UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. KUSUMA NIO, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	)	Civil Action No. 1:17-00998-ESH-RMM

DEFENDANTS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The July 7 Guidance that is the subject of this summary judgment briefing is lawful, reasonable, and working as intended. Since implementing the July 7 Guidance, United States Citizenship and Immigration Service ("USCIS") has adjudicated, and indeed naturalized, more than 1,000 *Nio* class members. *See* ECF No. 234-1. Moreover, Defendants' most recent reporting reflects that a Military Service Suitability Determination ("MSSD") is complete for all but 590 class members.[1] ECF No. 234, at 2. Of these 590 cases,[2] the vast majority (428) have received unfavorable Military Service Suitability Recommendations ("MSSRs") such that their MSSDs will be processed in accordance with Department of the Army's October 26, 2018 Memo. ECF No. 213-1; *See* ECF No. 236-1 (February 15, 2019 Declaration of Christopher P. Arendt in Response to the Court's January 8, 2019 Order).

In short, under the July 7 Guidance, the majority of MAVNI recruits for whom Department of Defense ("DoD") background checks did not return significant derogatory information have already become United States citizens. The majority of cases where the DoD process remains incomplete are those in which DoD has determined that additional analysis and information is needed. Because USCIS is implementing the July 7 Guidance in an effective manner, and because Plaintiffs have not identified any basis why the Guidance is unlawful, Defendants respectfully ask that this Court grant summary judgment in their favor.

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[1] There are an additional 23 *Nio* class members who were previously separated but have been offered reinstatement "for purposes of receiving the administrative due process" set forth in the Army's October 26, 2018 Memo. ECF No. 213-1, at 4. ECF No. 234-2. If these individuals decide to accept reinstatement, new MSSDs will need to be completed for them as well. *Id.*

[2] The February 15, 2019 Arendt Declaration, which is based solely on a review of Department of Defense records as of February 8, 2019, reflects that the total number of *Nio* class members with pending MSSDs is 575. *See* ECF No. 236-1.

II. ARGUMENT

A. Plaintiffs have failed to meet their burden of showing USCIS's July 7 Guidance is unlawful under 5 U.S.C. § 706(2).[3]

1. Plaintiffs again fail to identify any manner in which USCIS acts contrary to law by awaiting the result of an MSSD before proceeding with further adjudication of a naturalization application.

Rather than attempt to identify a specific statute or regulation to support their view that awaiting MSSDs is "contrary to law," Plaintiffs simply argue that "nothing in federal immigration law . . . *contemplates* separate MSSD adjudications." ECF No. 227, at 7 (emphasis added). But that argument falls well short of explaining how USCIS's decision to require completion of the MSSD phase of the enhanced background check process is *contrary* to law. Indeed, while denying Plaintiffs' motion for preliminary injunction, this Court recognized that "because no statute or regulation prohibits enhanced security screening, this Court cannot conclude that plaintiffs are likely to succeed on their contrary-to-law claim." *Nio v. United States Department of Homeland Security*, 270 F. Supp. 3d 49, 64 (D.D.C. 2017) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 513, 517-18 (1994), which "up[held] application of a broad regulation because it did not conflict with the regulation's plain language"). Like the enhanced security screening process as a whole, no statute or regulation precludes USCIS from waiting to receive the result of an MSSD before adjudicating a MAVNI recruit's naturalization application.

[3] For reasons explained in Defendants' prior briefing, and explained again below, there is no separate "MSSD Policy," and Defendants do not agree with Plaintiffs attempt to divide the July 7 Guidance into "investigative" and "adjudicative" aspects. *See* ECF No. 219, at 19, n.11; ECF No. 128, at 13-19. While Plaintiffs emphasize that the Court directed Plaintiffs to separate their arguments in this manner, this was only after the Court denied Plaintiffs' motion for leave to amend their complaint based on the premise that awaiting an MSSD constitutes a new and separate policy. ECF No. 135. Nevertheless, as reflected in Defendants' most recent reporting, it appears that all individuals listed in the report now have a "special processing" completion date, with the exception of six cases for whom DoD reported a "special processing" date as "N/A." ECF No. 234-2.

As Defendants have repeatedly explained, the July 7 Guidance explains only *when* USCIS may proceed with respect to naturalization applications filed by MAVNI recruits, not how. And crucially, there is no statutory or regulatory deadline for adjudicating naturalization applications; there is only a right, once 120 days pass *after* the applicant has been interviewed, to apply to a district court for a hearing on the matter. *See* 8 U.S.C. § 1447(b); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 50 (D.D.C. 2008) (observing that because the Immigration and Nationality Act ("INA") does not specify a timeframe for adjudicating naturalization applications, the APA's requirement of action within a reasonable time applies); *Omar v. Mueller*, 501 F. Supp. 2d 636, 639-40 (D.N.J. 2007) (dismissing APA and mandamus claims because "USCIS is not required to process a naturalization application or conduct an interview within a certain time period. . . and regulations prohibit it from conducting the required examination before the background check is complete"); *Dorta v. Gonzales*, 2008 WL 131206 (S.D. Fla. 2008) ("Plaintiff does not have a clear right to the relief requested because naturalization is a privilege" and the INA "does not set a timetable for adjudicating naturalization applications"). Plaintiffs' argument that a policy governing the timing of adjudications is somehow "contrary to law" thus necessarily fails because the statute plainly lacks any specific timeframe for such adjudications apart from that provided in 8 U.S.C. § 1447(b).

Moreover, even if the Court were to conclude that the statutory framework is ambiguous as to whether USCIS may await MSSDs before proceeding to take certain action on naturalization applications filed by MAVNI recruits, the Court should defer to USCIS's reading of the statute so long as it is "a reasonable interpretation." *See Nio*, 270 F. Supp. 3d at 64 (citing *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009), which in turn cites to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)). Deference to the agency's interpretation is particularly appropriate here given that "Congress has conferred broad discretion on the executive branch in the realm of naturalization." *Akpan v. Cissna*, 288 F. Supp. 3d 164 (D.D.C.

