UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUNAY MIRIYEVA
6442 Ambrosia Dr., Apt. 5304
San Diego, CA 92124,

ANN TUM
131 Alycia Dr., Apt. 2
Richmond, KY 40475,

SIDDHI KULKARNI
506 Jefferson St.
Warrensburg, MO 64093,

BIPIN KADEL
3000 Greenridge Dr., Apt. 2011
Houston, TX 77057,

Plaintiffs,

v.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
20 Massachusetts Ave., NW
Washington, D.C. 20529,

and

KENNETH CUCCINELLI
Director
U.S. Citizenship and Immigration Services
(in his official capacity only),
20 Massachusetts Ave., NW
Washington, D.C. 20529,

Defendants.

Civil Action No. _____

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Overview

1. Each Plaintiff in this lawsuit should have been sworn in as a naturalized United States citizen by now. Under the law, each Plaintiff, on account of his/her military service in the United States Army, was eligible to become a United States citizen after they enlisted, when they

took an oath to support and defend the Constitution and the United States and began serving in the military. Yet, Defendants have denied Plaintiffs their statutory right to citizenship. In true Orwellian fashion, Defendants wrongly are claiming that these once-eligible soldier-applicants became ineligible for naturalization when they received "uncharacterized" discharges from the military, even though the military itself – by law and regulation – treats such discharges as "under honorable conditions" discharges.

2. For instance, because of an uncharacterized discharge, Defendants have denied naturalization to Plaintiff Gunay Miriyeva, a highly-educated, multi-lingual Army veteran, who (a) served honorably in the Army since her enlistment in March 2016; (b) applied for naturalization, passed her naturalization exam, and was approved for naturalization before being shipped to basic training; (c) repeatedly asked to be scheduled for a naturalization oath ceremony before her shipment date (but no ceremony was arranged); (d) was diagnosed with a breast tumor while at basic training; and (e) was then discharged for medical reasons. *Incredibly, even though Defendants approved Ms. Miriyeva for naturalization before the Army sent her to basic training and even though Ms. Miriyeva would have been a U.S. citizen before basic training had Defendants arranged the oath ceremony in a timely manner*, Defendants are now denying her naturalization on the sole basis that she received an "uncharacterized" discharge from the Army.

3. Similarly, Defendants denied Plaintiff Ann Tum naturalization based on an uncharacterized discharge. And, Defendants did so even though the military treats "uncharacterized" discharges as "under honorable conditions" discharges and even though the Army certified on her naturalization paperwork – namely a Form N-426 – that she had served honorably throughout her military service period, including during active duty, *and* that her discharge was "honorable." Ms. Tum, too, was diagnosed with a medical condition – primary

hypertension – during basic training and was discharged on that basis. Ignoring the Army's view that Ms. Tum's military service – including her discharge – was "honorable," Defendants nevertheless claimed that she could not be naturalized because her discharge order lists her discharge as "uncharacterized."

4. Likewise, Plaintiff Siddhi Kulkarni received an uncharacterized discharge from active duty in the U.S. Army after she sustained multiple bone fractures during basic training. Thereafter, notwithstanding the Army having certified Ms. Kulkarni's entire period of military service as honorable, Defendants denied her naturalization application because the Army assigned her an "uncharacterized" discharge on the discharge order. But for those injuries and the resulting discharge combined with Defendants' unlawful policy, Ms. Kulkarni would be a naturalized U.S. citizen today.

5. Finally, Plaintiff Bipin Kadel received an uncharacterized discharge – notwithstanding his undisputed two years of honorable service in the U.S. Army Selected Reserve of the Ready Reserve – after the Army failed to ship him to basic training within two years of his enlistment. Under what was then a two-year "time-out" rule, the Army gave Mr. Kadel an "uncharacterized" discharge because (through no fault of Mr. Kadel) the Army (a) did not complete the background investigations and send Mr. Kadel to basic training within two years, and (b) failed to provide Mr. Kadel notice of the discharge, which would have resulted in Mr. Kadel informing the Army that the two-year rule had been extended by the Army prior to his discharge order being issued. While the Army has assured a federal court that no soldier has been "affected" by the time-out rule, but for the uncharacterized discharge and Defendants' unlawful policy, Mr. Kadel would be a U.S. citizen today.

6. None of these Plaintiffs is a U.S. citizen today. Instead, each is being deprived of her/his statutory right to U.S. citizenship – and therefore suffering irreparable harm – due to an unlawful U.S. Citizenship and Immigration Services ("USCIS") policy that improperly holds that an applicant for naturalization based on their military service is ineligible for citizenship if the applicant received an entry-level (*e.g.*, where the soldier has served less than 180 days of what is referred to as "active duty" service) or "uncharacterized" discharge from the military (the "Policy").

7. The Policy is directly contrary to federal law and must be set aside. USCIS may not lawfully deny citizenship to an otherwise eligible applicant – such as each Plaintiff – merely because the Army's discharge order says "uncharacterized." In fact, USCIS must – by law – defer to the military's assessment of whether an applicant's service, including discharge, was honorable. And, as shown below, the military's own regulations, in addition to a specific federal statute, make clear that an uncharacterized discharge must be treated as an "under honorable conditions" discharge.

Summary Background

8. Section 329 of the Immigration and Naturalization Act ("INA") and 8 U.S.C. § 1440 provide an expedited path to U.S. citizenship to certain persons who have served honorably in the U.S. military. If the § 1440 applicant is no longer serving in the military, the veteran remains eligible for naturalization so long as he/she was separated "under honorable conditions." Section 1440 specifies that "[t]he executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions." 8 U.S.C. § 1440(a).

9. As set forth below, a federal statute and military regulations make clear that a soldier who is separated from the military with an "entry-level" or "uncharacterized" discharge has been separated "under honorable conditions," which is the exact language found in 8 U.S.C. § 1440(a).

10. For instance, 10 U.S.C. § 12685, which applies to reservists (such as Plaintiffs Miriyeva, Tum, and Kadel) expressly mandates that, unless a soldier is discharged as a result of a court-martial or other formal proceeding (none of which apply to Plaintiffs), the soldier "is entitled to a discharge under honorable conditions." *See also* Department of Defense Instruction ("DoDI") 1332.14 at Enclosure 4, 3c(1)(d) ("In accordance with section 12685 of Reference (i), an entry-level separation of a Service member of a Reserve Component for cause . . . will be 'under honorable conditions.'").

11. Without any distinction between reservists and non-reservist soldiers – thereby applying to all Plaintiffs – and without any reference to the reason for discharge, military regulations specifically expand on that concept by providing: "With respect to administrative matters outside this instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization." DoDI 1332.14 at Enclosure 4, 3c(1)(c).

12. As such, any applicant for naturalization under § 1440 who has received an "uncharacterized" discharge has been determined by the U.S. Army – *i.e.*, "the executive department under which [the soldier] served" – to have been separated "under honorable conditions."

13. Notwithstanding these laws and regulations, and despite the fact that the INA specifically assigns to the U.S. military the duty of determining whether an uncharacterized

discharge is a separation "under honorable conditions" for purposes of § 1440, it is the policy of USCIS to deny naturalization to any person applying for citizenship based on his/her military service if the veteran received an "uncharacterized" discharge. Simply put, under the Policy, USCIS refuses to treat an entry level uncharacterized discharge as a separation "under honorable conditions" for purposes of § 1440 and is denying naturalization applications on that basis. The Policy is unlawful and must be set aside.

