 2020, class counsel notified Defendants about non-compliance at Fort Jackson. Mayat Decl. ¶¶ 8, 20 & Ex. 1.⁵ Class counsel informed Defendants that a class member had approached her chain of command at Fort Jackson to request her N-426 certification. Her chain of command refused to assist her, even after she presented copies of the Order and Army Implementing Memo. Instead, her chain of command handed her written guidance, which incorrectly stated that all soldiers must complete the Minimum Service Requirements before seeking N-426 certification. Mayat Decl. ¶ 8 & Exs. 1, 8; Kutovaya Decl. ¶¶ 13–14 & Ex. B. Class counsel shared this guidance with Defendants. Mayat Decl. ¶ 8 & Exs. 1, 8.

Class counsel informed Defendants that this class member’s experience indicated that Defendants’ implementing memoranda were insufficient to ensure compliance with the Order. Mayat Decl. ¶ 9, 12 & Ex. 1. Class counsel further suggested that Defendants identify a specific individual as a “point of contact” to receive class member requests for N-426 certification and ensure that such requests move quickly up the chain of command. Class counsel noted that this point of contact had been effective in the related *Kirwa* litigation. Mayat Decl. ¶¶ 9, 12 & Ex. 1. Defendants rejected the need for a point of contact. Mayat Decl. ¶¶ 12–13 & Ex. 1.

⁵ Class counsel first notified Defendants about this case of non-compliance on September 25, 2020, but identified the class member’s location as Fort Jackson in their October 22, 2020 email. Mayat Decl. ¶¶ 8, 19 & Ex. 1.

On April 19, 2021, class counsel notified Defendants about two additional cases of non-compliance at Fort Jackson. Mayat Decl. ¶ 39 & Ex. 12. In both cases, class members who sought their N-426 certifications from their chains of command were informed that they had to complete the vacated Minimum Service Requirements before obtaining the certification. Mayat Decl. ¶ 39 & Ex. 12; Lingamaneni Decl. ¶ 8; Yu Decl. ¶ 8. Class counsel explained that these cases indicated that military officers at Fort Jackson were not complying with the Order and asked what steps Defendants would take to ensure compliance with the Order at this installation. Mayat Decl. ¶ 40 & Ex. 12. On May 7, 2021, having failed to hear from Defendants for nearly three weeks, class counsel followed up on their April 19 email. Mayat Decl. ¶ 41 & Ex. 12.

On May 28, 2021, having failed to hear from Defendants for more than a month, class counsel followed up again on the two cases of non-compliance in their April 19 email and also notified Defendants about an additional case of non-compliance at Fort Jackson. Mayat Decl. ¶¶ 42–43 & Ex. 12. In this instance, a class member who sought his N-426 certification from his chain of command was handed the same guidance class counsel had brought to Defendants' attention eight months earlier, in September 2020. Mayat Decl. ¶ 43 & Exs. 12–13; Cutler Decl. ¶ 21 & Ex. A. Class counsel shared this guidance with Defendants and requested a response on these cases of non-compliance at Fort Jackson (as well as other cases of non-compliance at other Army installations) by June 11, 2021. Mayat Decl. ¶¶ 43–45 & Ex. 12–13. Class counsel also requested Defendants undertake several steps to rectify Defendants' ongoing non-compliance with the Order, including identifying points of contact to assist class members experiencing problems with obtaining their N-426 certifications, and preparing a joint communication, together with Plaintiffs, to distribute to class members, which would explain class members'

rights and inform them of the relevant points of contact. Mayat Decl. ¶ 44 & Ex. 12. Defendants did not respond by June 11, 2021. Mayat Decl. ¶ 46.

On June 22, 2021, over two months after class counsel's April 19 email, Defendants responded by purporting to provide N-426 certifications for the two class members at Fort Jackson identified in class counsel's April 19 email. Mayat Decl. ¶ 48 & Ex. 14.⁶ However, Defendants failed to address the additional case raised in class counsel's May 28 email, or the written evidence that Fort Jackson was continuing to systematically deny class members' N-426 certifications until they meet the vacated Minimum Service Requirements. Defendants also failed to address the steps requested by class counsel to rectify Defendants' ongoing non-compliance. *Id.*

On June 25, 2021, class counsel followed up on Defendants' failure to rectify ongoing non-compliance at Fort Jackson, including the continuing circulation of the written guidance in defiance of the Court's Order. Mayat Decl. ¶¶ 51–56 & Ex. 14. Class counsel also notified Defendants about a new case of non-compliance at Fort Jackson, in which a class member was again told that he would have to complete the Minimum Service Requirements before he could obtain an N-426 certification. Mayat Decl. ¶ 54 & Ex. 14; Liu Decl. ¶ 15.⁷

⁶ By this point, both class members had already received their N-426 certifications through their respective chains of command after continuing to press for their certifications. Lingamaneni Decl. ¶¶ 8–10; Yu Decl. ¶¶ 8–11. However, the N-426 form for one of the class members was not properly certified because one of the sections was not properly completed. Mayat Decl. ¶ 51 & Ex. 14; Lingamaneni Decl. ¶ 10. On June 30, 2021, after Plaintiffs notified Defendants of their intent to file this motion, Defendants provided a corrected N-426 form for this class member. Mayat Decl. ¶ 59 & Ex. 20.

⁷ On August 12, 2021, nearly seven weeks after class counsel notified Defendants about this case of non-compliance, Defendants provided an N-426 certification for this class member. Mayat Decl. ¶ 72. This class member was unable to update his declaration prior to Plaintiffs' filing of this motion and it therefore does not reflect his receipt of his N-426 certification on that date.

b. Fort Leonard Wood

In February 2021, class counsel reported to Defendants that a class member had unsuccessfully sought his N-426 certification several times from his chain of command at Fort Leonard Wood, another major Army training base. Mayat Decl. ¶ 30 & Ex. 10; Cutler Decl. ¶¶ 5–7.⁸ This class member was told by his chain of command that he would have to complete the vacated Minimum Service Requirements before obtaining his certification and was unable to seek his certification even after providing copies of the Order, the DOD Implementing Memo, and the Army Implementing Memo. Mayat Decl. ¶ 30 & Ex. 10; Cutler Decl. ¶¶ 5–7. In March 2021, after initially (and inaccurately) disputing that this service member was a member of the class, Defendants agreed to assist with his N-426 certification. Mayat Decl. ¶¶ 31–34 & Ex. 10. Class counsel followed up with Defendants on this class member’s N-426 certification on April 19 and May 7, but received no response. Mayat Decl. ¶¶ 38–39, 41 & Ex. 12.⁹

In July 2021, in the midst of ongoing negotiations with Defendants over non-compliance following Plaintiffs’ notice of their intent to file this motion, class counsel notified Defendants of six additional cases of non-compliance at Fort Leonard Wood. Kim Decl. ¶¶ 14, 21, 23–24 & Exs. 26, 29, 31–32. In one such case, another attorney, while seeking an N-426 certification on behalf of a class member serving at Fort Leonard Wood, was informed by the legal assistance

⁸ Class counsel have redacted this class member’s personally identifying information from the declarations and exhibits in support of this motion because he fears he may suffer retaliation for speaking publicly about his difficulty obtaining his N-426 certification. He will be relying on the assistance of his chain of command to attend appointments with U.S. Citizenship & Immigration Services related to his naturalization application. At present, he anticipates a deployment overseas in the next few months and does not want to risk any further delays to his application.

