No. _____

In The
Supreme Court of the United States

JIAHAO KUANG; DERON COOKE, ON BEHALF OF THEMSELVES AND THOSE SIMILARLY SITUATED,

Applicants,

V.

UNITED STATES DEPARTMENT OF DEFENSE; MARK ESPER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE OF THE UNITED STATES DEPARTMENT OF DEFENSE,

Respondents.

APPLICATION DIRECTED TO THE HONORABLE ELENA KAGAN
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 17, 2020

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicants Jiahao Kuang and Deron Cooke ("Plaintiffs") respectfully request a 60-day extension of time, to and including March 30, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Kuang v. U.S. Dep't of Defense*, No. 18-17381. The Ninth Circuit issued its opinion on July 2, 2019. The Ninth Circuit denied rehearing en banc on November 1, 2019. (A copy of the Ninth Circuit's panel decision is appended hereto as Attachment 1. A copy of the order denying rehearing is appended hereto as Attachment 2.) Currently, a petition for a writ of certiorari would be due on January 30, 2020. This application has been filed more than 10 days before the date a petition would be due. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

1. This case involves the reviewability of military decisions under what has become known as the "*Mindes* doctrine." *See Mindes v. Seamen*, 453 F.2d 197 (5th Cir. 1971). Specifically, this case raises the question whether a bare invocation of national security concerns can justify a United States Department of Defense (DoD) policy that facially discriminates against lawful permanent residents (LPRs).

2. On October 13, 2017, the DoD issued a policy (the "October 13 Policy") prohibiting LPRs—but not U.S. nationals—from shipping to basic training until their background checks were completed. ECF No. 15-2 at ER 77-78. DoD's prior practice

permitted all enlistees to ship to basic training while certain background checks were pending. The October 13 Policy's new prohibition was not targeted or limited to enlistees with suspicious foreign contacts, particular criminal backgrounds, or known ties to terrorist groups. Rather, it applied to every LPR who enlisted—as permitted by statute, *see* 10 U.S.C. § 504(b)(1)(B)—in the United States military. The October 13 Policy itself does not cite any national security justification. Instead, its purported goal was to "facilitate process efficiency and the appropriate sharing of information." ECF No. 15-2 at ER 77.

3. Plaintiffs brought suit under the Equal Protection Clause and Due Process Clause of the Constitution, U.S. Const. amend. XIV, § 1, and Sections 706(1) and 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. § 706. On July 19, 2018, Plaintiffs sought a preliminary injunction based on their Section 706(2)(A) APA claim. ECF No. 15-1 at ER 9. DoD and the Secretary of Defense ("Defendants") argued that the October 13 Policy arose out of national security concerns and was therefore non-justiciable under the *Mindes* doctrine. *See id.* at ER 15-22. The *Mindes* doctrine is a prudential doctrine which some courts have applied to limit judicial review of military regulations and decisions in certain circumstances. *See Mindes*, 453 F.2d at 201; *Wallace v. Chappel*, 661 F.2d 729, 732-33 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 296 (1983).

The district court granted the preliminary injunction, holding that Plaintiffs' claim was justiciable and that Plaintiffs had demonstrated a likelihood of success on the merits and irreparable harm. ECF No. 15-1 at ER 43-55. Defendants filed an

emergency motion to stay the district court's injunction pending appeal, which the motions panel denied. ECF No. 21.

4. On July 2, 2019, the Ninth Circuit held that the claim was non-justiciable under *Mindes*, vacated the preliminary injunction, and remanded the case with instructions to dismiss Plaintiffs' § 706(2)(A) APA claim. *See* Attachment 1. On November 1, 2019, the Ninth Circuit denied Plaintiffs' petition for rehearing en banc. *See* Attachment 2.

5. This Court's review would be warranted here. The Court has never considered the viability, let alone the scope, of the so-called *Mindes* doctrine. Applying that doctrine here, the Ninth Circuit significantly expanded its reach. In doing so, the court ignored the important right to be free from arbitrary discrimination, the irreparable harm suffered by Plaintiffs while they are prevented from beginning basic training, and the preliminary injunction's minimal interference with military functions or discretion.