14. Each Plaintiff herein is a victim of the Policy. Each Plaintiff enlisted in the United States Army under the Military Accessions Vital to the National Interest ("MAVNI") program. Based on their certified, honorable military service, each Plaintiff would be a United States citizen today but for the Policy. Each Plaintiff is entitled to have this unlawful barrier to naturalization removed without further delay.

15. Accordingly, Plaintiffs should not have to suffer another day of being deprived of their lawful right to citizenship. They seek, and are entitled to receive, the injunctive and declaratory relief sought herein, with the result that Defendants may not treat their uncharacterized discharges as disqualifying for naturalization purposes. Plaintiffs therefore bring this action under § 706(2) of the Administrative Procedure Act to set aside the Policy.

JURISDICTION

16. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question) and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*.

VENUE

17. Venue is proper in this Court under 28 U.S.C. § 1391(e) because the Policy was implemented by Defendants in this district.

PARTIES

18. Plaintiff Gunay Miriyeva currently resides in San Diego, California. Ms. Miriyeva served in the Selected Reserve of the Ready Reserve of the United States Army. The U.S. Army certified, specifically for naturalization purposes, that Ms. Miriyeva's service was honorable. The U.S. Army discharged her after she developed a medical condition during basic training and the Army determined that she was medically unable to complete basic training at that time. Ms. Miriyeva received an uncharacterized discharge from the Army and, on that basis alone, USCIS applied the Policy and denied her application for naturalization.

19. Plaintiff Ann Tum currently resides in Richmond, Kentucky. Ms. Tum served in the Selected Reserve of the Ready Reserve of the United States Army. The U.S. Army certified, specifically for naturalization purposes, that Ms. Tum's service was honorable. The U.S. Army discharged her after it assessed that she could not continue to serve due to a medical condition diagnosed while she was at basic training. Ms. Tum received an uncharacterized discharge from the Army and, on that basis alone, USCIS applied the Policy and denied her application for naturalization.

20. Plaintiff Siddhi Kulkarni currently resides in Warrensburg, Missouri. Ms. Kulkarni enlisted in the United States Army and was shipped to basic training. The U.S. Army certified, specifically for naturalization purposes, that Ms. Kulkarni's service was honorable. The U.S. Army discharged her with an uncharacterized discharge after she sustained injuries during basic training. On that basis alone, USCIS applied the Policy and denied her application for naturalization.

21. Plaintiff Bipin Kadel currently resides in Houston, Texas. Mr. Kadel served in the Selected Reserve of the Ready Reserve of the United States Army. The U.S. Army certified,

specifically for naturalization purposes, that Mr. Kadel's service was honorable. The U.S. Army discharged him with an uncharacterized discharge after the Army failed to ship Mr. Kadel to basic training within two years of his enlistment. On the basis of the uncharacterized discharge alone, USCIS applied the Policy and denied his application for naturalization.

22. Defendant USCIS is the agency designated by the Department of Homeland Security ("DHS") to make naturalization decisions with respect to applicants pursuing naturalization under 8 U.S.C. § 1440 and is responsible for implementing the Policy.

23. Defendant Ken Cuccinelli is the Director of USCIS. He is sued solely in his official capacity and to the extent necessary to afford relief to Plaintiffs.

24. Defendants USCIS and Cuccinelli collectively are referred to as "Defendants."

FACTUAL BACKGROUND

Gunay Miriyeva

25. On March 14, 2016, Ms. Miriyeva enlisted in the U.S. Army under the MAVNI program. She became a member of the Selected Reserve of the Ready Reserve, was assigned to an Army Reserve unit, and began serving and drilling thereafter. Ms. Miriyeva's Army rank was Specialist E-4.

26. In March 2018, as a service member in the Selected Reserve of the Ready Reserve, Ms. Miriyeva applied for naturalization under § 1440. As required by USCIS, Ms. Miriyeva's naturalization application (N-400) included a Form N-426. This Form, completed by the U.S. Army on January 18, 2018, confirmed Ms. Miriyeva's military service and certified that her service was "honorable."

27. In early October 2018, after Ms. Miriyeva received a suitable Military Service Suitability Determination ("MSSD") from the Army, USCIS interviewed Ms. Miriyeva pursuant

to her N-400 military naturalization application. Ms. Miriyeva passed the requisite history/civics and English tests administered by the USCIS officer.

28. On October 4, 2018, the USCIS adjudicator issued a decision approving Ms. Miriyeva's application for naturalization. Accordingly, USCIS stamped Ms. Miriyeva's N-400 as "APPROVED" – meaning that she was immediately eligible to be administered the oath of citizenship, the final step to becoming a U.S. citizen. In fact, USCIS regularly administers a same-day oath to applicants who have been approved for citizenship. Even so, and notwithstanding that she met all of the eligibility requirements for naturalization, USCIS did not schedule Ms. Miriyeva for an oath ceremony.

29. On October 18, 2018, as reflected in the USCIS "Case Decision Activity History" for Ms. Miriyeva's application, USCIS re-verified the grant of naturalization for Ms. Miriyeva. At that point, and indeed from the approval two weeks earlier, USCIS could have (and should have) promptly scheduled Ms. Miriyeva for an oath ceremony. Had USCIS done so, Ms. Miriyeva would be a U.S. citizen today.

30. USCIS did not promptly schedule Ms. Miriyeva for a naturalization oath ceremony. In the meantime, having received a favorable MSSD from the Army, the Army ordered Ms. Miriyeva to report to basic training at Fort Jackson, South Carolina.

31. Ms. Miriyeva urged USCIS to schedule her oath ceremony *before* she shipped to basic training, but USCIS failed to do so. Among other attempts, Ms. Miriyeva specifically informed USCIS on October 10, 2018 that she had completed her interview and passed the requisite tests, that she was being shipped to basic training on November 5, 2018, and that she needed to have her oath ceremony prior to November 5. On October 15, 2018, USCIS responded that it had notified the USCIS Kansas City Field Office of the November 5, 2018 ship date and the

need for her to have her oath ceremony before that date. USCIS nevertheless failed to arrange for Ms. Miriyeva to become a naturalized citizen prior to her ship date.

32. Had USCIS made the necessary arrangements in the month-long period between her naturalization interview/approval and her ship date, Ms. Miriyeva would have been a U.S. citizen when she arrived at basic training, and her subsequent "uncharacterized" discharge (on medical grounds) would have had no impact on her citizenship status.

33. On November 5, 2018, Ms. Miriyeva reported to basic training (*i.e.*, active duty status). While at basic training, Ms. Miriyeva discovered a fibroadenoma in her breast and sought medical treatment at an Army medical facility. Shortly thereafter, the U.S. Army determined that Ms. Miriyeva was medically unable to continue serving in the U.S. Army at that time.

34. On December 21, 2018, the U.S. Army purportedly discharged Ms. Miriyeva and issued her a Form DD-214, specifying her discharge type as "uncharacterized" and identifying her medical condition as the basis for her discharge.