2018) (citing 8 U.S.C. § 1421(a)). While the statutory framework does not mandate any timeframe for adjudicating naturalization applications prior to the interview, it *does* plainly require that USCIS ensure that background checks are complete for each applicant. *See* 8 U.S.C. § 1446(a)-(b); 8 C.F.R. §§ 335.1, 335.2(b). And under Supreme Court precedent, USCIS must ensure "strict compliance with all congressionally imposed requirements to the acquisition of citizenship." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981); *see also* 8 U.S.C. § 1440(b) (mandating that military naturalization applicants "shall comply in all other respects with the requirements of this subchapter," including the requirement that they establish good moral character and attachment to the U.S. Constitution). Given this backdrop, it was reasonable for USCIS to wait until MAVNI recruits completed the DoD enhanced screening process – including the MSSD – before interviewing them, adjudicating their naturalization applications, or administering the Oath of Allegiance to them.[4]

2. The fact that the July 7 Guidance calls for awaiting an MSSD before proceeding with an interview, approval, or administering the oath of allegiance does not render it arbitrary and capricious.

The July 7 Guidance that Plaintiffs challenge as "arbitrary and capricious" reflects a straightforward decision by the agency to await the completion of the DoD background check process before taking certain further actions on naturalization applications filed by MAVNI recruits. USCIS CAR at 5. As discussed in Defendants' Cross Motion, this decision was informed by the fact that the DoD background check process revealed information about MAVNI recruits that may be relevant to an assessment of whether they meet the statutory requirements for naturalization. *See* ECF No. 219, at 22-26. Viewed through the lens of the APA's arbitrary and capricious standard, USCIS considered

[4] Plaintiffs' observation that USCIS cannot "act in a discriminatory manner or apply its discretion in an unconstitutional fashion," *see* ECF No. 227, at 8, is of course true, but inapposite. Plaintiffs have not argued that the July 7 Guidance is discriminatory, and apart from their meritless argument that the Guidance violates the Naturalization Clause (which simply repeats the same arguments they put forward in support of their "contrary-to-law" claim), they do not contend that it violates the U.S. Constitution.

the relevant factors – the fact that DoD background checks may reveal information bearing on a MAVNI recruit's statutory eligibility to naturalize – and made a commonsense decision: wait to adjudicate these applications until the DoD background check process is complete. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 519 (1971) ("The reviewing Court considers "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."); *Bean v. Purdue*, No. 17-cv-0140, 2017 WL 4005603, at *5 (D.D.C. Sept. 11, 2017) ("[T]he court will generally defer to the wisdom of the agency as long as the action is supported by 'reasoned decision-making.'" (quoting *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012)).

a. Plaintiffs' arguments regarding the administrative record

In order to prop up their APA challenge, Plaintiffs conjure something that does not exist – an "MSSD Policy" – and then attack it as lacking support in the administrative record. ECF No. 227, at 8-12. However, as Defendants have repeatedly explained in prior briefing, there is no "MSSD Policy." *See* ECF No. 128, at 3 ("processing of naturalization applications filed by MAVNI recruits after DoD Defendants complete MSSD adjudications for these recruits is not 'separate and distinct from DHS Defendants' July 7, 2017 Policy,' as Plaintiffs claim."); *see also id*., at 13-19; ECF No. 135 (April 12, 2018 Order denying Plaintiffs' Motion for Leave to File a Third Proposed Amended Complaint). Rather, what is solely at issue here is the July 7 Guidance, which simply provides that USCIS "will not proceed to interview, approve, or oath" for naturalization applications filed by MAVNI recruits "until all enhanced DoD security checks are *complete*." USCIS CAR at 5 (emphasis added).

The question for this Court is not whether there is support in the administrative record for a non-existent "MSSD Policy," but rather, whether the administrative record supports the July 7 Guidance as a whole; i.e., whether it was reasonable for USCIS to decide to await the *completion* of

the DoD background check process before proceeding to take further action on applications filed by MAVNI recruits.[5]

As Defendants explained in their Cross Motion, USCIS regards the MSSD as the time at which the DoD background investigation is "*complete*." *See* ECF No. 219, at 26. The July 7 Guidance explicitly calls for "proper DoD vetting and clearance in alignment with the September 30, 2016 MAVNI extension authorization and restrictions," which in turn describes the "military suitability determination" as final phase of DoD's "Initial Screening" process. *See* USCIS CAR at 5; *see also* USCIS CAR at 238. Plaintiffs argue that USCIS "fail[ed] to even consider what an MSSD entailed."[6] ECF No. 227, at 10. But this argument turns the logic of July 7 Guidance on its head. Again, the July 7 Guidance simply calls for DoD vetting to be "complete" before proceeding with certain naturalization applications. USCIS CAR at 5. And as per the September 30, 2016 Memo, the MSSD represents the *completion* of the DoD vetting process. In other words, USCIS plainly did consider what an MSSD entailed: it identified the MSSD as the final phase of the DoD background check process, after which "all enhanced DoD security checks are *complete*." USCIS CAR at 5.

Remarkably, after they themselves moved to include the September 30, 2016 Memo in the administrative record for the July 7 Guidance, *see* ECF No. 133, at 5-8, Plaintiffs now take issue with

[5] Plaintiffs also challenge what they regard as an "incongruous MAVNIs vs. LPR argument," because Congress "knew and understood that soldiers applying under § 1440 were not LPRs." ECF No. 227, at 23. But Defendants are not, as Plaintiffs suggest, requiring the completion of DoD backgrounds checks in order to "subject [MAVNI recruits] to naturalization standards that are more difficult to satisfy." *Id*. Rather, Defendants simply pointed out that because MAVNI recruits have not previously undergone background checks associated with an application for permanent residence or immigrant visa, it can be more difficult to obtain the *information* necessary to properly adjudicate their applications based on the standards set forth in 8 U.S.C. § 1440.

[6] Plaintiffs also offer various arguments about why they believe it is unlikely USCIS considered the September 30, 2016 Memo. *See* ECF No. 227, at 10 (inferring that because USCIS deferred to DoD to describe DoD's own background checks, it must be true that USCIS did not "know the difference between a Tier 5 and a DCII); *see also* USCIS CAR at 260. But it is unclear what the Plaintiffs are attempting to accomplish here. Defendants' reporting and numerous other filings amply demonstrate that USCIS *has in fact* implemented the July 7 Guidance by requiring the completion of MSSDs before proceeding to adjudication of naturalization applications.

Defendants' view that "the 'agency's path' is easily discerned simply by reading the July 7 Guidance together with the September 30 2016 Memo to which it cites." *See* ECF No. 227, at 8-9. Plaintiffs' supposed umbrage with Defendants' citation to the September 30, 2016 Memo rings particularly hollow given Plaintiffs' own prior arguments for why the Memo *should* be included in the administrative record. ECF No. 133, at 5-8. As Plaintiffs' previously argued to the Court:

> The July 7 Policy itself expressly references the September 2016 DoD Memo. In fact, the Policy states that it is being enacted to bring USCIS policy "in alignment with" the September 2016 DoD Memo: '*[E]ach applicant must receive proper DoD vetting and clearance in alignment with the September 2016 MAVNI extension authorization and restrictions.*' AR 5 (emphasis added). As such, it must be the case that the 'vetting and clearance' described in the September 2016 DoD Memo is a factor relevant to the July 7 Policy.