⁹ This class member eventually received his N-426 certification on May 17, 2021 from his chain of command after continuing to press for his certification. Cutler Decl. ¶ 13. At the time he received his N-426 certification, it had been nearly four months since he had requested certification, and nearly two months since Defendants had agreed to assist him. Cutler Decl. ¶¶ 16–17.

office there that the officers responsible for N-426 certifications were routinely imposing the Minimum Service Requirements and refusing to certify service members' N-426 forms. Quail Decl. ¶ 7. This statement was not only corroborated by the experience of the class member brought to Defendants' attention in February 2021, described above, but also by five additional class members, whose difficulties obtaining their N-426 certifications class counsel brought to Defendants' attention throughout July 2021. Cutler Decl. ¶¶ 29–32; Kim Decl. ¶¶ 21, 23–24 & Exs. 29, 31–32. Indeed, one of these class members stated that her drill sergeant informed her that, over the past year, he had never seen a service member at that base obtain an N-426 certification. Ex. 29. Another class member stated that his drill sergeant informed him that no service member from the last three graduating classes had obtained an N-426 certification. Ex. 32.

c. Fort Sill

In October 2020, class counsel reported to Defendants that a class member had unsuccessfully sought his N-426 certification several times from his chain of command at Fort Sill, another major Army training base. Mayat Decl. ¶ 18 & Ex. 1; Goo Decl. ¶¶ 10–16. Even after explaining to his chain of command that the Minimum Service Requirements were no longer applicable, this class member was still informed that he would have to wait until he shipped to his first duty station overseas before he could obtain his N-426 certification. Goo Decl. ¶ 15. In July 2021, in the midst of ongoing negotiations with Defendants over non-compliance, class counsel notified Defendants of an additional case of non-compliance at Fort Sill. Kim Decl. ¶ 21 & Ex. 29. In this instance, a class member who requested her N-426 certification from her chain of command was informed that she could not obtain the certification while at basic training. Ex. 29.

d. Fort Eustis

Last week, class counsel reported to Defendants that a class member had been unable to request his N-426 certification while training at Fort Eustis, another Army training base. Kim Decl. ¶ 29 & Ex. 36.¹⁰ This class member attended a briefing with his company commander, where he asked about the N-426 certification process. The company commander instructed him that he should submit his N-426 form after he graduated from training and shipped to his first duty station. This class member also approached multiple drill sergeants for assistance with his N-426 certification. Several informed him that he would need to serve for at least one year before seeking his N-426 certification; others informed him that he should seek his N-426 certification after he shipped to his first duty station. Ex. 36.¹¹

2. Non-Compliance at Other Military Installations

Defendants have also imposed the vacated Minimum Service Requirements on active duty class members deployed to their duty stations after completing training. For example, in February 2021, class counsel notified Defendants that a class member, serving with the 25th Combat Aviation Brigade, received written guidance stating that service members must serve in the Brigade for at least a year before requesting their N-426 certification, a requirement that far exceeds even the vacated Minimum Service Requirements. Mayat Decl. ¶ 29 & Ex. 10; Rinaldi

¹⁰ This class member also experienced non-compliance while completing basic training at Fort Jackson, where his chain of command informed him that he could not seek his N-426 certification while at basic training. Later, his first sergeant and battalion commander at Fort Jackson advised service members at a briefing that they would have to wait until they shipped to the next phase of their training (*i.e.* advanced individual training) to seek their N-426 certifications. Ex. 36.

¹¹ On August 16, 2021, Defendants provided class counsel with this class member's N-426 certification. Kim Decl. ¶ 30 & Ex. 27. However, Defendants did not respond to Plaintiffs' request that Defendants investigate non-compliance at Fort Eustis and ensure that Army officials at that base understand their duties under the Order. *See* Ex. 36.

Decl. ¶ 8 & Ex. A. Class counsel provided a screenshot of this guidance to Defendants. Mayat Decl. ¶ 29 & Exs. 10–11. Defendants’ counsel responded that, given the Brigade’s denial that they “employ Minimum Service Requirements to certify Forms N-426,” the guidance “from our view does not exist.” Mayat Decl. ¶ 31 & Ex. 10. Class counsel subsequently clarified that the guidance was posted on the Brigade’s internal website, which was shared with the class member by his chain of command. Mayat Decl. ¶ 32 & Ex. 10; Rinaldi Decl. ¶ 8. Defendants’ counsel responded that while he would “relay . . . concerns about the 25th Combat Aviation Brigade to Army,” there did not seem to be “anything more to add here.” Mayat Decl. ¶ 34 & Ex. 10.

Defendants have also imposed the vacated Minimum Service Requirements on class members serving with their units in the Selected Reserve. For example, in September 2020, class counsel notified Defendants of a class member in the Selected Reserve who was unable to seek her N-426 certification while serving in her unit. Mayat Decl. ¶ 8 & Ex. 1; Kutovaya Decl. ¶¶ 6–11.¹² When this class member sought assistance from her legal assistance office and shared the Court’s Order with that office, a lawyer from that office told her that the Order was not binding on her unit because it was issued by a court in Washington, D.C. and she was serving in California. The military lawyer also threatened this class member with a characterization of her service as “dishonorable” for failing to meet the vacated Minimum Service Requirements if she persisted in requesting her N-426 certification. Kutovaya Decl. ¶ 9.

B. Defendants’ Failure to Process N-426 Forms within 30 Days Pursuant to the Order

Even where class members have been able to submit their N-426 forms for certification, Defendants have not processed their forms within 30 days, as required by the Order. In some

¹² This class member was later unable to obtain her N-426 certification after shipping to basic training, as described above. *See supra* 8; Mayat Decl. ¶ 8 & Ex. 1; Kutovaya Decl. ¶ 13.

instances, class members have waited months while awaiting their N-426 certifications. And in many cases, these class members have experienced these delays after Defendants imposed the vacated Minimum Service Requirements, compounding their difficulties in seeking citizenship in the expedited fashion intended by Congress.

For example, in October 2020, class counsel notified Defendants about a class member experiencing difficulties obtaining his N-426 certification. Mayat Decl. ¶ 18 & Ex. 1. This class member was unable to get his chain of command to accept his N-426 form for certification while training at Fort Sill. Goo Decl. ¶¶ 10–16. In October 2020, another attorney assisting this class member was finally able to submit his N-426 form for certification to the Inspector General’s office at Fort Sill. Goo Decl. ¶¶ 14, 17. However, the signed N-426 form that the Inspector General’s office returned was not properly certified because it was signed by an officer of O-3 pay grade, and not O-6 pay grade, as required by Defendants’ policy. Mayat Decl. ¶ 18 & Ex. 1; Goo Decl. ¶ 18. By this point, the class member had shipped to Fort Benning to complete training and Defendants connected class counsel with the legal assistance office at Fort Benning to help the class member obtain a new, properly certified N-426 form. Mayat Decl. ¶¶ 19–20 & Ex. 1; Goo Decl. ¶ 21 & Ex. A. However, the legal assistance office failed to assist this class member to obtain a properly certified N-426 form. Mayat Decl. ¶ 42 & Ex. 12; Goo Decl. ¶¶ 22–24, 26–29. In April 2021, this class member had to seek yet another N-426 certification from his chain of command at his duty station in Germany, where he is currently serving. Mayat Decl. ¶ 42 & Ex. 12; Goo Decl. ¶¶ 29–30. Class counsel followed up with Defendants about this class member’s continuing inability to obtain a properly certified N-426 form on May 28, June 25, and June 29. Mayat Decl. ¶¶ 42, 52 & Exs. 12, 14; Kim Decl. ¶ 6(b) & Ex. 21. On July 13, Defendants finally provided this class member with a properly certified N-426 form, ten months

after he first submitted his N-426 form for certification at Fort Sill—eight of which he served while deployed abroad—and only after Plaintiffs notified Defendants of their intent to file this motion. Mayat Decl. ¶ 63 & Ex. 14; Goo Decl. ¶¶ 17, 25, 31, 34.