35. Because Ms. Miriyeva had not yet served 180 days on active duty at the time she became medically unable to serve, the Army designated her discharge as "uncharacterized." If Ms. Miriyeva had remained in the Army in an active duty status for 180 days, the Army would have listed her discharge as "honorable" on her DD-214.

36. An Army official informed Ms. Miriyeva that her discharge would be treated as an "honorable" discharge.

37. Ms. Miriyeva submitted to USCIS a second Form N-426. On that Form, the U.S. Army certified that Ms. Miriyeva had served honorably in the U.S. Army during her entire period of military service, beginning on March 14, 2016. The Form, signed by Col. Brian Thomas (the

Army official designated to sign N-426s as a result of federal court litigation involving MAVNIs),[1] certified on January 11, 2019 that Ms. Miriyeva had not been "separated" by the U.S. Army (with Col. Thomas specifically initialing that response on the Form) and adding that "The soldier has been found suitable for military service."

38. The INA, 8 U.S.C. § 1447(b), authorizes a naturalization applicant to initiate a federal court action if USCIS does not make a decision (including scheduling an oath ceremony if the application is approved) within 120 days following a naturalization interview. On March 12, 2019, Ms. Miriyeva filed a § 1447 lawsuit seeking an oath ceremony. *See Miriyeva v. McAlleenan, et al.*, No. 19-cv-477-CAB-KSC (S.D. Cal.).

39. On April 1, 2019, Ms. Miriyeva received a notice from USCIS (dated March 29, 2019) that her naturalization oath ceremony was scheduled for April 17, 2019 at the United States District Court in San Diego, California.

40. On April 17, 2019, Ms. Miriyeva received a notice from USCIS stating that, "due to unforeseen circumstances," her oath ceremony had been "descheduled."

41. On April 23, 2019, the Army provided a third Form N-426 (although not requested by Ms. Miriyeva) in which Col. Thomas certified (again) that Ms. Miriyeva had served "honorably" during her entire period of military service in U.S. Army – from March 14, 2016 through December 21, 2018 – and that she was "suitable for military service." Col. Thomas inserted "Yes" in response to the question of whether Ms. Miriyeva had been separated, but did not answer the question as to the discharge type.

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[1] Beginning in May 2017, three "related" MAVNI cases have been pending in federal court in the District of Columbia. *See Nio, et al. v. DHS, et al.*, No. 17-cv-0998 (ESH); *Kirwa, et al. v. Dep't of Defense, et al.*, No. 17-cv-01793 (ESH); and *Calixto, et al., v. Dep't of the Army, et al.*, 18-cv-01551 (ESH). These MAVNI cases raise challenges to certain USCIS and Department of Defense/Army policies pertaining to MAVNI naturalizations and purported discharge actions.

42. Two months after commencing her § 1447 lawsuit in federal court, the parties in that case agreed to seek a remand to USCIS. The Court granted the parties' Joint Motion to Remand on May 13, 2019.

43. Even after remand, however, USCIS still did not schedule Ms. Miriyeva's oath ceremony.

44. Instead, on June 6, 2019, USCIS issued a written decision – entitled "Agency Motion to Reopen" – revoking USCIS's prior approval of Ms. Miriyeva's N-400 and effectively denying Ms. Miriyeva's naturalization application. In that decision, pursuant to the Policy, USCIS stated that Ms. Miriyeva was ineligible for naturalization under § 1440 because she failed to demonstrate that she was discharged "under honorable conditions" from the U.S. Army. The decision specifically stated that Ms. Miriyeva's "uncharacterized" discharge (as reflected on the DD-214) is not an under honorable conditions discharge for purposes of § 1440:

> As noted above, subsequent to the approval of your N-400 and prior to your taking the oath of allegiance, USCIS received Form DD-214, Certificate of Release or Discharge from Active Duty, dated December 21, 2018, which reflects that you received an "uncharacterized" discharge from the U.S. Armed Forces. The third and final Form N-426 that USCIS later received, certified on April 23, 2019, confirms that you were separated from service on December 21, 2018, but it does not indicate the characterization of your separation. Although it indicates that you served honorably, it does not indicate that whether you were separated under honorable conditions.
>
> As discussed above, INA Section 329 requires that if an applicant was separated from service, that he or she was separated under honorable conditions. Longstanding USCIS policy provides that only a discharge specifically characterized as either "honorable" or "general (under honorable conditions)" qualifies as a separation "under honorable conditions." *See* USCIS Policy Manual Vol. 12, Part I, Chap. 3. Because your character of service is listed as "uncharacterized" on your Certification of Release or Discharge from Active Duty, and there is nothing on your Form DD-214 or Form N-426 to suggest that your separation was in fact characterized

> as "under honorable conditions," you have not met your burden to demonstrate that the Department of the Army designated your separation as "under honorable conditions." Therefore, you have not met your burden to show that you are eligible for naturalization under INA 329, and USCIS intends to reopen your Form N-400 pursuant to the provisions of Title 8, Code of Federal Regulations, § 335.5
>
> CONCLUSION: USCIS has determined that the aforementioned N-400 was improvidently approved.

45. The denial decision identifies the "uncharacterized" discharge as the sole reason why USCIS believes that Ms. Miriyeva is not eligible for naturalization under § 1440.

46. On June 11, 2019, USCIS stamped Ms. Miriyeva's N-400 application as "DENIED" as of that date.

47. On July 11, 2019, USCIS annotated Ms. Miriyeva's N-400 application by writing "Reopened by Service, 7/11/19" over the "APPROVED" stamp from October 4, 2018. In the USCIS "Adjudication Decision History," USCIS reports that the denial date was July 11, 2019 and that the denial was based on Ms. Miriyeva's "Separat[ion] from military service without honorable discharge."

48. Shortly thereafter, USCIS learned from the U.S. Army – via Court-mandated disclosures in the *Nio* litigation – that Ms. Miriyeva had *not* been discharged from the U.S. Army. Given that the sole basis for the USCIS denial decision was the purported uncharacterized discharge, USCIS had no grounds on which to withhold U.S. citizenship from Ms. Miriyeva.

49. Thereafter, on August 12, 2019, USCIS annotated Ms. Miriyeva's N-400 application again by writing "reopened on service motion, 8/12/19" over the "DENIED" stamp from June 11, 2019.

50. On August 13, 2019, USCIS reversed course again, this time approving Ms. Miriyeva's naturalization application for a second time. USCIS accordingly stamped the N-400

as "APPROVED" as of that date. Even so, USCIS again failed to promptly schedule Ms. Miriyeva for her oath ceremony.

51. Instead, USCIS did not accept the Army's representation in federal court that Ms. Miriyeva had not been discharged. On September 18, 2019, in the *Nio* litigation, USCIS submitted a status report that said the following with respect to Ms. Miriyeva: "No longer on the *Calixto* list of 349 [soldiers identified by the Army as *not* discharged] because the DD-214 indicates a final discharge. USCIS previously reopened the case and it is under review."

52. On September 23, 2019, at a status hearing in the *Nio* litigation, USCIS represented that it was still reviewing Ms. Miriyeva's application.