ECF No. 133, at 5 (original emphasis). Plaintiffs now appear to take the exact opposite view, or at least appear to argue that the September 30, 2016 Memo may only be cited to the extent it serves their purposes. In their odd effort to preclude consideration of the Memo, Plaintiffs also selectively quote from the transcript of the April 11, 2018 hearing, *see* ECF No. 227, at 9, and entirely ignore the fact that when the Court ultimately asked for Defendants' position on whether it should be added to the administrative record, Defendants' counsel responded: "Your honor, we won't object to that." April 11, 2018 Tr. 142:4-10. It was on this basis that the Court ruled on April 12, 2018, that "DoD's September 30, 2016 Memo *will be considered* part of the administrative record." [7] ECF No. 135, at 1 (emphasis added). In contesting Defendants' reliance on the September 30, 2016 Memo, Plaintiffs

[7] Plaintiffs attach significance to the fact that the Defendants' Cross Motion cites to the DoD CAR page number for the September 30, 2016 Memo, rather than as a supplement to the USCIS CAR. *See* ECF No. 227, at 9, n.8; *see also* USCIS CAR 233-241 (September 30, 2016 Memo, as added to the administrative record per the Court's order). Regardless of how Defendants cited to these materials in their briefing, it is undisputed that the Memo is now part of the administrative record for the July 7 Guidance.

thus appear anxious to litigate an issue that has already been decided by this Court, and in a manner that is exactly the opposite of their prior position.[8]

Plaintiffs also argue that USCIS "cannot know what an MSSD may entail in the future." ECF No. 227, at 10. While true, this argument only supports the logic of the July 7 Guidance, which turns on the completion of the "*all* enhanced DoD screening checks," USCIS CAR at 5 (emphasis added), rather than the completion of any particular subcomponent. Indeed, recent changes to the MSSD process demonstrate precisely why this makes sense. As reflected in the notice Defendants filed with this Court on October 31, 2018, the Department of the Army issued a memorandum on October 26, 2018, regarding the Army's policy for processing MAVNI recruits with adverse security recommendations. *See* ECF Nos. 213, 213-1. Under the October 26, 2018 Memo, in cases where the Department of Defense Central Adjudications Facility ("CAF") has made an adverse MSSR, the soldier will be notified and allowed 30 days in which to "submit matters which may refute, correct, explain, extenuate, mitigate, or update the unfavorable information." ECF No. 213-1, at 3. Any information that a soldier submits will then be reviewed before issuance of an MSSD. *Id*.

The Army's October 26, 2018 Memo thus reflects that the MSSD process has evolved in such a manner that new information may now be generated even after the CAF issues a recommendation.

[8] In their recent "Notice of Supplemental Authority," Plaintiffs cite a decision from the Western District of Washington, *Tiwari v. Mattis*, No. C17-00242 (W.D. Wa.), which they claim held that "the September 2016 Memo embodies a discriminatory DoD policy that has now been permanently enjoined." ECF No. 233, at 2. But the *Tiwari* decision was concerned with one particular part of the September 2016 Memo, the "Continuous Monitoring" section described on pages 234 and 239 of the USCIS administrative record, as applied to United States citizens who joined the military as MAVNI recruits. *See* ECF No. 233-1, *Tiwari* Order, at 5; *see also* DoD CAR 131. The *Tiwari* court's determination that the "Continuous Monitoring" section of the September 2016 Memo discriminated against *citizens* on the basis of national origin has no bearing on the lawfulness of USCIS's reference to the Memo for purposes of determining when the DoD enhanced security screening is "complete," USCIS CAR at 5, especially in relation to the *Nio* plaintiffs who are all *non-citizens*. Nor is the *Tiwari* court's review of the evidence particularly instructive here, given that Court was reviewing that evidence under strict scrutiny. *See* ECF No. 233-1, *Tiwari* Order, at 21-25.

This change exemplifies why USCIS's decision to await the *completion* of the DoD process makes perfect sense, or at a minimum, represents a reasonable choice. By designating the "complet[ion] of all enhanced security checks," USCIS CAR at 5, as the time at which USCIS may proceed with taking further action on naturalization applications, USCIS ensures that, where necessary, it may review any information that may have emerged throughout the *entire* DoD process. And the potential usefulness of this information is precisely the rationale for the July 7 Guidance reflected in the administrative record. USCIS CAR at 5 ("USCIS has become aware of circumstances and instances where MAVNI enlistees have applied for naturalization or been naturalized before a DoD background check revealed derogatory information suggesting that they lacked good moral character or attachment to the U.S. Constitution.").

The possibility that new information – information that comes directly from the applicant – may be presented to DoD even after the recruit's case is submitted to the CAF also cuts squarely against Plaintiffs' argument that "all of the additional information gathered and generated during the DoD background checks is, by definition, complete and available before the MSSD can even begin."[9] ECF No. 227, at 17. Regardless of whether it was at some point true that the information-gathering phase of the DoD background check process was complete by the time the case was "adjudication ready" before the CAF, that is no longer the case in light of the October 26, 2018 Memo. Again, it is for this reason that it was reasonable for USCIS to identify the *completion* of the DoD process as the time at which it is appropriate to continue processing naturalization applications, rather than some

[9] In support of this argument, Plaintiffs quote from a portion of what they claim is an MSSR Memo. ECF No. 227, at 18. This Memo is not part of the administrative record, and nor is it included in Plaintiffs' Appendix. *See* ECF No. 216-2. Accordingly, even leaving aside the fact that it is impossible for Defendants to verify its contents, it is clearly not properly before the Court.

intermediate phase of the DoD process based on its understanding about the manner in which DoD collects information.[10]

b. Plaintiffs' proposal of an alternative process – that USCIS should review DoD background investigations *before* the DoD process is complete – does not render the July 7 Guidance "arbitrary and capricious."

The primary basis for Plaintiffs' argument that the July 7 Guidance is arbitrary and capricious is their belief that USCIS can and should adjudicate naturalization applications even *before* the DoD vetting process entirely "complete." *See e.g.,* ECF No. 227, at 10-12, 1. In support of this view, Plaintiffs contend that "the 'information' USCIS claims it will consider is gathered and 'adjudication ready' for USCIS purposes no later than the completion of the DoD investigation reports, which occur before the MSSD even begins." ECF No. 227, at 11, *see id.*, at 17-20.