The following are additional examples of cases in which Defendants have failed to process N-426 forms within the 30-day timeline ordered by this Court:

- In July 2021, class counsel notified Defendants about a class member who submitted her N-426 form in November 2020 while training at Fort Lee. She finally received a properly certified N-426 form in August 2021, after Plaintiffs notified Defendants of their intent to file this motion. Total time: nine months. Kim Decl. ¶ 21 & Ex. 29.
- In May 2021, class counsel notified Defendants about a class member who submitted his N-426 form to his Selected Reserve unit in January 2021. He finally received a properly certified N-426 form in August 2021, after Plaintiffs notified Defendants of their intent to file this motion. Total time: seven months. Mayat Decl. ¶ 43 & Ex. 12; Yi Decl. ¶¶ 12–15, 19.
- In May 2021, class counsel notified Defendants about a class member who submitted his N-426 form to his Selected Reserve unit in July 2020. He finally received his N-426 certification in June 2021. Total time: seven months (as calculated from the date of the Court's Order). Mayat Decl. ¶ 43 & Ex. 12; Zapata Decl. ¶¶ 10, 13, 16.
- In May 2021, class counsel notified Defendants about a class member whose counsel submitted his N-426 form in April 2021 while he was training at Fort Leonard Wood. He finally received his N-426 certification, with the assistance of separate counsel, in June 2021. Total time: over two months. Mayat Decl. ¶¶ 39, 42 & Ex. 12; Zong Decl. ¶¶ 6–15, 18.
- In February 2021, class counsel notified Defendants about a class member whose counsel submitted her N-426 form in December 2020 while she was serving at Camp Carroll in South Korea. She finally received her N-426 certification, with the assistance of separate counsel, in March 2021. Total time: three months. Mayat Decl. ¶ 30 & Ex. 10; Lee Decl. ¶¶ 13, 15–17, 20.
- In September 2020, class counsel notified Defendants about a class member who had been unable to obtain her N-426 certification from her Selected Reserve unit. On October 22, 2020, Defendants agreed to facilitate certification and class counsel submitted her N-426 form that day. Even with assistance from Defendants, she did not receive a properly certified N-426 form until December 1, 2020. Total time: three months from request; five and a half weeks from submission. Mayat Decl. ¶¶ 8, 11–24 & Ex. 1; Kutovaya Decl. ¶¶ 21, 23.

C. Defendants' Failure to Rectify Non-Compliance from September 2020 to June 2021

1. Defendants' Failure to Address Individual or Systemic Cases of Non-Compliance

From September 2020 through June 2021, when Plaintiffs first notified Defendants of their intent to file this motion, class counsel have repeatedly brought cases of non-compliance to Defendants' attention in an effort to resolve these issues without the Court's involvement. During this nine-month period, Defendants insisted on addressing cases of non-compliance individually, even where class counsel provided evidence of a systemic refusal to comply with the Order at a particular military installation. Mayat Decl. ¶¶ 8–16 & Ex. 1. For example, class counsel flagged to Defendants the continued circulation of a memorandum at Fort Jackson stating that service members must continue to comply with the vacated Minimum Service Requirements. Mayat Decl. ¶¶ 8, 43 & Exs. 1, 8, 12–13. Class counsel also suggested steps Defendants could take to rectify these systemic problems. Mayat Decl. ¶¶ 9, 12, 44 & Exs. 1, 12. Defendants repeatedly rejected or ignored these suggestions. Mayat Decl. ¶¶ 9–13, 48–50, 57 & Exs. 1, 12.

Defendants' insistence on addressing non-compliance on a case-by-case basis is unreasonable given the hierarchical structure of the military. Generally speaking, class members are not encountering non-compliance by rogue officers one link above them in the chain of command. Rather, those officers are receiving instructions not to comply from officers much higher up in the chain. For example, two class members at Fort Jackson were informed by their company commander that *his* chain of command had instructed him that service members could not obtain an N-426 certification until they completed the Minimum Service Requirements. Lingamaneni Decl. ¶ 8; Yu Decl. ¶ 8. Similarly, a class member at Fort Leonard Wood was informed by her platoon leader that *his* chain of command had instructed him that service

members could not obtain an N-426 certification until they completed the Minimum Service Requirements. Kim Decl. ¶ 23 & Ex. 31. Thus, even individual cases of non-compliance are likely to indicate a broader pattern of non-compliance at a particular installation. For example, in February 2021, class counsel notified Defendants about a class member who had been unable to obtain his N-426 certification at Fort Leonard Wood. Mayat Decl. ¶ 30 & Ex. 10.¹³ Several months later, the legal assistance office there confirmed that the officers responsible for N-426 certifications were routinely imposing the vacated Minimum Service Requirements and refusing to certify N-426 forms. Quail Decl. ¶¶ 7–8.

Even with respect to the individual cases of non-compliance that class counsel brought to Defendants' attention from September 2020 to June 2021, Defendants rectified only one such case, and only after sending this class member on a wild goose chase to obtain her N-426 certification. In that case, Defendants' initial response was to dispute that this service member was even a member of the class, because she served in the National Guard, a position Defendants later admitted was in error.¹⁴ Defendants then provided two different email addresses the class member should use to request her N-426 certification but later acknowledged that neither address would work for that purpose. After these missteps, Defendants ultimately agreed to facilitate this class member's certification. Mayat Decl. ¶¶ 11–14, 16–17, 19, 21 & Ex. 1.¹⁵

¹³ Even after class counsel brought this case to Defendants' attention, Defendants took no action to investigate or rectify non-compliance at Fort Leonard Wood. Mayat Decl. ¶¶ 30–46 & Exs. 10, 12.

¹⁴ Defendants have erroneously asserted that other class members are not members of the class. *See, e.g.*, Mayat Decl. ¶¶ 16, 27, 33 & Exs. 1, 9, 10.

¹⁵ Despite directly facilitating this class member's N-426 certification, Defendants still failed to process it within the 30-day timeline required by the Order. *See supra* 16; Mayat Decl. ¶¶ 8, 11–24 & Ex. 1; Kutovaya Decl. ¶¶ 21, 23.

Later, Defendants abandoned any pretense of assisting individual class members encountering non-compliance with the Order. In a June 22, 2021 email, Defendants' counsel indicated that Defendants were altering their original position of remediating non-compliance cases individually, Mayat Decl. ¶ 5 & Ex. 1, declaring that while class counsel "should feel free to contact me with respect to programmatic issues related to the injunction," he was not the appropriate person to address "individualized N-426 issues," Mayat Decl. ¶ 49 & Ex. 14.