53. On September 27, 2019, pursuant to a Court order in the *Nio* litigation, USCIS informed *Nio* class counsel that USCIS will not be scheduling a naturalization oath ceremony for Ms. Miriyeva "at this time."

54. Thus, over the course of a year, the following happened:

a) USCIS approved Ms. Miriyeva's naturalization application while she was serving in the U.S. Army, but then failed to schedule her for an oath ceremony before she was shipped to basic training.

b) While she was at basic training, USCIS failed to make arrangements for Ms. Miriyeva – who was then in active duty status – to have her oath ceremony.

c) During basic training, a medical exam revealed a medical condition that prevented Ms. Miriyeva from continuing to serve.

d) The Army purportedly discharged Ms. Miriyeva – notwithstanding her honorable service – with an uncharacterized discharge because the discharge occurred before she had attained 180 days of active duty service.

e) Following her discharge, Ms. Miriyeva was forced to file a § 1447 federal lawsuit in order to force USCIS to arrange for her oath ceremony based on the prior approval of her N-400 application.

f) Ms. Miriyeva received an oath ceremony notice, but thereafter received a notice stating that her oath ceremony had been "descheduled" purportedly due to "unforeseen circumstances."

g) USCIS convinced Ms. Miriyeva to agree to remand the case to USCIS for further proceedings.

h) USCIS then denied the application on the grounds that Ms. Miriyeva had been discharged from the military since the initial approval, and that the discharge type – uncharacterized – rendered her ineligible for naturalization.

i) USCIS then learned from the Army that Ms. Miriyeva had not been discharged, and USCIS again approved her N-400 application but failed to schedule her for an oath ceremony.

j) USCIS then reversed course again, contending that Ms. Miriyeva had been properly discharged.

k) USCIS now claims that it will not schedule Ms. Miriyeva for an oath ceremony because her uncharacterized discharge – which was the result of a medical condition discovered during basic training – renders her ineligible for naturalization.

55. Throughout this entire time period, USCIS had in front of it the Army's certifications regarding Ms. Miriyeva's service, even post-discharge, which reflected that the Army viewed Ms. Miriyeva's service as honorable. USCIS also knew when it made its denial decision that the Army's policy and practice – consistent with military regulations and federal law – is to treat uncharacterized discharges as "under honorable conditions" discharges.

56. On or about August 16, 2019, Ms. Miriyeva filed a timely administrative appeal pursuant to § 336 of the INA. That appeal is pending. However, the administrative appeal decision maker cannot change USCIS policy. As established in this Complaint, USCIS has confirmed the Policy that applicants for naturalization under § 1440 are not eligible for naturalization if they have received an uncharacterized discharge from the military. Therefore, absent relief here, Ms. Miriyeva's administrative appeal is futile.

Ann Tum

57. On March 17, 2016, Plaintiff Ann Tum signed an enlistment contract with the U.S. Army as a member of the Selected Reserve of the Ready Reserve. Ms. Tum was assigned to the 411th Engineering Brigade. Ms. Tum held the military rank of U.S. Army Private First Class.

58. On or about August 2, 2018, after she began drilling with her Army unit, Ms. Tum applied for naturalization pursuant to 8 U.S.C. § 1440. She submitted her N-400 application to USCIS and included a Form N-426 in which the Army certified Ms. Tum's honorable service in the Army.

59. On November 15, 2018, while her naturalization application was pending at USCIS, the Army issued orders for Ms. Tum to report to basic training.

60. On November 19, 2018, the Army shipped Ms. Tum to basic training in Ft. Jackson, South Carolina, at which time she began service in "active duty" status. The Army orders also directed her to report to Advanced Individual Training on May 20, 2019, after she finished basic training.

61. While at basic training, Ms. Tum underwent an Army medical exam and was diagnosed with "essential (primary) hypertension" – more commonly known as high blood pressure. On or about January 31, 2019, Army physicians recommended that Ms. Tum be separated from the Army due to her medical condition. Army discharge paperwork confirmed that neither Ms. Tum nor the Army was aware of her medical condition at the time of enlistment.

62. Ms. Tum received some counseling from the Army regarding her potential discharge, but she was not told – nor does the counseling paperwork reflect – that she would receive an "uncharacterized" discharge or that USCIS would deny her naturalization application on the grounds that she received an uncharacterized discharge. Ms. Tum also was not told that if

she remained in the Army for 180 days on active duty – a milestone she could have attained if she had contested the discharge recommendation or demonstrated that she met the medical standards – the Army could not designate her discharge as "uncharacterized" and she would have received an honorable discharge.

63. On or about February 19, 2019, the Army issued a DD-214 discharging Ms. Tum from active duty because of her medical condition. The DD-214 designates Ms. Tum's discharge type as "uncharacterized." The Army confirmed that, as of the date of discharge, Ms. Tum had served three months and one day on active duty.

64. On May 20, 2019, U.S. Army Col. Michael Sherman, an authorized Army official, executed a second Form N-426 for Ms. Tum, certifying Ms. Tum's honorable service in the United States Army. On the Form, Col. Smith confirmed that Ms. Tum had served honorably in the Selected Reserve of the Ready Reserve during the thirty-five-month period between March 17, 2016 and February 19, 2019.

65. On the same Form N-426, Col. Sherman stated that Ms. Tum had been separated from the Army and that her "discharge type" was "Honorable." Col. Sherman further stated in the "Remarks" section (which seeks a description of any "derogatory" information): "No derogatory information found as Soldier received an honorable discharge."

66. On May 23, 2019, USCIS conducted a naturalization interview of Ms. Tum at the USCIS Field Office in Louisville, Kentucky. Ms. Tum provided the N-426 certified by Col. Sherman.

67. On May 28, 2019, USCIS issued a decision denying Ms. Tum's naturalization application. The sole ground for denial is specified in the decision as follows:

> Your DD Form 214, Certificate of Release or Discharge from Active Duty reflects that February 19, 2019, you received an

> uncharacterized discharge from the U.S. Army. The DD Form 214 reflects that you were separated for failed medical/physical/procurement standards.
>
> In order to qualify for naturalization under INA 329, you must demonstrate that you were discharged from the U.S. Armed Forces under honorable conditions. You have not demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions; therefore, you are not eligible for naturalization under INA 329.

68. The denial decision does not mention the N-426 in which the Army certified three days prior to her naturalization interview that Ms. Tum had served honorably in the Army and that her discharge was under "honorable" conditions (a fact that USCIS stated would have been dispositive to establish eligibility with respect to Plaintiff Miriyeva). The denial decision does not specify any other ground for denial of the naturalization application. Here, too, at the time of the denial decision, USCIS was well aware of – but failed to account for – the fact that the Army considered Ms. Tum's discharge to be "under honorable conditions."

69. Ms. Tum filed a timely administrative appeal pursuant to § 336 of the INA. That appeal is pending. However, the administrative appeal decision maker cannot change USCIS policy. As established in this Complaint, USCIS has confirmed the Policy that applicants for naturalization under § 1440 are not eligible for naturalization if they have received an uncharacterized discharge from the military. Therefore, absent relief here, Ms. Tum's administrative appeal is futile.

Siddhi Kulkarni

70. Siddhi Kulkarni enlisted in the U.S. Army through the MAVNI program on January 22, 2016. Ms. Kulkarni held the U.S. Army rank of Specialist.