In essence, Plaintiffs ask that the Court invalidate the July 7 Guidance because they believe an alternative plan would work better. In so doing, however they largely ignore the applicable standard of review, under which "a court need not find that the agency's decision is 'the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings." *Ohio Head Start Ass'n, Inc., v. U.S. Dep't of Health and Human Servs.*, 873 F. Supp. 2d 335, 356 (D.D.C. 2012), *aff'd* 510 F. App'x 1 (D.C. Cir. 2013); *see also Universal Health Servs. Of McAllen, Inc. Subsidiary of Universal Health Servs., Inc. v. Sullivan*, 770 F. Supp. 704, 718 (D.D.C. 1991), aff'd 978 F.2d 745 (D.C. Cir. 1992) ("although a better method may exist by which to reclassify hospitals – or, more to the point, a method may exist which does not

[10] The process described in Army's October 26, 2018 Memo is increasingly relevant with respect to the number of *Nio* class members who have yet to receive an MSSD. As discussed above and the February 15, 2019 Declaration of Christopher P. Arendt, the CAF has made an unfavorable MSSR in 428 of the approximately 590 cases with pending MSSDs. ECF No. 236-1. Thus, in many cases for which an MSSD is pending, it is entirely possible that additional information will be collected as part of the DoD screening process.

deny reclassification to [plaintiffs] – the law requires only that the Secretary's guideline be reasonable as applied over the entire population of hospitals").

A "rule of reason" applies in assessing whether an agency considered a sufficient range of alternatives, and "the agency need not consider options inconsistent with the action's purpose." *Oceana, Inc. v. Evans*, No. Civ.A.04-0811, 2005 WL 555416, at *7 (D.D.C. Mar. 9, 2005). Moreover, "[t]he *goals of an action* delimit the universe of the actions reasonable alternatives." *City of Alexandria v. Slater,* 198 F.3d 862, 867 (D.C. Cir. 1999) (emphasis added); *Am. Inst. of Certified Pub. Accountants v. Internal Revenue Serv.,* 746 F. App'x 1, 13 (D.C. Cir. 2018) ("We cannot fault the IRS for failing to consider an alternative that was not addressed to the problem with which it was concerned."). In this case, the goal of the July 7 Guidance is clear from the administrative record: to "ensure that each MAVNI naturalization applicant demonstrates good moral character and attachment to the U.S. Constitution as required by the INA and [code of federal regulations." USCIS CAR at 5. While Plaintiffs may prefer an approach that accomplishes a different goal – i.e., faster processing of applications – the agency was not required to consider such an alternative where the aim of the policy was ensuring "strict compliance with all congressionally imposed requirements to the acquisition of citizenship." *Fedorenko,* 449 U.S. at 506.

As Defendants explained in their Cross Motion, the notion that USCIS should be required to examine the information that emerges from the DoD background check process before the process is completed is unpersuasive for several other reasons as well. *See* ECF No. 219, at 27-29. First, Defendants noted that while USCIS has received information from DoD about certain applicants on an *ad hoc* basis (the information which prompted the July 7 Guidance in the first place), the record does not reflect that it has means of "accessing raw data from the DoD background checks of *every* applicant." ECF No. 219, at 27 (original emphasis). Contrary to what Plaintiffs suggest, Defendants' statement that USCIS does not have "ready access to the materials that are forwarded to the CAF"

does not mean that USCIS has no access to "information gathered by DoD." *See* ECF No. 227, at 11 (citing ECF No. 219, at 27, and characterizing Defendants' statement as "disturbing and consequential"). However, because this information resides with a different agency – DoD – it is necessary for purposes of government efficiency for USCIS and DoD to make arrangements to share only the information that USCIS needs, at the time when USCIS needs that information.

Defendants explained in their Cross Motion that a plan requiring that USCIS deploy its resources to examine DoD background investigation information for every applicant while DoD officials review the same information would be an inefficient use of government resources. ECF No. 219, at 27-28. Plaintiffs attack this "resources" based argument as unsupported in the administrative record. ECF No. 227, at 19-20. But Defendants did not assert that conservation of resources or efficiency was what prompted the July 7 Guidance. ECF No. 219, at 27-28. Rather, in pointing out the apparent *inefficiency* of Plaintiffs' proposal relative to the current process, Defendants simply aimed to explain why the agency's lack of explicit consideration of such an alternative does not render the July 7 Guidance "arbitrary and capricious." *Oceana, Inc.*, 2005 WL 555416, at *7 ("rule of reason" applies when considering whether agency sufficiently considered alternatives). In any event, Plaintiffs offer no rebuttal to the reality that their alternative would require USCIS to deploy resources *in every case* to review material that officials at DoD are already reviewing. *See* ECF No. 227, at 19-20. They instead simply repeat the claim that adjudicating applications prior to the issuance of MSSDs would result in *faster* adjudications. ECF No. 21-23. But as discussed above, USCIS's purpose in implementing the July 7 Guidance was to ensure that military naturalization applicants meet the statutory requirements, not to reduce the time required to adjudicate military naturalization applications.

Plaintiffs' assertion that USCIS's implementation of the July 7 Guidance impermissibly "outsources" an initial assessment of the "materiality of information" to DoD also lacks merit. ECF

No. 227, at 21. As explained in Defendants' Cross Motion, USCIS's decision to await the result of an MSSD is reasonable because many of the factors considered at the CAF overlap with the good moral character and attachment to the Constitution naturalization requirements. ECF No. 219, at 27-28. And under the July 7 Guidance, USCIS does *not* automatically deny or approve a naturalization application based on whether an MSSD is favorable or not. Nor, as Plaintiffs suggest, does USCIS "equat[e] an unfavorable MSSD" with lack of good moral character. ECF No. 227, at 22.[11]

Likewise, the fact that USCIS implements the July 7 Guidance by regarding a favorable MSSD as an indicator that no significant derogatory information was located during the DoD background check process does not mean that USCIS is in any way abdicating its own responsibilities. As Defendants explained in their opposition to Plaintiffs' most recent motion for preliminary injunction, USCIS continues to process *all* applications filed by MAVNI recruits in the statutorily-required manner, regardless of whether the applicants' MSSD is favorable or not. *See* ECF No. 128, at 19-23 (explaining that USCIS continues to use its own longstanding FBI background check procedure for all MAVNI applicants). Plaintiffs' suggestion that, at least in theory, a favorable MSSD may serve to *obscure* certain adverse information – because a soldier's skills outweighs the adverse information – is speculative. *See* ECF No. 227, at 22. Absent some indication that favorable