2. Defendants' Ineffective Avenues of Redress

From September 2020 to June 2021, Defendants also repeatedly suggested that class members pursue ineffective avenues for seeking their N-426 certifications that have only further delayed their attempts to obtain certifications and seek naturalization. One example demonstrating this pattern is Defendants' repeated insistence that class members go through their chains of command to request their N-426 certifications. Mayat Decl. ¶¶ 19, 49 & Exs. 1, 14. Defendants persisted with this recommendation even in the face of consistent evidence that class members' chains of command are refusing to assist them, even when presented with copies of the Order and Defendants' implementing memoranda. *See, e.g.* Cutler Decl. ¶¶ 7, 22; Goo Decl. ¶ 15; Kutovaya Decl. ¶¶ 13–14; Lingamaneni Decl. ¶¶ 8–9.

Defendants also continually insisted that class members encountering resistance from their chains of command seek help from the legal assistance offices at the installations where they are serving. Mayat Decl. ¶¶ 19, 27, 34, 49 & Exs. 1, 9, 10, 14. This response effectively abdicates Defendants' responsibility for complying with the Court's Order, which enjoins *Defendants* from subjecting any class member to the Minimum Service Requirements and orders *Defendants* to process class members' N-426 requests within 30 days. Thus, once a class member encounters non-compliance from his or her chain of command, Defendants should act

immediately to rectify that non-compliance. Instead, Defendants have proposed that class members shoulder the responsibility of pursuing their N-426 certifications in the face of defiance by their superiors.

Setting aside Defendants' abdication of their own responsibility to comply with the Court's Order, their instruction that class members seek help from their legal assistance offices has only exacerbated the delays caused by Defendants' non-compliance. In some cases, legal assistance offices simply refused to assist class members. For example, in July 2021, the office of another attorney representing a class member serving at Fort Leonard Wood reached out to the legal assistance office at that base for assistance with her client's N-426 certification. Quail Decl. ¶¶ 3–7. The legal assistance office stated that the officers responsible for N-426 certification were regularly imposing the vacated Minimum Service Requirements on service members and that even where the legal assistance office forwarded an N-426 form for certification to those officers, they refused to certify them. Quail Decl. ¶ 7. The legal assistance office then advised that the class member's attorney reach out directly to the class member's battalion for his N-426 certification. Quail Decl. ¶ 10. In another example, a class member who sought assistance with her N-426 certification from the legal assistance office at her duty station in South Korea was told by the office that it could not assist her with the certification and that she should seek it from her unit. Lee Decl. ¶ 12.¹⁶

¹⁶ Even when Defendants have directly connected class members to contacts at legal assistance offices, those offices have failed to provide assistance. For example, in October 2020, class counsel brought to Defendants' attention the case of a class member who was about to deploy overseas and still had not received his N-426 certification despite repeated attempts to obtain it. Defendants connected the class member with the legal assistance office at the base where the class member was then located. But that office failed to assist the class member to obtain a properly certified N-426 form. Mayat Decl. ¶¶ 18, 19, 42 & Ex. 12; Goo Decl. ¶¶ 10-20, 22–31 & Ex. A.

In other cases, legal assistance offices are providing erroneous guidance. In one instance, a lawyer at a legal assistance office informed a class member that the Order was not binding on her unit because it was issued by a court in Washington, D.C., and she was serving in California. Mayat Decl. ¶ 8 & Ex. 1; Kutovaya Decl. ¶ 9. The lawyer also threatened this class member with a characterization of her service as “dishonorable” for failing to meet the vacated Minimum Service Requirements if she persisted in requesting her N-426 certification. Kutovaya Decl. ¶ 9. In another instance, a lawyer at a legal assistance office informed a class member that he was not eligible for expedited naturalization under 8 U.S.C. § 1440 because he was serving in the National Guard, a position that is incorrect. Ex. 36.¹⁷

Even if the legal assistance offices were willing or able to assist class members, those offices are not a practical avenue of redress when Defendants have denied class members their rights under the Order. Most class members are seeking their N-426 certifications while training, during which time their schedules are strictly controlled by their training instructors and they must seek permission for nearly every activity, including obtaining assistance with their N-426 certifications. Stock Decl. ¶ 9. Moreover, one of the most critical aspects of the instruction class members receive during this period is the need to obey their chain of command. Stock Decl. ¶ 10. Nevertheless, Defendants propose that class members whose chains of command refuse to assist them with their N-426 certifications seek permission from those same chains of command to visit the legal assistance office about an issue their immediate superiors have already refused to resolve for them. Stock Decl. ¶ 11. This recommendation places an unreasonable burden on

¹⁷ Another class member received written guidance from his unit, which appears to have emanated from his legal assistance office, stating that he had to serve at least a year in the unit before he could seek his N-426 certification. Rinaldi Decl. ¶ 8 & Ex. A.

class members who are understandably concerned with disrespecting their chains of command and bringing negative attention upon themselves. Stock Decl. ¶ 11.

Moreover, Defendants' recommendation that class members visit legal assistance offices will often be of no use, since their training instructors have absolute discretion to grant or deny this request. Stock Decl. ¶ 12. An attorney who regularly represents class members seeking N-426 certifications attests that some clients who made such requests were asked by their drill sergeants why they wanted to visit the legal assistance office and when they responded that it was for help with their citizenship applications, their requests were denied. Stock Decl. ¶ 12. Likewise, when a class member whose case class counsel brought to Defendants' attention asked his drill sergeant for permission to visit the legal assistance office (following his drill sergeant's refusal to assist him with his N-426 certification), his drill sergeant refused and informed him he would have to wait until he shipped overseas to request his N-426 certification. Goo Decl. ¶ 15.

A further example of misdirection is Defendants' repeated suggestion that class members serving in the Selected Reserve and seeking N-426 certification send a message to a specific e-mail address. Mayat Dec. ¶¶ 11, 27 & Exs. 1, 9. Although this e-mail address was established for *Kirwa* class members, Defendants assured class counsel that *Samma* class members in the Selected Reserve could also use the address and that it was monitored daily. Mayat Decl. ¶ 11 & Ex. 1. However, Defendants later had to clarify that this address only serves a subset of class members in the Selected Reserve, Mayat Decl. ¶ 14 & Ex. 1, and it subsequently appeared that the address did not work at all, Yi Decl. ¶¶ 16–17.¹⁸ In July 2021, when class counsel asked

¹⁸ Class counsel notified Defendants of this problem, but received no response. Mayat Decl. ¶¶ 43, 45–46, 53 & Ex. 12. On June 28, 2021, after Plaintiffs notified Defendants of their intent to file this motion, class counsel received a response to their June 23, 2021 test email to the address from a military lawyer. Mayat Decl. ¶ 60 & Ex. 15.

about the status of this email address, Defendants' counsel stated that it was no longer active. Kim Decl. ¶ 17(d) & Ex. 28.