71. The Army assigned Ms. Kulkarni to the Delayed Entry Program. As such, under the Army's practice, she could not obtain the Form N-426 certification necessary to apply for naturalization until she began basic training.

72. On May 30, 2018, the Army shipped Ms. Kulkarni to basic training at Fort Leonard Wood where she began serving on active duty. While at basic training, in a full-time active duty status, Ms. Kulkarni had no ready means to apply for naturalization.

73. During her second week on active duty at basic training, Ms. Kulkarni sustained multiple injuries, including pelvic and knee fractures.

74. On July 2, 2018, Army medical personnel at Fort Leonard Wood recommended that Ms. Kulkarni be transferred to the Warrior Training & Rehabilitation Program, Fitness Training Unit, 43rd AG Battalion "at the earliest opportunity." The Army recommendation noted that Ms. Kulkarni's knee fractures "are healing well." Thereafter, Ms. Kulkarni attended physical therapy sessions and was compliant with the Army's prescribed treatment plan. Ms. Kulkarni repeatedly expressed her desire and intention to return to basic training.

75. On November 7, 2018, Ms. Kulkarni acknowledged receipt of counseling with respect to her potential discharge due to her medical condition. The Army indicated in writing that she had been counseled that her "unsatisfactory duty performance" – *i.e.*, her multiple bone fractures – "may result in initiation of separation action to eliminate you from the Army. If you are separated for unsatisfactory performance, you could receive an Honorable, General, or Other than Honorable (OTH) Discharge. A General or OTH Discharge could severely prejudice you in civilian life." The Army did not counsel Ms. Kulkarni that she would receive an "uncharacterized" discharge and that such a discharge type would – according to USCIS – render her ineligible for naturalization under § 1440 and result in the denial of her naturalization application.

76. On December 7, 2018, the Army issued a DD-214 discharging Ms. Kulkarni from active duty because of her medical condition. The DD-214 listed Ms. Kulkarni's discharge type as "uncharacterized."

77. However, the DD-214 confirms that, as of the date of discharge, Ms. Kulkarni had served six months and eight days on active duty. Under Army Regulations, a soldier who has served less than 180 days on active duty can receive an "uncharacterized" discharge, but longer service requires a characterized discharge. Even though Ms. Kulkarni's entire period of service was honorable and even though Ms. Kulkarni's 180+ days of active duty service meant that she had surpassed entry-level status, the Army still listed her discharge as "uncharacterized."

78. Ms. Kulkarni submitted her N-400 application for naturalization to USCIS on December 21, 2018. Ms. Kulkarni's application included a Form N-426 by which the Army certified that she had served honorably in the U.S. Army, in an active duty capacity, from May 30, 2018 to December 7, 2018.

79. On May 16, 2019, Ms. Kulkarni appeared for her naturalization interview at the USCIS Field Office in Kansas City, Missouri.

80. On June 5, 2019, USCIS issued a decision (which Ms. Kulkarni received on June 12) denying Ms. Kulkarni's naturalization application as follows:

> USCIS received your Form N-400 on December 21, 2018, and on May 16, 2019, you appeared for an interview to determine your eligibility for naturalization.
>
> During the interview and review of your application with an Immigration Services Officer, you testified that the information on your Form N-400, along with any amendments made during the naturalization interview, and the documents submitted by you were true and correct. Your Form N-426, Request for Certification of Military or Naval Service, reflects that you received an uncharacterized discharge from the U.S. Armed Forces.

> In order to qualify for naturalization under INA 329, you must demonstrate that you were discharged from the U.S. Armed Forces under honorable conditions. You have not demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions; therefore, you are not eligible for naturalization under INA 329.

81. The denial decision does not specify any other ground for denial of the naturalization application. At the time of its denial decision, USCIS knew – but did not account for – the fact that the military treated Ms. Kulkarni's entry-level uncharacterized discharge as an "under honorable conditions" discharge.

82. On June 19, 2019, the Army issued a second N-426 for Ms. Kulkarni. The Army certified that Ms. Kulkarni's entire period of military service, through December 7, 2018, had been honorable. The Army further stated that Ms. Kulkarni had been separated from the Army with an uncharacterized discharge but that "no derogatory information" had been found with respect to Ms. Kulkarni.

83. On or about July 3, 2019, pursuant to § 336 of the INA, Ms. Kulkarni filed a timely administrative appeal of the denial of her naturalization application. On October 17, 2019, in a written decision, USCIS denied Ms. Kulkarni's § 336 appeal, citing the Policy as the sole ground for the denial.

Bipin Kadel

84. On July 24, 2015, Bipin Kadel enlisted in the U.S. Army through the MAVNI program. The Army assigned Mr. Kadel to the 808th Engineering Company in Houston, Texas as

a member of the Selected Reserve of the Ready Reserve. Serving in the U.S. Army, Mr. Kadel achieved the rank of Specialist.

85. On July 24, 2017, Mr. Kadel applied for naturalization under § 1440 and submitted to USCIS his N-400 application. In that application, Mr. Kadel included a Form N-426 in which the Army certified that Mr. Kadel was serving honorably in the U.S. Army.

86. On August 4, 2017, the U.S. Army Reserve Command issued an order discharging Mr. Kadel from the Army Reserve. The effective date of the discharge was eleven days earlier, on July 24, 2017. Mr. Kadel did not receive any advance notice of this discharge action or any of the due process mandated by military regulations.

87. The discharge order specifies the discharge type as "uncharacterized."

88. According to the orders, the Army discharged Mr. Kadel because his "maximum DEP time has been exceeded." The orders mistakenly cite to "DEP" – suggesting that Mr. Kadel was in the Delayed Entry Program. In fact, Mr. Kadel was in the Delayed Training Program ("DTP"), and he was assigned to a Reserve Command unit and had drilled with that unit as a reservist.

89. The stated discharge ground is based on the Army's so-called "time-out" policy, whereby a soldier who had not been sent to basic training within two years of enlistment is no longer eligible to serve. In the *Nio* litigation – which had commenced prior to the August 2017 discharge order – USCIS and the Army represented that the two-year "time-out" rule was being extended to three years such that no *Nio* class member would be impacted by it. Specifically, in that litigation, then-Department of Defense Under Secretary Stephanie Miller stated that the two-year rule was not mandatory and – referring to the delays caused by Department of Defense enhanced background investigations – "may be waived if movement to [basic training/active duty]

remains impracticable." The United States made that representation in order to persuade the Court that there was no imminent injury to any *Nio* class member and that, consequently, no preliminary injunction should issue to protect soldiers from the time-out rule. Moreover, the fact that Mr. Kadel had not been sent to basic training within two years of enlistment was due solely to the Department of Defense policy, created after Mr. Kadel enlisted, which blocks soldiers from being sent to basic training until the completion of enhanced background checks and a favorable MSSD, which in some instances has now blocked soldiers from attending basic training even though they are more than three and four years past their enlistment dates.