[11] Plaintiffs cite to the transcript of an October 3, 2018 hearing where Defendants' counsel explained to the Court that if an MSSD is negative because an applicant has "unmitigable derogatory information" then the applicant is not "likely" to meet the good moral character requirement. Oct 3, 2018 Tr. 45:20-25. This statement is plainly descriptive of what is "likely" to happen in most cases, and does not amount to the announcement of a definitive agency policy position. It is fair to surmise that in many cases where there is derogatory information, the *information* that led to an adverse MSSD will also be relevant, and disqualifying, for purposes of good moral character analysis. But at no point did Defendants' suggest that USCIS mechanically treats adverse MSSDs based on "unmitigable derogatory information" as an automatic disqualifier without analyzing the underlying information itself. Indeed, at the outset of the statement from which Plaintiffs quote, Defendants' counsel made clear that he was attempting to add "nuance" to the Court's question regarding whether a negative MSSD necessarily precludes naturalization. Oct 3, 2018 Tr. 45:20-23. It is regrettable that Plaintiffs reach to misread Defendants' counsel's statements in order to bolster their own arguments.

MSSDs actually *do* serve to obscure relevant adverse information, the agency's choice of how to implement the July 7 Guidance is presumptively valid. *Ohio Head Start Ass'n, Inc.*, 873 F. Supp. 2d at 356 ("the Court begins with the presumption that the Secretary's action was valid"); *see Akpan*, 288 F. Supp. 3d at 164 (D.D.C. 2018) ("Congress has conferred broad discretion on the executive branch in the realm of naturalization").

Defendants have also explained that waiting for a MAVNI recruit's MSSD before proceeding with his or her naturalization application is reasonable because an applicant who receives an unfavorable MSSD is subject to discharge, and characterization of discharge has a clear bearing on naturalization eligibility under 8 U.S.C. § 1440(a). ECF No. 219, at 29. Specifically, the statute requires that an applicant who is "separated from service [must have been] separated under honorable conditions." 8 U.S.C. § 1440(a). Plaintiffs note in their Response that USCIS takes the position that an "uncharacterized" discharge does not meet the requirement of a separation "under honorable conditions." ECF No. 227, at 12. Because Plaintiffs disagree with this position, they argue that "USICS's policy is based on the erroneous proposition that a MAVNI's potential future discharge is relevant to the question of naturalization eligibility." *Id.*, at 14-15. However, Defendants have never claimed that waiting to see the characterization of a MAVNI recruit's potential discharge – much less waiting to see whether it is "uncharacterized" – was one of USCIS's stated reasons for the July 7 Guidance. Rather, Defendants only highlight this factor to further emphasize the July 7 Guidance's advantages relative to Plaintiffs' alternative of proceeding with adjudication at some intermediate phase of the DoD process. The import of an "uncharacterized" discharge is not at issue in this case because USCIS did not issue the July 7 Guidance for the purpose of learning how MAVNI recruits who are separated would be discharged.[12] Rather, the purpose of the July 7 Guidance was to ensure

[12] If USCIS is indeed misreading the term "separated under honorable conditions," and denies any *Nio* class members' naturalization application on that basis, the class member will have

that the DoD background check process is *complete* before adjudicating MAVNI naturalization applications so as to "ensure that each [applicant] demonstrates good moral character and attachment to the Constitution." USCIS CAR at 5. And it is on this basis this basis that the Court should uphold the Guidance as a reasonable exercise of the agency's broad discretion in the realm of naturalization.[13] *Akpan*, 288 F. Supp. 3d, at 164.

c. Plaintiffs have not identified important factors that USCIS failed to consider.

The six supposed factors that Plaintiffs argue USCIS "failed to consider" were already addressed in Defendants' Cross Motion. *See* ECF No. 30-34. Plaintiffs' restatement of these claims in their Response does not enhance their merit.

First, Plaintiffs repeat the claim that "USCIS failed to consider what an MSSD adjudication entails." *See* ECF No. 227, at 25. But as explained above and in Defendants' Cross Motion, "USCIS deems the MSSD to be the *conclusion* of the of the DoD background check process." ECF No. 219, at 26 (emphasis added). It is precisely this fact about "what the MSSD adjudication entails" – that it constitutes the final phase of the DoD process – that USCIS considered. *See supra*, at 5-6. To the extent Plaintiffs repeat the argument that USCIS failed to consider the manner in which the MSSD Adjudicative Guidelines differ from naturalization requirements, *see* ECF No. 227, at 25, again, USCIS does not deny or grant naturalization applications based on whether an MSSD is favorable or

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the opportunity to challenge USCIS's decision in federal court as part of a proceeding under 8 U.S.C. § 1421(c).

[13] In the event the Court finds that USCIS should have considered an alternative to awaiting the conclusion of DoD enhanced screening process, or treating the MSSD as the conclusion of that process, it does not automatically follow that the Court must vacate the July 7 Guidance. "Often courts will remand to the agency for reconsideration without technically vacating the regulation when the challenged rule fails for lack of reasoned decision-making." *See Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 13 (D.D.C. 2004); *see also Checkosky v. SEC*, 23 F.3d 452, 462-66 (D.C. Cir. 1994) (failure to provide satisfactory explanation does not necessarily mean that agency has acted illegally; therefore, court has discretion not to vacate agency action pending agency's elaboration of its reasoning); *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 151 (D.C. Cir. 1993) (remanding rule to agency without vacating "to develop a reasoned" explanation for its action).

not, but rather looks to the underlying information that led to an unfavorable MSSD. This approach is reasonable given the clear overlap between the factors for consideration in the MSSD Adjudicative Guidelines and the good moral character and attachment to the Constitution requirements for naturalization. ECF No. 219, at 30. Plaintiffs again rely on an excerpt from a hearing transcript in order to suggest that USCIS applies a mechanical rule that an adverse MSSD based on unmitigable derogatory information *necessarily* equates with a lack of good moral character. *See* ECF No. 227, at 25 (citing Oct. 3, 2018 Tr. 45:23-25). This of course is not true, and as explained above, Plaintiffs have taken Defendants' counsel's statement out context in order to prop up their own argument. *See supra*, at 13, n.9 (describing the context in which this statement was made).