D. Defendants' Failure to Rectify Non-Compliance from July to August 2021

For two months—from April 19 to June 22, 2021—class counsel heard nothing from Defendants despite writing repeatedly to raise and follow-up on ongoing cases of non-compliance. Mayat Decl. ¶¶ 38–46 & Ex. 12. On June 22, 2021, Defendants' counsel wrote a cursory email, stating that class members “need to work through their chain of command” to obtain their N-426 certifications and that “[i]f the chain of command refuses to sign an N-426, the proper recourse is not to contact me” but to have “the service member contact the legal assistance office at the base where [they are] stationed.” Mayat Decl. ¶ 49 & Ex. 14. Defendants' counsel also stated that he “face[d] the press of other DOJ business” and that while class counsel “should feel free to contact me with respect to programmatic issues related to the injunction,” he was not the appropriate person to address “individualized N-426 issues.” Mayat Decl. ¶ 49 & Ex. 14.

On June 25, 2021, class counsel responded to Defendants' counsel's June 22 email, to remind Defendants about the numerous cases of non-compliance that continued to go unresolved and to inform Defendants of Plaintiffs' intent to file a motion to enforce the Court's Order. Mayat Decl. ¶¶ 51–56 & Ex. 14. Later that day, Defendants' counsel responded, explaining that he had “somehow missed” class counsel's May 28, 2021 email, and requesting “a couple of weeks to look into all of these issues and your specific requests.” Mayat Decl. ¶ 57 & Ex. 14. Later that day, class counsel informed Defendants' counsel that, given the continued pattern of non-compliance, Plaintiffs intended to proceed with their motion. Mayat Decl. ¶ 58 & Ex. 14.

On June 29, 2021, senior Department of Justice officials reached out to class counsel and assured class counsel that Plaintiffs' concerns would now receive attention at high levels of the

Departments of Justice and Defense. Kim Decl. ¶¶ 2–8 & Ex 21. Relying on that assurance, Plaintiffs agreed to delay the filing of this motion, and articulated the measures they sought Defendants to take, which are substantially identical to the relief requested in this motion. Kim Decl. ¶ 6 & Ex. 21. Plaintiffs explained that these proposed measures were reasonable, given that the Court had previously ordered Defendants to undertake them in response to similar non-compliance in the related litigation of *Kirwa*, and long overdue. Kim Decl. ¶ 7 & Ex. 21.

Over the last seven weeks, Plaintiffs have engaged in a good faith effort to work with Defendants on solutions to redress non-compliance with the Court’s Order without recourse to further litigation. Yet Defendants have refused to implement any of the reasonable measures proposed by Plaintiffs. Instead, they continue to propose increasingly impractical avenues for relief, which require class members to individually shoulder the burden of holding their chains of command to account for failing to comply with the Order. To date, Defendants have done little more than rectify a handful of individual cases of non-compliance. All the while, Plaintiffs continue to document a steady stream of new cases of non-compliance, many of which remain unresolved.

1. Defendants Reject Plaintiffs’ Proposed Measures

Plaintiffs have repeatedly proposed three primary measures to redress Defendants’ persistent pattern of non-compliance: (1) identifying centralized points of contact to assist class members experiencing non-compliance; (2) tracking class members’ N-426 certification requests; and (3) assisting class counsel with notifying class members of their rights under the Order. Mayat Decl. ¶¶ 3, 9, 12, 44 & Exs. 1, 14; Kim Decl. ¶¶ 6, 11, 14, 17, 23 & Exs. 21, 24, 26, 28, 31. These measures are derived from the related action of *Kirwa v. United States Department of Defense*, No. 17-cv-1793 (D.D.C.), where they proved effective in achieving

enforcement of this Court’s preliminary injunction after similar non-compliance. *See* Plaintiffs’ Mot. to Enforce Court Order, *Kirwa v. U.S. Dep’t of Def.*, No. 17-cv-1793, ECF No. 35 (Nov. 15, 2017). In response to that motion, this Court ordered Defendants “to propose a joint communication to be distributed to class members explaining their rights under the Court’s . . . order” and to track *Kirwa* class members’ N-426 certification requests by providing bi-weekly status reports of “class members who submitted an N-426 form, the dates they submitted their N-426 forms, and the dates they received their N-426 certification.” Order, *Kirwa v. U.S. Dep’t of Def.*, No. 17-cv-1793, ECF No. 37 (Nov. 16, 2017), Ex. 17; Order, *Kirwa v. U.S. Dep’t of Def.*, No. 17-cv-1793, ECF No. 55 (Dec. 15, 2017), Ex. 19. This Court subsequently approved a class notice, which identified two points of contact (*i.e.*, specific individuals) that *Kirwa* class members could email when they had “not received a copy of [their] completed/signed Form N-426 . . . within 7 business days of submission to [their] commander, or his or her designee.” Order, *Kirwa v. U.S. Dep’t of Def.*, No. 17-cv-1793, ECF No. 54 (Dec. 14, 2017), Ex. 18 at 6–7.

Despite implementing those measures in *Kirwa*, Defendants have refused to do so here. Nor have they provided any reasonable explanation for their refusal. With respect to centralized points of contact, Defendants have simply stated that establishing them would unduly burden Defendants’ resources. Kim Decl. ¶ 17(a)–(c) & Exs. 28, 31. And when Plaintiffs have pointed out that Defendants were able to establish such points of contact in *Kirwa*, Defendants have stated that their burden would be greater here because of the larger size of the class. Kim Decl. ¶ 17(c) & Exs. 28, 31. That statement is telling because it indicates Defendants’ recognition that

non-compliance is a widespread problem impacting a significant number of service members; addressing a minor problem would not require a burdensome level of staffing.¹⁹

As for tracking class members' N-426 certification requests, Defendants have insisted that such tracking is not possible because there is no centralized system documenting this information. Kim Decl. ¶ 17(e) & Exs. 28, 30. When Plaintiffs again pointed out that Defendants were able to institute such a tracking system in *Kirwa*, Defendants stated that the distinction between the *Kirwa* and *Samma* classes make such reporting infeasible in this litigation. Kim Decl. ¶ 17(e) & Ex. 28. However, Defendants have failed, despite repeated pressing by Plaintiffs, to explain what specific obstacles stand in the way of such reporting. Kim Decl. ¶ 17(e), (g) & Exs. 28, 31. Plaintiffs have suggested, as a lesser burden, that Defendants could track N-426 certification requests at a subset of Army installations, such as at the Army's five basic training bases, given that many class members seek their N-426 certifications while in training. Kim Decl. ¶ 17(f) & Ex. 28. Defendants stated that they would look into this possibility but ultimately rejected it as well without explanation. Kim Decl. ¶ 17(f) & Exs. 28, 30.²⁰

Finally, Defendants have refused to provide notice of this Court's Order to class members, or to identify class members to class counsel, so that class counsel could better assist

¹⁹ In a letter dated August 6, 2021, Defendants make the baffling assertion that they have "addressed your request for a centralized point of contact," which "is the service member's Commander." Ex. 35. Clearly, an officer in a class member's own chain of command cannot serve as a "centralized point of contact," particularly where that very chain of command is refusing to comply with the Court's Order.