90. In addition, on July 27, 2017, the Acting Army Secretary issued a memorandum ordering that the two-year time-out rule be extended to three years for MAVNI soldiers. Thus, as of the time when the Army Reserve command issued its discharge orders for Mr. Kadel, the Army already had extended the time-out period. Consequently, Mr. Kadel's discharge order was an unlawful order contrary to U.S. Army policy. Had Mr. Kadel received the requisite advance notice of his discharge action, he could have challenged the planned discharge on that basis. He has tried to challenge the discharge since, but to no avail.

91. On March 4, 2019, USCIS represented to the federal court in the *Nio* litigation that the time-out policy had been extended from two years to three years shortly after issuance "of the July 7 [2017] Guidance, and as a result, no [*Nio*] class member was affected by the two-year rule." *Nio*, Dkt. 240 at 4. This representation was false because USCIS is now stating that Mr. Kadel, a *Nio* class member, was discharged because of the time-out rule and that his discharge type (uncharacterized) renders him ineligible for naturalization.

92. On July 9, 2019, USCIS conducted a naturalization interview of Mr. Kadel at the USCIS Field Office in Houston, Texas.

93. On July 10, 2019, USCIS issued a decision denying Mr. Kadel's naturalization application. The sole ground for denial is specified in the decision as follows:

> [Army Orders] dated August 4, 2017 and your testimony at your [naturalization] interview, reflects that you received an uncharacterized discharge from the U.S. Armed Forces.
>
> In order to qualify for naturalization under INA 329, you must demonstrate that you were discharged from the U.S. Armed Forces under honorable conditions. You have not demonstrated that you were discharged from the U.S. Armed Forces under honorable conditions; therefore, you are not eligible for naturalization under INA 329.

94. The denial decision does not mention the N-426 in which the Army certified that Mr. Kadel had served honorably in the Army. Nor does it mention or account for 10 U.S.C. § 12685, military regulations, or the military's policy that uncharacterized discharges constitute separations "under honorable conditions."

95. The denial decision does not specify any other ground for denial of Mr. Kadel's naturalization application.

96. On August 7, 2019, pursuant to Court Order, the Army notified USCIS that Mr. Kadel (along with 348 other MAVNIs) had not been discharged from the U.S. Army.

97. On September 18, 2019, in the *Nio* litigation, USCIS claimed that it had been informed by the Army that it considered Mr. Kadel to be discharged because he had been issued discharge orders both from the U.S. Army Recruiting Command and the U.S. Army Reserve Command. USCIS did not state whether the Army claimed that the discharge had been accomplished in accordance with due process requirements under military regulations or federal law. In fact, Mr. Kadel did not receive the requisite due process – for example, he did not receive a Recruiting Command "training cancellation"/discharge order or a notice pursuant to Chapter 3

of Army Regulation 135-178, and thus had no opportunity to challenge the discharge because it was unlawful as contrary to Army policy, among other grounds.

98. Mr. Kadel filed a timely administrative appeal pursuant to § 336 of the INA. That appeal is pending. However, the administrative decision maker cannot change USCIS policy. As established in this complaint, USCIS has confirmed that its policy is that applicants for naturalization under § 1440 are not eligible for naturalization if they have received an uncharacterized discharge from the military. Therefore, absent relief here, Mr. Kadel's administrative appeal is futile.

THE USCIS POLICY

99. In the *Nio* litigation, USCIS has admitted that it treats an "uncharacterized" discharge as disqualifying for naturalization purposes under 8 U.S.C. § 1440 because the discharge order itself does not use the words "Honorable" or " General - under honorable conditions."

100. USCIS also has claimed that the Policy is set forth in the USCIS Policy Manual at Vol. 12, Part I, Chapter 3.[2] According to the USCIS website hosting the Policy Manual, the "USCIS Policy Manual contains the official policies of USCIS and must be followed by all USCIS officers in the performance of their duties."[3]

101. However, the USCIS Policy Manual does not support the challenged Policy. Instead, it states in relevant part:

> **B. Honorable Service**
>
> Qualifying military service is honorable service in the Selected Reserve of the Ready Reserve or active duty service in the U.S.

[2] *Available at* https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3 (last visited Nov. 6, 2019).

[3] *Available at* https://www.uscis.gov/policy-manual (last visited Nov. 6, 2019).

> Army, Navy, Marine Corps, Air Force, or Coast Guard. Service in a National Guard Unit may also qualify.
>
> Honorable service means only service in the U.S. armed forces that is designated as honorable service by the executive department under which the applicant performed that military service.
>
> Both "Honorable" and "General-Under Honorable Conditions" discharge types qualify as honorable service for immigration purposes. Other discharge types, such as "Other Than Honorable," do not qualify as honorable service.

The USCIS Policy Manual does not state that an "uncharacterized" discharge renders a § 1440 applicant ineligible for naturalization. It specifies – consistent with § 1440 – that honorable service is service that is designated as such by the applicant's military department (here, the U.S. Army). For each Plaintiff, the U.S. Army has certified – through the Form N-426 – that the soldier's military service was "honorable." Moreover, U.S. military policy treats an "uncharacterized" discharge as an "Honorable" or "General-Under Honorable Conditions" discharge in administrative matters where such characterizations are required. Yet, USCIS refuses to recognize the Army's treatment of these discharges and, in fact, treats them in a manner that is incompatible with military law, regulations, and policy.

THE USCIS POLICY IS CONTRARY TO LAW

102. 8 U.S.C. § 1440 provides, in relevant part, as follows:

> (a) Any person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States . . . during any other period which the President by Executive order shall designate as a period in which Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment, reenlistment,

> extension of enlistment, or induction such person shall have been in the United States. . . whether or not he has been lawfully admitted to the United States for permanent residence . . . The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions . . .
>
> (b) A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that-
>
> (1) he may be naturalized regardless of age, and notwithstanding the provisions of section 1429 of this title as they relate to deportability and the provisions of section 1442 of this title;
>
> (2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required;
>
> (3) service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving. . . and was separated from such service under honorable conditions . . .

103. Each Plaintiff satisfies all of the requirements for naturalization under this statute:

a) Each Plaintiff enlisted in the Army and served in the Selected Reserve of the Ready Reserve and/or in an active duty status.

b) Executive Order 13269 has been in effect at all times relevant to this lawsuit. *See* Exec. Order No. 13269, 67 Fed. Reg. 45287 (2002) (declaring that members of the US Armed Forces have been in conflict with a hostile foreign force since September 11, 2001, and ordering expedited military naturalizations under INA § 329).

c) The Army provided a "duly authenticated certification" of each Plaintiff's honorable military service, as reflected in a Form N-426. *See also* USCIS Policy Manual Vol. 12, Part I, Ch. 5, section A ("The Request for Certification of Military or Naval Service confirms whether the applicant served honorably in an active duty status or in the Selected Reserve of the Ready Reserve."). Moreover, the Army provided one or more additional certifications, including through the discharge orders on Form 500 or a DD-214. Each Plaintiff was discharged "under honorable conditions" according to military law, regulations, and policy.

104. Under federal law, an "uncharacterized" discharge of a reservist is, and must be treated as, a discharge "under honorable conditions." 10 U.S.C. § 12685 provides as follows:

> A member of a reserve component who is separated for cause, except under section 12684 of this title [not applicable here], is entitled to a discharge under honorable conditions unless—
>
> (1) the member is discharged under conditions other than honorable under an approved sentence of a court-martial or under the approved findings of a board of officers convened by an authority designated by the Secretary concerned; or
>
> (2) the member consents to a discharge under conditions other than honorable with a waiver of proceedings of a court-martial or a board.