Plaintiffs also assert that Defendants did not consider the "adverse impact" on the regulated population. ECF No. 227, at 26. But as before, the only "adverse impact" Plaintiffs identify is that the DoD background check process takes additional time.[14] Though one can sympathize with the uncertainly faced by those without lawful status during the pendency of their naturalization applications, one cannot ignore the reality that, to the best of Defendants' knowledge, almost *none* of the *Nio* class members with pending background checks have been placed in removal proceedings. *See* ECF No. 219, at 31, n.18 (identifying a mere two cases in which MAVNI recruits were placed in removal proceedings after their background checks were completed and after they were discharged from the military). Plaintiffs claim to have identified "four MAVNI soldiers in removal proceedings." ECF No. 227, at 27 (noting the two cases that appear in Defendants Cross motion and citing a document from *Calixto v. Dep't of Def.*, No. 1:18-cv-01551 (D.D.C.), Dkt. 33, at 4, 9, as supposedly referencing others). Upon closer inspection, however, it appears that the individual referenced on page four of the *Calixto* document to which Plaintiffs cite, *Zeyuan Li*, is one of the same two

[14] Plaintiffs' claim that class members with pending applications "lost the opportunity to participate in another major state and federal election cycle," *see* ECF No. 227, at 27, simply restates in other terms the claim that the DoD background check process takes time.

individuals referenced by Defendants in their cross motion. *See Calixto*, No. 1:18-cv-01551, Dkt. 33, at 4; *Cf.* ECF No. 219, at 31, n.18. The supposed "fourth" individual, referenced on page nine of the *Calixto* document, appears to be part of the Delayed Entry Program ("DEP") and is therefore not a *Nio* class member. In sum, notwithstanding the understandable uncertainty faced by class members with pending applications, the likelihood that a *Nio* class member will be placed in removal proceedings remains very small.[15]

The remaining factors Plaintiffs identify that they believe should have been considered and were not have already been addressed in Defendants' Cross Motion. ECF No. 219, at 31-34. As explained in that briefing, USCIS was not required to consider a policy favoring expedited *processing* of naturalization applicants under 8 U.S.C. § 1440 because no such policy exists. Rather, naturalization under section 1440 is considered "expedited" only in the sense that it relaxes certain age, residency, and physical presence requirements. ECF No. 219, at 15-16, 32. Nor is there any merit to the claim that USCIS erred by failing to consider factors that simply never materialized. *See* ECF No. 227, at 30-31 (arguing that, "at the time" DoD intended to discharge class members without completing background checks, and that USCIS failed to consider "time-out" policies that DoD ultimately did not enforce). Finally, Plaintiffs argue that USCIS should have considered whether it had the "capability to implement and apply the policy as promulgated." *See* ECF No. 227, at 32. But Plaintiffs do not cite to any authority that would require explicit consideration of "capability" in the administrative record when it is abundantly clear from Defendants' reporting that USCIS *is* capable

[15] Defendants acknowledge the Court's prior "irreparable harm" finding in the context of Plaintiffs' motion for preliminary injunction. *Nio*, 270 F.Supp.3d at 62-63. This finding was based in part on the fact that the Department of Homeland Security ("DHS") "refuses to give the Court any assurance that these plaintiffs will not be removed." *Id*. To the extent this analysis overlaps with Plaintiffs' contentions regarding "adverse factors" that USCIS did not consider, Defendants submit that, regardless of DHS's lack of assurance, it is now clear that *Nio* class members are not significantly at risk for removal.

of implementing the policy. Defendants most recent reporting, showing that 1,033 of the 1,929 individuals who appear in the report have naturalized, is a testament to this fact. *See* ECF No. 234-1.

B. Plaintiffs misstate the effect of the July 7 Guidance in order to bolster their meritless retroactivity argument.

As explained in Defendants' Cross Motion, the July 7 Guidance does not change the substantive requirements for naturalization or attach "new legal consequences," and for that reason, Plaintiffs' retroactivity argument necessarily fails. ECF No. 219, at 34-35. Indeed, the Guidance simply dictates *when* USCIS will adjudicate a naturalization application under pre-existing standards; it does not in any way change the standards that USCIS employs when adjudicating applications. The July 7 Guidance is therefore not "substantively inconsistent" with the agency's prior process for adjudicating naturalization applications. *Kirwa v. United States Department of Justice*, 285 F. Supp.3d 21, 40-41 (D.D.C. 2017).

Plaintiffs suggest that the July 7 Guidance "changes the legal landscape in two ways" for class members. ECF No. 227, at 40. But the first of these two ways simply relates to the *time* it takes to adjudicate an application. *Id*. ("MAVNIs are now barred from having their naturalization applications processed to decision until an MSSD is completed and shared with USCIS.").[16] According to Plaintiffs, the second way in which the July 7 Guidance "changes the legal landscape" is that they must now "'pass' the equivalent of a Top Secret security clearance adjudication" in order to qualify for naturalization. *Id*. In support of this assertion, Plaintiffs again misread Defendants statements during the October 3, 2018 hearing as equating a "negative MSSD" with a lack of good moral character. *Id*. Defendants' have already explained above why this reading is inaccurate, *see supra*, at 13, n.9, and have explained *ad nauseam* that USCIS does *not* decide naturalization applications based

[16] To the extent Plaintiffs claim in a footnote that soldiers who are "discharged without completed MSSDs" will "not receive a naturalization," this assertion is uncited and untrue. USCIS does not await an MSSD before adjudicating in any case where an MSSD will not be forthcoming.

on the outcome of an MSSD, but rather looks to the information generated during the DoD background check process to assess an applicant's eligibility under the statutory naturalization criteria. Contrary to what Plaintiffs' suggest, "unmitigable derogatory findings" that are unrelated to the statutory naturalization criteria do not serve as a new basis for denying an application. And if certain individuals were naturalized prior to the July 7 Guidance notwithstanding derogatory information that *is* relevant to the question of naturalization, that simply proves why the July 7 Guidance is reasonable and necessary. *See* ECF No. 227, at 32-33 (arguing that some MAVNI soldiers who enlisted at the same time as class members were naturalized even with "unmitigable derogatory findings"). The fact that USCIS introduced a policy in order to acquire more information and more accurately ensure the applicants meet the statutory criteria does not amount to a "substantive change" to those criteria.

C. The July 7 Guidance is not subject to the APA's notice and comment rulemaking requirement, and Plaintiffs cannot show they were adversely affected by nonpublication of the Guidance in the Federal Register.