²⁰ Plaintiffs also asked Defendants to explain why tracking the N-426 requests of the sub-set of *Samma* class members recruited through the MAVNI program was not possible, given that the *Kirwa* class was also comprised of service members recruited through this program. Kim Decl. ¶ 17(g) & Ex. 28. Defendants' later admission that the "Army's lack of a system of records related to Forms N-426 is not tied to whether the service member was recruited through the [MAVNI] program" is illuminating because it indicates that Defendants also had no pre-existing system for centrally tracking the N-426 certification requests of *Kirwa* class members but established one in response to this Court's order in that case. Ex. 30.

the class. Mayat Decl. ¶¶ 3–7, 49 & Exs. 1, 12. Class counsel have sought to provide notice to class members by posting information on the ACLU website. *See ACLU, Honorable Service Certifications for Non-Citizen Military Service Members*, <https://www.aclu.org/honorable-service-certifications-non-citizen-military-service-members> (last visited Aug. 17, 2021).

However, this notice has limited utility: even if class members know to look on the ACLU website for information, many are in training and have extremely limited access to their mobile phones or computers. Stock Decl. ¶ 13. And even class members who learn about the Order face numerous obstacles to vindicating their rights, including educating their military superiors about the Order, and correcting and questioning those superiors about their rights to N-426 certification in the face of contrary guidance or instructions—tasks that are particularly unrealistic for new recruits who are being taught that obeying their chain of command is a core military value.²¹

Defendants, by contrast, know the identity and location of each class member and are therefore uniquely situated to provide notice. But rather than provide notice to class members (or enable class counsel to do so), Defendants have stated only that they are “exploring various methods to further disseminate information such as by using Army’s social media channels.” Ex. 23. Despite making that statement nearly seven weeks ago, Defendants have not yet undertaken

²¹ Indeed, most of the cases of non-compliance class counsel have reported to Defendants’ counsel were reported to class counsel by other *lawyers* separately representing class members. *See* Cutler Decl. ¶ 3; Goo Decl. ¶ 14; Lee Decl. ¶ 11; Lingamaneni Decl. ¶ 7; Liu Decl. ¶ 7; Quail Decl. ¶¶ 3–10; Rinaldi Decl. ¶ 9; Yu Decl. ¶ 7; Zong Decl. ¶ 6. Moreover, even with the assistance of outside counsel, these class members continued to encounter non-compliance by Defendants and difficulty obtaining their N-426 certifications. *See* Cutler ¶¶ 5–11, 19–23, 29–32; Goo Decl. ¶¶ 14–30; Lee Decl. ¶¶ 7–10; 11–17; Lingamaneni Decl. ¶¶ 8–10; Liu Decl. ¶¶ 7–17; Quail Decl. ¶¶ 3–8; Rinaldi Decl. ¶¶ 9–14; Yu Decl. ¶¶ 7–10; Zong Decl. ¶¶ 6–15. It is therefore reasonable to assume that many other class members who are without the assistance of counsel are experiencing significant challenges vindicating their rights under the Order.

these measures, and have been unable to provide any timeline for doing so. Kim Decl. ¶¶ 17(h)-(i) & Exs. 28, 30.

Disturbingly, Defendants also continue to maintain public materials on their websites indicating that the Minimum Service Requirements vacated by the Order remain in effect. For example, both the Department of Defense and the Department of the Army continue to maintain articles on their respective sites describing implementation of the vacated requirements.²² Neither article contains an update explaining that the Order has vacated those requirements. Defendants' continued publication of these materials in combination with their lack of notice to class members is likely to generate confusion for class members and their chains of command alike. Class counsel have requested Defendants remove or update these sites but Defendants have failed to respond to this request. Exs. 31, 35.

2. Defendants Propose Unreasonable and Ineffective Measures

Defendants have not only refused to implement any of Plaintiffs' proposed measures, but have counter-proposed unrealistic and ineffective measures. Defendants have continued to insist that legal assistance offices should be the primary avenue of recourse for class members encountering non-compliance by their chains of command. Kim Decl. ¶ 16(g) & Exs. 23, 25, 28, 30. As explained above, however, legal assistance offices are simply not practical avenues for redress, especially for class members in training, who must seek permission from the very

²² See, e.g., U.S. Department of Defense, *DoD Announces Policies Affecting Foreign Nationals Entering Military*, Oct. 13, 2017, <https://www.defense.gov/Explore/News/Article/Article/1342430/dod-announces-policiesaffecting-foreign-nationals-entering-military/> (last visited Aug. 17, 2021); U.S. Department of the Army, *DoD Announces Policies Affecting Foreign National Entering Military*, Oct. 13, 2017, https://www.army.mil/article/195435/dod_announces_policies_affecting_foreign_nationals_entering_military (last visited Aug. 17, 2021).

officers who have refused their N-426 certification requests to further pursue this issue. Even where service members are able to seek help from the legal assistance offices, those offices have no power to give orders to the commanding officers of class members. *See, e.g.*, Quail Decl. ¶¶ 7–8, 10.²³ In any event, the Court’s Order does not enjoin class members to visit legal assistance offices, it enjoins Defendants to act promptly on requests for N-426 certifications.

On July 23, 2021, Defendants identified several new proposed “avenues of redress for Form N-426 related issues,” each more quixotic than the next. Ex. 30. First, Defendants suggested that class members must “first utilize” their Commander’s “open door policy” before “escalating any issue.” Ex. 30. Defendants provided little more guidance on this point than to cite Army Regulation 600-20, paragraph 2-2, which states that “Soldiers are responsible for ensuring that the commander is made aware of problems that affect discipline, morale, and mission effectiveness.” Ex. 30.²⁴ Second, where the open door policy fails, Defendants suggested that class members file formal complaints against their commanding officers pursuant to Article 138

²³ Over the course of negotiations with Defendants, Plaintiffs reiterated why legal assistance offices were not a realistic avenue of redress for class members. Kim Decl. ¶¶ 11, 16(i), 14, 23 & Exs. 24, 26, 27, 31. Nevertheless, in light of documented instances where legal assistance offices were refusing to assist class members, Plaintiffs requested Defendants to take steps to ensure that these offices would assist class members able to access them. Kim Decl. ¶ 16(i) & Ex. 28. In response, Defendants issued a “practice note” to legal assistance offices. Kim Decl. ¶ 16(h) & Ex. 28. Plaintiffs obtained a copy of this note, which states that “Soldiers who have served ONE day on active duty are eligible to apply for naturalization under 8 U.S.C. § 1440 using USCIS Form N-400.” Ex. 31. That statement is incorrect. In fact, section 1440 provides that service members who have served one day “as a member of the Selected Reserve of the Ready Reserve or in an active-duty status” are eligible for naturalization. In response to Plaintiffs’ request that Defendants correct this note, Ex. 31, Defendants “declined” to do so on the basis that it “is not intended for the public and is subject to applicable privileges and exemptions from disclosure,” Ex. 35.

²⁴ In an August 6, 2021 letter, Defendants state that this Army regulation “is valid, binding, and unaffected by the *Samma* injunction.” Ex. 35. If Defendants are suggesting that they cannot comply with the Court’s Order before class members exhaust the “open door policy,” they are wrong.

of the Uniform Code of Military Justice, 10 U.S.C. § 938. Ex. 30. Finally, Defendants suggested that “[c]lass members can also seek redress from the Inspector General” or “[o]ther avenues of relief . . . at the installation level, such as Commanding General hotlines.” Ex. 30.

These avenues ignore the reality of and demonstrate a callous disregard for the circumstances of most class members. As explained above, most class members are new recruits just beginning their service and in the throes of grueling training. They sit at the very bottom of their chains of command and are instructed that they must respect and obey their superiors. They are at the mercy of their drill sergeants, from whom they must seek permission for nearly any activity deviating from their training schedule. Stock Decl. ¶¶ 9–10.