105. This statute makes clear that the discharge of a reservist may not be treated as anything other than one "under honorable conditions" unless the discharge was effected through a court martial, a board of officers' decision, or with the soldier's consent and express waiver of these due process rights. No Plaintiff was discharged under any of these other circumstances that might have resulted in an "other than honorable" discharge designation. If any Plaintiff's

discharge had been effected in such a manner (such as following a court-martial), it would be clear from that Plaintiff's discharge paperwork.

106. Consistent with this statute, military regulations require the following: "In accordance with section 12685 of Reference (i), an entry-level separation of a Service member of a Reserve Component for cause . . . will be 'under honorable conditions.'" DoDI 1332.14 at Enclosure 4, 3c(1)(d).

107. But, beyond that, DoD and other military regulations dictate that an "uncharacterized" discharge – for *any* service member under *any* circumstance – must be treated as an "honorable" or "under honorable conditions" discharge for administrative purposes. *See* DoDI 1332.14 at Enclosure 4, 3c(1)(c) ("With respect to administrative matters outside this instruction that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization."). Thus, the Department of Defense's own instruction mandates that, for any service member under any circumstance, an "uncharacterized" discharge is a discharge "under honorable conditions."

108. Accordingly, because 8 U.S.C. § 1440 specifies that an otherwise-qualified soldier is eligible to naturalize "if he or she was separated under honorable conditions," and because (absent a court martial or board of officers' decision resulting in an "other than honorable" discharge designation) 10 U.S.C. § 12685 and military regulations specify that a reservist's discharge is "under honorable conditions," a reservist with an uncharacterized discharge cannot be denied naturalization on the grounds that his uncharacterized discharge does not satisfy § 1440.

109. Further, military regulations require that *any* service member's uncharacterized discharge be treated as an "under honorable conditions" discharge for administrative matters, meaning that such discharges cannot be used as a basis for denying naturalization under § 1440.

On the contrary, such discharges are deemed to be separations "under honorable conditions" and must be accepted as such by USCIS.

110. Army personnel documentation further confirms that the USCIS Policy is unfounded. In particular, the United States Army Human Resources Command issued "The Soldier's Guide to Citizenship Application," which explains:

> As a general rule, a Soldier is considered to be serving honorably unless a decision has been made, either by the Soldier's commander or a court martial, to discharge him/her under less than honorable conditions. In the rare cases where the character of a Soldier's service is questionable, ONLY the Soldier's commander can decide this issue, and the sole criterion for the decision is: If the Soldier were being discharged today, based on his/her record, what type of discharge would the Soldier receive? If Honorable or General or Under Honorable Conditions, the character of service on the N-426 will read "honorable". If Under Less than Honorable Conditions, the N-426 character of service item will NOT read "honorable".

111. Under 8 U.S.C. § 1440, the "executive department under which such person served" – *i.e.*, the relevant branch of the U.S. military – determines if the person has been separated "under honorable conditions." Thus, the statute and military regulations mandating the treatment of "entry-level" or "uncharacterized" discharges as "under honorable conditions" discharges are controlling here.

CLAIMS FOR RELIEF

COUNT I: ADMINISTRATIVE PROCEDURE ACT

112. Plaintiffs re-allege paragraphs one through 111 as if fully set forth herein.

113. 5 U.S.C. § 706(2) authorizes a court to hold unlawful and set aside final agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or in excess of statutory jurisdiction, authority, or limitations.

114. As set forth above, USCIS has created – and in the case of each Plaintiff implemented – a policy that denies naturalization to an applicant who seeks naturalization pursuant to 8 U.S.C. § 1440 but has been purportedly discharged with an "uncharacterized" discharge. According to the Policy, USCIS will accept only a discharge expressly designated by the military, on military discharge order paperwork, as "Honorable" or "General - under honorable conditions."

115. Application of the Policy is manifest from the USCIS denial decisions described above.

116. The Policy further has been confirmed by the Department of Homeland Security, through their legal counsel, in federal court proceedings involving the naturalization of soldiers under § 1440. For instance, in a hearing in the *Nio* litigation on August 23, 2017, Department of Justice ("DOJ") counsel (on behalf of DHS) represented to the Court that soldiers cannot naturalize under § 1440 with an uncharacterized discharge:

> So this person would be ineligible to be naturalized because he has an uncharacterized discharge. . . . With an uncharacterized discharge, one is not eligible to naturalize under section 1440 which is the military naturalization program. You have to have an honorable discharge if you are discharged.

117. At a March 20, 2019 hearing in *Nio*, the Court questioned DOJ counsel regarding USCIS's position as to whether an uncharacterized discharge would render a military naturalization applicant ineligible for naturalization under § 1440. In response, DOJ counsel repeatedly affirmed the Policy:

> *The Court* [referring to a similarly-situated soldier's February 14, 2019 naturalization denial letter]: "Can I consider what this person has received, which is a statement apparently that USCIS is taking a position . . . [that if] you've got an uncharacterized discharge, you are out the door."
>
> *DOJ Counsel*: " . . . We're telling you the way that USCIS reads its own statute, which is that uncharacterized doesn't count as meeting

> the honorable service requirement. As I understand it, what they're talking about is a decision that says precisely that."
>
> . . .
>
> *The Court*: "Okay. . . . But the question is, is the one uncharacterized discharge sufficient [to deny a naturalization application]. And I think you are telling me it is."
>
> *DOJ Counsel*: "Sure, yes. . . ."

118. A USCIS official at the same *Nio* hearing separately cited to the USCIS Policy Manual as reflecting the Policy:

> *The Court*: "[I]s there anything, anywhere that tells USCIS, shut the door on somebody with an uncharacterized discharge? . . ."
>
> . . .
>
> *USCIS Official*: "It's in the USCIS policy manual that is a publicly available resource. It is posted online. It has been in the USCIS policy manual since that was published which was approximately 2008."

119. More recently, a USCIS official at a *Nio* hearing held on September 23, 2019 discussed certain of the Plaintiffs, admitting, "Yes, they were denied naturalization because the evidence before USCIS is that they have a discharge order, an uncharacterized discharge order."

120. For the reasons stated above, the Policy is unlawful. Military law and regulations, including 10 U.S.C. § 12685 and DoDI 1332.14, state that an uncharacterized discharge in these circumstances is, and must be treated as, a discharge "under honorable conditions." As such, an uncharacterized discharge does not render a § 1440 naturalization applicant ineligible for naturalization.

121. Moreover, under 8 U.S.C. § 1440 and INA § 329, USCIS must defer to the military's assessment of discharges, and the military's assessment of entry-level uncharacterized

discharges is that they are, and must be treated as, honorable or under honorable conditions discharges.

122. The Policy – which resulted in the denial of Plaintiffs' naturalization applications – therefore is not in accordance with law, is arbitrary and capricious, and evidences USCIS acting outside of its statutory authority.