1. Plaintiffs' claim under 5 U.S.C. § 553 fails because the July 7 Guidance is not a legislative rule.

For the reasons explained in Defendants' Cross Motion, none of the descriptions of a "legislative rule," as set forth in *American Mining Congress*, apply to the July 7 Guidance. *See* ECF No. 219, at 37-39 (citing *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (a "legislative rule" will generally be found when: (1) in the absence of the rule, there would not be an adequate legislative basis for the agency action; (2) when the agency has explicitly invoked its general legislative authority; or (3) when the rule effectively amends a prior legislative rule).

Plaintiffs allege that "the MSSD Policy has nothing to do with any Congressionally-mandated USCIS investigation" because it is not an "investigation." ECF 227, at 35. But the fact that certain phases of the larger DoD background process are labeled by DoD as "adjudications" does not change

the fact that *USCIS's* purpose in awaiting the conclusion of the process is plainly investigatory in nature. Indeed, the July 7 Guidance itself reflects that USCIS awaits the completion of "all enhanced DoD security checks" precisely because "[d]erogatory information about MAVNI applicants has been obtained through DoD enhanced background checks," and because USCIS became "increasingly concerned about MAVNI applicants' eligibility for naturalization specifically related to Good Moral Character and attachment to the Constitution." USCIS CAR at 5. In other words, the purpose of the July 7 Guidance is to enable consideration of *information* that may emerge during the DoD process. As such, the various provisions of the INA and the Code of Federal Regulations authorizing – indeed *requiring* – USCIS to investigate applicants for naturalization provide a firm, and independent, legislative basis for the Guidance. *See* ECF No. 219, at 37.

To the extent Plaintiffs argue that the July 7 Guidance "amend[s] a prior legislative rule," they simply repeat the inaccurate statement that "for soldiers who receive an unfavorable MSSD, Defendants' position is that naturalization will be denied." ECF No. 227, at 35. Again, this is not how USCIS applies the July 7 Guidance. Applications corresponding with an unfavorable MSSD will only be denied if there is some statutory basis for the denial in the INA. Nor is it accurate to suggest, as Plaintiffs do, that USCIS will not adjudicate naturalization applications filed by MAVNIs who are discharged before receiving an MSSD. *Id*. (suggesting that USCIS will not adjudicate a naturalization application until it receives an MSSD, *even* for soldiers who will not receive an MSSD).

As for Plaintiff's continued reliance on *Electronic Privacy Information Center v. U.S. Department of Homeland Security ("EPIC")*, 653 F.3d 1 (D.C. Cir. 2011), Defendants explained in their Cross Motion that the court's decision in that case was largely informed by the privacy interests at stake. ECF No. 219, at 39-40. Plaintiffs argue that "nothing in *EPIC* limits its holding in that manner." ECF No. 227, at 34. However, in rejecting the DHS's claim that the use of advanced imaging technology ("AIT") was a "rule[] of agency organization, procedure, or practice," (or a

"procedural rule," as the court termed it), the D.C. Circuit noted that "the distinction between substantive and procedural rules is 'one of degree' depending on 'whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *EPIC*, 653 F.3d at 5-6. The court pointedly held that, because "an AIT scanner intrudes upon his or her personal privacy in a way a magnetometer does not . . . the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice and comment rulemaking." *Id*. at 6. USCIS's decision to await the result of MSSDs prior to adjudicating naturalization applications has no comparable substantive affect.

Plaintiffs' only response to Defendants' argument that the "good cause" exception to notice and comment applies based on national security concerns is that "the background checks are done," and that "DoD's so-called 'national security' concerns at the MSSD stage apply to all non-citizens (LPRs and MAVNIs alike)." ECF No. 227, at 35. But whether or not the "background checks are done" *now* has no bearing on whether the circumstances justified issuing the July 7 Guidance without notice and comment at the time of issuance. Additionally, even if there are national security concerns that apply to LPR military enlistees in addition to MAVNI military enlistees, the existence of such broader concerns does not diminish the significance of the MAVNI-related national security concerns upon which the July 7 Guidance was based.

2. Plaintiffs' claim under 5 U.S.C. § 552 fails because they were not adversely affected by nonpublication of the July 7 Guidance.

As noted in Defendants' Cross Motion, Plaintiffs cannot show they were adversely affected by nonpublication of the July 7 Guidance in the Federal Register. ECF No. 219, at 42 ("Courts have refused to invalidate agency enforcement actions where the agency failed to publish internal guidelines or policies and the challengers could not show they were adversely affected by nonpublication."). In response, Plaintiffs simply rely on this Court's discussion about irreparable harm for purposes of their motion for preliminary injunction. Pls.' Resp. at 34 (citing *Nio, et al. v.*

United States Department of Homeland Security, 270 F. Supp. 3d 49, 62 (D.D.C. 2017)). Importantly though, this Court's discussion of irreparable harm in the context of Plaintiffs' motion for preliminary injunction was based on the Court's assessment of the July 7 Guidance as a whole, not the fact that the guidance was never published in the Federal Register. *Nio*, 270 F.3d at 62. While the Court's prior discussion of irreparable harm reflects concern that the July 7 Guidance left the eight named Plaintiffs in "legal limbo" while their naturalization applications remained pending, the Court did not even remotely suggest that this harm would have been alleviated had USCIS published the policy in the Federal Register. The Court's discussion of irreparable harm thus provides no support for Plaintiffs' argument that they were "adversely affected" by nonpublication of the July 7 Guidance. Nor is Plaintiffs' conclusory assertion that, "[h]ad Plaintiffs received adequate notice, they could have made different decisions and would have arranged their affairs differently," ECF No. 227, at 36, sufficient to establish a claim under 5 U.S.C. § 552. Plaintiffs were already on notice that they would need to undergo a background check as part of their naturalization application process, and the fact that USCIS began considering more information as part of that process did not in any way affect Plaintiffs' substantive rights. *Nguyen v. United States*, 824 F.2d 687, 700-02 (9th Cir. 1987) (a person seeking relief from unpublished statements must show that the statements affect their substantive rights).

Moreover, the Court did *directly* consider Plaintiffs' nonpublication argument in its earlier decision denying their motion for preliminary injunction, and concluded that Plaintiffs were unlikely to succeed on the merits of this claim given the classified nature of the reports that led to the July 7 Guidance. *Nio*, 270 F.3d at 66, n.23. Indeed, as argued in Defendants' Cross Motion, under 5 U.S.C. § 552(b)(1), the requirements of section 552 do not apply to "*matters* that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and are in fact properly classified pursuant to such Executive order." Insofar as the 2017 Inspector General Report and the 2017 Defense Intelligence Agency Report which

prompted the July 7 Guidance are covered by the national security exemption at 5 U.S.C. 552(b)(1), Defendants contend that this same exception applies to the July 7 Guidance itself.