Against this backdrop, Defendants’ suggestions are ludicrous. New recruits cannot just walk in the commander’s “open door”—they need permission from the very chains of command that have already refused to help them. Stock Decl. ¶ 15. Counseling class members to use the “Commanding General Hotline”—*i.e.* complaining directly to the commanding general of a major military base—is asking them to defy their *entire* chain of command and risks stigmatizing them as troublemakers at the very outset of their military careers. Stock Decl. ¶ 16.

Filing a complaint pursuant to Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 138, is a completely unrealistic avenue of redress; it essentially asks the commanding general to investigate and possibly discipline a commanding officer.²⁵ It is considered the

²⁵ Article 138 provides:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as

“nuclear option” and is known to invite “retaliation and harassment by the command.” Stock Decl. ¶¶ 20–21. It is not reasonable to require entry-level service members to file Article 138 complaints over delayed N-426 certifications. And even if class members were to pursue this extreme measure, the process would take far longer than the 30 days within which Defendants are required to process their forms. Stock Decl. ¶ 18.²⁶

Putting aside the fanciful nature of these suggestions, they are each a deflecting maneuver by Defendants, whose obligation is to comply with this Court’s Order, not to instruct service members to fix their own problems.

3. Defendants Have Done Virtually Nothing to Redress Non-Compliance

Defendants have also done virtually nothing to date, aside from certifying a handful of delayed N-426 forms, to redress outstanding cases of non-compliance. On July 2, 2021, at the outset of the extended meet-and-confer period, Defendants acknowledged a need “to ensure that N-426 processing is swift and to resolve promptly any problems that may arise.” Ex. 23. In purported recognition of that need, Defendants described “steps that the Department of the Army has already taken” and “steps it plans to take.” Ex. 23. These steps consisted of (1) certifying the N-426 forms of class members Plaintiffs had brought to Defendants’ attention; (2) re-issuing the

possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

10 U.S.C. § 938.

²⁶ For similar reasons, filing an Inspector General complaint is an equally futile avenue to redress Defendants’ non-compliance. Like filing an Article 138 complaint, filing an IG complaint defies one’s chain of command by asking the military to investigate and possibly discipline one’s own commanding officer. Stock Decl. ¶ 22. It is not realistic to ask service members just beginning their service to take such a step. Moreover, the timeline is typically many months and would therefore far exceed the 30-day timeline for processing N-426 certifications set forth in the Court’s Order. Stock Decl. ¶ 22.

Army Implementing Memo dated September 3, 2020; (3) requiring the O-6 Commanders at three installations—Fort Jackson, Fort Leonard Wood, and Fort Benning — to confirm receipt of the Army Implementing Memo and “that their Company and Battalion Commanders have read and understood their obligations;” and (4) exploring avenues “to ensure service members are aware of their rights related to the N-426 process . . . such as by using Army’s social media channels.” Ex. 23.

As of the date of this motion—nearly seven weeks after Defendants promised to take swift action on non-compliance—Defendants have completed virtually none of the steps identified in their July 2 letter. As discussed above, Defendants have undertaken no attempts to notify Defendants of their rights under the Order, including by distributing information on the “Army’s social media channels.” *See supra* at 27–28. They also continue to publicize materials on their websites that indicate that the Minimum Service Requirements vacated by the Order remain in effect and have refused to update or remove such materials. *See id.* at 28.

Defendants have also not re-issued the Army Implementing Memo. In fact, in an August 6, 2021 letter, Defendants asserted that the Memo “will be ready for final approval by the Army Staff no later than August 20, 2021,” which would be seven weeks after it first proposed re-issuance. Ex. 35.²⁷ Given this delay, Defendants have also failed to complete the promised step

²⁷ In their July 2, 2021 letter, Defendants’ counsel stated that the “Army will reissue the Army-wide guidance that was distributed to all chains of command after the *Samma* injunction” and attached the September 3, 2020 Army Implementing Memo. Ex. 23. In a July 23, 2021 letter, however, Defendants’ counsel stated that the “Army will be issuing an Army-wide directive on this subject” as a “fragmented order (FRAGO), as an addendum to the original execute order (EXORD).” Ex. 30. In a July 28, 2021 letter, class counsel asked Defendants’ counsel to clarify whether this “Army-wide directive” was the September 3, 2020 Army Implementing Memo or a new guidance document. Ex. 31. In an August 8, 2021 letter, Defendants’ counsel offered no such clarification and referred again to the same “Army-wide directive;” they also referred for the first time to a prior October 6, 2020 FRAGO. Ex. 35. Plaintiffs are only aware of a single Army-wide guidance, which is the September 3, 2020 Army Implementing Memo, and have

of educating military officers at three Army installations about their obligations under the Army Implementing Memo. In their August 6 letter, Defendants indicated that O-6 Commanders at those installations would be required to confirm receipt of the Memo following its re-issuance, which has yet to occur. Ex. 35. Although Defendants indicated that they had redistributed the prior Army Implementing Memo at those three installations,²⁸ they failed to confirm whether that redistribution had included O-6 Commander confirmation of receipt of the Memo (or confirmation that their Company and Battalion Commanders have read and understood their obligations under the Memo.)²⁹

Defendants have also rebuffed Plaintiffs' request that their education efforts be expanded to other Army installations. From September 2020 to June 2021, in addition to the three installations where Defendants propose to educate military officers, Plaintiffs identified

never seen the October 6, 2020 FRAGO to which Defendants refer. It is unclear whether the October 6, 2020 FRAGO is a mistaken reference to the September 3, 2020 Army Implementing Memo. Moreover, despite requesting clarification on this point, Defendants have not explained whether the "Army-wide directive" that Defendants are preparing to issue is a copy of the September 3, 2020 Army Implementing Memo, a copy of the unknown October 6, 2020 FRAGO, or a different guidance altogether.

²⁸ Defendants' counsel again referred to the "October 6, 2020 FRAGO" in this part of their August 6, 2021 letter. Ex. 35. Again, it is unclear whether the FRAGO is a mistaken reference to the September 3, 2020 Army Implementing Memo or some other guidance.

²⁹ Defendants also failed to clarify whether they would still be requiring unit level leaders—*i.e.* first lieutenants—at the three installations to also confirm they have read and understood the Army Implementing Memo. In a July 2, 2021 letter, Plaintiffs requested that Defendants incorporate a requirement that all officers acting as the immediate military superiors of class members confirm that they have read and understood the Army Implementing Memo, given that many class members have encountered non-compliance by those directly above them in their chains of command. Ex. 24. At a July 15, 2021 conference, Defendants stated that they would require such confirmation by unit level leaders, which they identified as first lieutenants. Kim Decl. ¶ 16(d) & Ex. 28. In a July 28, 2021 letter, Plaintiffs asked Defendants to confirm they would be requiring such confirmation given that Defendants' July 23, 2021 letter omitted this requirement when discussing education efforts at the three installations. Ex. 31. Defendants' explicit omission of this requirement in their August 6, 2021 letter suggests that Defendants no longer plan to honor their agreement to incorporate it into their education efforts. Ex. 35.

numerous other installations where class members experienced non-compliance. *See supra* 12–16. And in letters to Defendants on July 2, July 28, and August 12, Plaintiffs identified several new installations where class members have experienced non-compliance. Exs. 24, 32, 36. In an August 6 letter, Defendants stated that they were “actively considering plans to require O-6 confirmation” at other installations. Ex. 35. However, they did not indicate which installations or provide any timeline for a decision.