123. Moreover, Defendants did not quantify or consider harms that would result from the Policy or the fact that the Policy would result in inconsistent and varying standards for naturalization, unintended by Congress, depending on whether a soldier is serving when seeking naturalization or is a veteran when seeking naturalization.

124. Defendants' actions also exceed the delegation of statutory authority because the Policy creates a minimum period of service requirement and/or an active duty service requirement that Congress did not intend and for which Congress did not give Defendants discretion to create.

125. Defendants' implementation of the cited provision from USCIS's Policy Manual is inconsistent with 8 U.S.C. § 1440, which differentiates only characterized "other than honorable" service from "under honorable conditions" service.

126. Defendants violate their own regulations and publicly-available policy statements concerning acceptable military certifications of service, including discharge orders, to the prejudice of others.[4]

127. Defendants' action is a new substantive legal requirement that is subject to the notice and comment requirements of 5 U.S.C. § 553 prior to implementation. Defendants failed

[4] *See, e.g.*, USCIS Policy Manual at Volume 12, Part I, Chapter 5, *available at* https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-5 (last visited Nov. 6, 2019).

to comply with such requirements before issuing their Policy and applying that Policy to Plaintiffs' applications.

128. Alternatively, Defendants failed to comply with the publication requirements of 5 U.S.C. § 552, which requires publication in the Federal Register of all "rules of procedure" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency." Defendants have made clear that their Policy applies to all veterans with "uncharacterized" discharges seeking naturalization based on their military service. Thus, the directive is one of general applicability subject to the publication requirements of 5 U.S.C. § 552.

129. Section 552 further provides that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." Plaintiffs had no actual notice of Defendants' Policy and adversely were affected by the agency's failure to timely publish that Policy. Among other things, had Plaintiffs known prior to enlistment and even prior to their discharges that an "uncharacterized" discharge would result in a naturalization application denial, Plaintiffs would have followed a different path and arranged their affairs differently or handled their discharges differently. Defendants' failure to timely publish their actual policy precludes Defendants from retroactively applying the Policy to the naturalization applications filed by Plaintiffs.

130. Accordingly, Plaintiffs seek an order setting aside the Policy pursuant to 5 U.S.C. § 706(2).

COUNT II: CONSTITUTIONAL VIOLATIONS

131. Plaintiffs re-allege paragraphs one through 130 as if fully set forth herein.

132. Under the Constitution, namely, the "Uniform Rule of Naturalization" clause, Congress has the sole power to establish criteria for naturalization.

133. By enacting 8 U.S.C. § 1440, Congress has specified the naturalization eligibility conditions for veterans such as Plaintiffs.

134. Congress did not specify that veterans seeking naturalization under § 1440 were subject to a different standard for naturalization than currently-serving soldiers. In particular, Congress did not impose a minimum period of service requirement for veterans or an active duty service requirement for veterans. Likewise, Congress did not impose physical requirements for military naturalizations that disallowed naturalization for soldiers injured or otherwise medically unable to continue their military service. Congress did not establish a standard that allowed for a soldier to naturalize on Day 160 as long as the soldier was still serving but disallowed naturalization if the soldier was injured and discharged because of that injury on Day 161 of service. Nor did Congress establish a standard that allows a veteran who served honorably to naturalize if discharged on Day 181 of active duty service but to be denied naturalization if the discharge of the exact same nature was completed on Day 179 of active duty service.

135. The Policy therefore constitutes additional, non-statutory, substantive pre-conditions to naturalization that are being imposed by Defendants. As such, Defendants violate the Constitution with resulting harm to Plaintiffs by depriving them of their right to naturalization under the law.

136. Plaintiffs are eligible and entitled by law – namely, 8 U.S.C. § 1440 – to be naturalized. If Plaintiffs are statutorily eligible to become naturalized under this statute (as they so allege), Defendants must grant their applications; Defendants have no discretion to deny naturalization to a person who satisfies the criteria established *by Congress* for naturalization.

137. Additionally, Defendants' imposition of unauthorized, unlawful, and arbitrary conditions on Plaintiffs' eligibility for naturalization violates Plaintiffs' right to due process under the Fifth Amendment to the U.S. Constitution.

138. Plaintiffs request that the Court grant appropriate equitable relief on the forgoing basis.

COUNT III: DECLARATORY JUDGMENT

139. Plaintiffs re-allege paragraphs one through 138 as if fully set forth herein.

140. 28 U.S.C. § 2201 authorizes a court, "[i]n a case of actual controversy within its jurisdiction . . . upon the filing of an appropriate pleading" to "declare the rights and other legal relations of any interested party seeking such declaration."

141. Federal law provides that soldiers meeting the eligibility requirements of § 1440 are entitled to become naturalized U.S. citizens. Military law and regulations further provide that an uncharacterized discharge of a soldier is, and must be treated as, a discharge "under honorable conditions." Based on this law, an uncharacterized discharge satisfies the requirement under 8 U.S.C. § 1440 of a separation "under honorable conditions" for purposes of naturalization eligibility. USCIS's determination that Plaintiffs' uncharacterized discharges disqualify them from naturalization is unlawful. Plaintiffs seek a declaratory judgment that uncharacterized discharges satisfy the "under honorable conditions" eligibility requirement under § 1440.

COUNT IV: INJUNCTIVE RELIEF

142. Plaintiffs re-allege paragraphs one through 141 as if fully set forth herein.

143. Defendants have adopted and implemented the Policy, and have applied it to Plaintiffs in a manner that precludes them from attaining citizenship pursuant to 8 U.S.C. § 1440.

144. Each Plaintiff has been and will continue to be irreparably harmed by the Policy, which is depriving each Plaintiff of his/her lawful right to attain U.S. citizenship. Plaintiffs have no adequate remedy at law.

145. Under the facts and circumstances of this case, the balance of the equities favor Plaintiffs, and Court action as requested by Plaintiffs is in the public interest.

146. Plaintiffs seek preliminary and permanent injunctive relief as follows:

a) Defendants shall be enjoined from applying the Policy;

b) Defendants shall be enjoined from denying any naturalization application or sustaining or maintaining the denial of any naturalization application, including each Plaintiff's application, on the grounds that a military naturalization applicant cannot meet his/her burden of showing an "under honorable conditions" discharge with discharge paperwork identifying the discharge as "uncharacterized."

c) Defendants shall be enjoined from treating an uncharacterized discharge differently than an Honorable or General – Under Honorable Conditions discharge for purposes of naturalization based on military service.

d) Defendants shall be enjoined from denying naturalization applications or maintaining or sustaining the denial of a naturalization application on the grounds that an uncharacterized discharge renders a veteran ineligible for naturalization based on his/her military service.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

a. Assume jurisdiction over this action;

b. Grant the relief requested under the APA pursuant to Count I of this Complaint;

c. Grant the relief requested under the Constitution pursuant to Count II of this Complaint;

d. Issue the declaratory judgment sought in Count III of this Complaint;

e. Grant the preliminary and permanent injunctive relief requested in Count IV of this Complaint;

f. Award Plaintiffs reasonable costs and attorneys' fees, including under the Equal Access to Justice Act; and

g. Award such further relief as the Court deems just or appropriate.

Dated: November 6, 2019

/s/ Jennifer M. Wollenberg

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