D. The July 7 Guidance does not violate the Naturalization Clause of the Constitution.

Defendants argued in their Cross Motion that Plaintiffs lack standing to bring a claim under the Naturalization Clause because that Clause "concerns the proper allocation of power between Congress and the States; it is not a rights giving provision." ECF No. 219, at 46. While Defendants' position continues to be the Plaintiffs lack standing to bring a claim under the Naturalization Clause, Defendants focus here on the merits of Plaintiffs' constitutional claim.

In their Response, Plaintiffs first contend that, unlike their APA-based challenges, in which the law requires deference to an agency's statutory interpretation, the Court owes no deference to this interpretation with respect to their constitutional claims. ECF No. 227, at 40. Plaintiffs' strategic decision to invoke the Constitution as one of the bases for their claims is not determinative of the standard of review. Certainly the Court "need not accord deference to the agency's pronouncement on a *constitutional* question." *Alliance for Natural Health US v. Sebelius*, 714 F. Supp. 2d 48, 59 (D.D.C. 2010) (original emphasis). But Plaintiffs' constitutional claim does not in any sense turn on an interpretation of the Naturalization Clause or any other part of the Constitution; it turns entirely on interpretation of the very statutory framework that USCIS is entrusted with executing.[17] *Chevron* deference thus remains appropriate. *Diné Citizens Against Ruining Our Environment v. Jewell*, 312 F. Supp. 3d 1031, 1075 (D.N.M. 2018) (While "Courts have superior competence in interpreting – and constitutionally vested authority and responsibility to interpret – the Constitution's content. . . . [t]he presence of a constitutional claim does not take a court's review outside the APA." *Id*. (recognizing that 5 U.S.C. § 706(2)(B) specifically contemplates adjudication of constitutional

[17] Perhaps the only part of Plaintiff's constitutional claim that requires interpretation of the Constitution is the question of standing, and on that matter, Defendants concede that the Court does not owe deference to the agency.

issues). Were that not the case, no Court would owe deference to USCIS's interpretation of naturalization statutes and regulations so long as a plaintiff couched his or her claim as arising under the Naturalization Clause. *Chiayu Chang, et al. v. United States Citizenship and Immigration Services*, 254 F. Supp. 3d 160, 162 (D.C. Cir. 2017) ("adding constitutional claims in an APA case cannot so transform the case that it ceases to be primarily a case involving judicial review of agency action") (internal citation and quotation marks omitted).

Plaintiffs also attempt to analogize the July 7 Guidance to a rule that would impose a more stringent English test on applicants, or one that would require them to visit the Declaration of Independence. ECF No. 227, at 41-42. These analogies fail for the simple reason that the July 7 Guidance, unlike these hypothetical rules, does *not* require MAVNI applicants to know or do anything over and above that which is expected of any other naturalization applicant. It simply requires them to wait while USCIS collects all the information it deems necessary to properly adjudicate their applications. Nor is the July 7 Guidance analogous to the situation presented in *Schwab et al. v. Coleman*, 145 F.2d 672 (4th Cir. 1944). Plaintiffs inaccurately characterize *Schwab* as "case law finding that requiring additional background checks violates the Naturalization Clause." ECF No. 227, at 42. In fact, in *Schwab*, the Fourth Circuit rejected an attempt by a district court judge to create a "policy" by which he refused to "grant citizenship during the war to German enemy aliens who have left Germany since the beginning of the Nazi regime." 145 F.2d 672, 673-74 (4th Cir. 1944). The Fourth Circuit held that the refusal to naturalize "enemy aliens" resulted in the "nullif[ication of] the provision of the statute which *permits* the naturalization of enemy aliens." *Id.* at 676 (emphasis added). This case bears no resemblance to *Schwab.* In *Schwab*, there was "no dispute as to the facts or as to . . . [petitioners'] good moral character [and] attach[ment] to the principles of the Constitution." *Id*. at 673. Here, with respect to applicants with pending MSSDs, USCIS has not yet made a determination as to good moral character or attachment to the Constitution. Moreover, in this

case, USCIS has not refused to naturalize MAVNI recruits or taken any other action abrogating their right to naturalize once their background investigations are complete if, at that time it is determined that they meet all the statutory requirements for naturalization. *Schwab* was not a case about "additional background checks," but rather about a refusal to naturalize eligible applicants, and it is not implicated by the facts of this case.[18]

Plaintiffs' remaining arguments in support of their constitutional claim are simply a rehash of their meritless, APA-based claim that by awaiting an MSSD, USCIS imposes new substantive requirements on applicants, or "outsources" adjudication decisions to DoD. As Defendants have repeatedly explained, USCIS does not decide naturalization applications based on whether an MSSD determination is favorable or unfavorable. Rather, USCIS reasonably regards the MSSD as the final phase of a DoD background check process, after which it may proceed with adjudicating the application based on the statutory criteria set forth in the INA.

III. CONCLUSION

For these reasons, as well as those set forth in their Cross Motion for Summary Judgment, Defendants ask that this Court deny Plaintiffs' Motion for Summary Judgment and instead grant summary judgment in favor of Defendants with respect to the matters discussed in these briefs.

DATED: February 15, 2019

Respectfully submitted,

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[18] The Ninth Circuit's 1950 decision in *Yuen Jung v. Barber*, 184 F.2d 491 (9th Cir. 1950) is similarly unhelpful to Plaintiffs' cause. There, the Ninth Circuit conducted a statutory analysis of 8 U.S.C. § 724(a) (the predecessor to 8 U.S.C. § 1439) and 8 U.S.C. § 724a (the predecessor to 8 U.S.C. § 1440) to determine whether conduct that pre-dated the statutory timeframe could be used to deny naturalization. The Court rejected the view that "Congress had enacted a legislative doctrine of predestination and eternal damnation" by permitting such conduct to preclude naturalization, when not contemplated by the statute. *Id*. at 495. Plaintiffs, however, incorrectly insinuate a much broader holding. *See* ECF No. 227, at 43 (stating that the Ninth Circuit found "that previous false representation of birthplace and use of forged documents could not per se bar naturalization under subsections for military service").

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CERTIFICATE OF SERVICE
Civil Action No. 1:17-00998-ESH

I HEREBY CERTIFY that on this 15th day of February, 2019, a true copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing via e-mail to the following:

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