Thus, all Defendants have done to date is certify a handful of individual N-426 forms for class members whom class counsel have brought to their attention. Moreover, as of this date, N-426 certification requests for five class members remain outstanding. Several of these class members requested their N-426 certifications months ago and the continued delay in their certifications is unacceptable. *See* Exs. 29, 31–32 (documenting that class member Enikanoselu requested his N-426 certification ten months ago, class member Aregbesola four months ago, class member Atat three months ago, and class member Okoisu three months ago).

E. Defendants’ June 17, 2021 Memorandum

DOD’s June 17, 2021 memorandum rescinding the Minimum Service Requirements while it “reconsiders” its policy—a policy that has already been declared unlawful and permanently enjoined—is not likely to rectify Defendants’ non-compliance with the Order. Defendants were already obligated to implement the Order and, indeed, recognized that obligation in the DOD Implementing Memo and the various services’ implementing memos issued shortly after the Order. Exs. 2–7. Given the history of non-compliance documented above, there is no reason to believe that DOD’s June 17, 2021 Memo will change anything. And there is no evidence that it has changed anything in the two months since it was issued.

ARGUMENT

“Where no stay pending appeal has been granted the district court retains the power to enforce its judgment and to take steps in aid of execution.” *Sec. & Exch. Comm’n v. Diversified Growth Corp.*, 595 F. Supp. 1159, 1170 (D.D.C. 1984); *see also Deering Milliken, Inc., v. Fed. Trade Comm’n*, 647 F. 2d 1124, 1129 (D.C. Cir. 1978) (noting “the trial court’s powers to enforce its unstayed judgment”). The “vitality” of a district court’s judgment “is undiminished by pendency of the appeal.” *Deering Milliken*, 647 F. 2d at 1129. Thus, “[u]nless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative.” *Id.* A court can enforce an unstayed injunction by contempt, *see Diversified Growth*, 595 F. Supp. at 1170; *Gullet v. Gullet*, 174 F. 2d 531, 533 (D.C. Cir. 1949) (holding that, absent a stay, a pending appeal did not protect a party from the district court’s punishment for contempt for failing to obey its order), but contempt is not the only remedy for failure to obey; a district court may take other steps to “preserve the status quo until decision by the appellate court.” *Wash. Metro. Area Transit Comm’n v. Reliable Limousine Servs., LLC.*, 985 F. Supp. 2d 23, 29 (D.D.C. 2013) (quoting *Newton v. Consol. Gas Co. of N.Y.*, 258 U.S. 165, 177 (1922)); *see also* Fed. R. Civ. P. 62(d) (“While an appeal is pending from [a] . . . final judgment . . . , the court may . . . modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.”).

In its Order, this Court vacated the Minimum Service Requirements because they had been unlawfully issued under the APA. ECF No. 47 at 1–2. It further enjoined Defendants from withholding N-426 certifications from any class member based on a failure to complete the Minimum Service Requirements and ordered Defendants to process submitted N-426 forms within 30 days. *Id.* at 2–3. Nevertheless, Defendants have imposed the vacated Minimum Service

Requirements at numerous Army installations, including at several of the Army's training bases. *See supra* 7–14. In addition, many class members who have submitted their N-426 forms for certification have had to wait far beyond the 30 days required by the Order to receive their certifications. *See supra* 14–16. Defendants have failed to rectify systemic issues of non-compliance and many individual cases of non-compliance brought to their attention. *See supra* 17–33.

Accordingly, Plaintiffs respectfully request that this Court enforce its Order by granting this Motion and issuing:

- (1) An order compelling Defendants to show cause why the Court should not find that Defendants have failed to comply with the Order;
- (2) An order compelling Defendants to file and serve a report of their efforts to comply with the Order, including:
 - (c) copies of all instructions for effectuating the Order issued to military personnel and documentation of the transmission of all such communications; and
 - (d) copies of all communications issued to class members to explain the Order, and documentation of the transmission of all such communications;
- (3) An order compelling Defendants to identify a point of contact in the Army, with authority to take appropriate action, for class members who experience problems submitting their N-426 certification requests to their commands or who have not received their N-426 certification or denial within 30 days of submission to their commands;
- (4) An order compelling Defendants to serve a list containing the names of all class members in the Army who have requested an N-426 certification, the dates they submitted their requests, and the dates (if any) on which they received their N-426 certifications;
- (5) An order compelling Defendants to certify or deny N-426 certification requests for all class members in the Army whose requests have been pending for over 30 days;
- (6) An order compelling Defendants to serve monthly status reports on the Army's compliance with the Order, including a list containing the names of all class members in the Army who have requested an N-426 certification since the previous report, the dates they submitted their requests, and the dates (if any) on which they received their N-426 certifications;

- (7) An order compelling Defendants to require all O-6 commanders at the Army's basic training bases and at other installations where class counsel have identified cases of non-compliance to confirm receipt of the September 3, 2020 Army implementing memorandum and to confirm that all officers below them in their chains of command have read and understood their obligations under the memorandum;
- (8) An order compelling Plaintiffs and Defendants to file a proposed joint communication, to be approved by the Court and distributed to all class members and relevant military personnel, explaining class members' rights under the Order, and providing that the communication distributed to class members in the Army shall include the relevant point of contact established pursuant to (3) above;
- (9) An order compelling Defendants to distribute the Court-approved joint communication on a monthly basis to individuals who have become class members since the previous distribution; and
- (10) An order compelling Defendants to update all public materials on their websites describing the Minimum Service Requirements to reflect that the Requirements have been vacated by the Order.

Plaintiffs' requests are remedies familiar to this Court for failure to obey its injunctions. Indeed, this Court already ordered nearly identical relief in the related *Kirwa* litigation in response to similar non-compliance by Defendants in that action. *See* Ex. 17 (ordering Defendants to file a report of their efforts to comply with the *Kirwa* Order, a proposed joint communication to class members, and a list of all class members who have requested an N-426 certification); Ex. 18 (approving a joint class notice including points of contact for class members experiencing issues with their N-426 certifications); and Ex. 19 (ordering Defendants file bi-weekly status reports). Courts in this district have also routinely ordered monthly reports as a measure to enforce its injunctions. *See, e.g.*, Order, *Costa v. Bazron*, No. 19-cv-3185-RDM, ECF No. 96 (D.D.C. May 24, 2020) (ordering bi-weekly reporting of COVID-19 test results at public mental hospital in case challenging hospital conditions); Minute Order, *Damus v. Nielsen*, No. 18-cv-578-JEB (D.D.C. August 28, 2018) (ordering monthly reporting to ensure defendants'

compliance with preliminary injunction order in case challenging Department of Homeland Security's failure to grant parole to asylum seekers).

CONCLUSION

For the reasons set forth above, Defendants have failed to comply with this Court's Order for nearly a year, despite Plaintiffs' repeated efforts to obtain compliance. The Court should therefore grant this motion to enforce and provide the relief requested above.

Dated: August 17, 2021

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