6. After the Ninth Circuit panel issued its decision, the DoD implemented a new policy to screen military recruits for foreign preference, the Expedited Screening Protocol (ESP). *See* ECF No. 46. Unlike the October 13 Policy, the ESP uses a recruit's citizenship as only one of many "potential risk indicators." *Id*. at 1. The ESP also considers factors such as residential history, education, family information, and foreign contacts. The ESP does precisely what the October 13 Policy did not do: it grounds the military's assessment of national security risk in a holistic analysis and does not discriminate against LPRs on a class-wide basis.

7. The ESP, however, is provisional. By its own terms, it may be revoked following a review period that ends on January 30, 2020—six months after its July 31, 2019 enactment. During this six-month period, the October 13 Policy is held "in abeyance." *Id.* at 1-2. After review, the October 13 Policy may be "terminated, held in abeyance for an additional period, or reinstated." *Id.* at 2.

8. The petition in this case is currently due on January 30, 2020. This is the same day by which the DoD must decide whether to terminate, continue to hold in abeyance, or reinstate the October 13 Policy.

9. Plaintiffs do not intend to seek further review in this Court if Defendants terminate the October 13 Policy. The additional time sought in this application is necessary to allow Plaintiffs to review the DoD's decision about the ESP and the October 13 Policy. Such an extension would avoid needless litigation in the event that DoD makes the ESP permanent or terminates the October 13 Policy. It would further prevent prejudice to Plaintiffs if DoD rescinds the ESP and reinstates the October 13 Policy on the same date that Plaintiffs' petition to this Court would otherwise be due.

10. The extension requested would not work any meaningful prejudice on any party.

11. For these reasons, Plaintiffs respectfully request that the time for filing a petition for a writ of certiorari in this case be extended to and including March 30, 2020.

Dated: January 17, 2020

Respectfully submitted,

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ATTACHMENT 1

NOT FOR PUBLICATION

FILED

JUL 2 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIAHAO KUANG; DERON COOKE, on behalf of themselves and those similarly situated,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE; JAMES MATTIS, in his official capacity as Secretary of Defense of the United States Department of Defense,

Defendants-Appellants.

No. 18-17381

D.C. No. 3:18-cv-03698-JST

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted June 14, 2019
San Francisco, California

Before: GOULD and IKUTA, Circuit Judges, and PEARSON,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

Plaintiffs are foreign nationals and lawful permanent residents ("LPRs") of the United States. Both have enlisted in the United States armed forces, but at the time of filing, neither had yet shipped out, or "accessed," to active duty.

Military recruits are subject to background screening on enlistment. *See* 32 C.F.R. § 66.1. The background screening is designed to identify and explore possible risks to national security and confirm that each recruit is eligible to hold a military position. Citizens and LPRs are subject to the same background screening rigors.

Until recently, both citizens and LPRs generally were eligible to begin active-duty service before their background screenings were completed as long as they had satisfied certain other screening requirements. On October 13, 2017, the Under Secretary of Defense for Personnel and Readiness issued a memorandum to military branches (the "October 13 Memo") instructing that LPR recruits should not be accessed prior to completion of a satisfactory background screening and favorable recommendation. The October 13 Memo did not affect the accession timeline for citizens.

Plaintiffs argue that the Department of Defense's ("DOD") change in practice was arbitrary and capricious and must therefore be set aside pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). On Plaintiffs' motion, the district court issued a preliminary injunction preventing DOD from

implementing the October 13 Memo, thereby requiring that citizens and LPRs be accessed according to the same timetable. DOD appeals from the injunction order.

Internal military regulations ordinarily are not amenable to judicial review without some preliminary scrutiny. *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) (articulating a four-factor test for reviewability).[1] To assess whether a claim against the military is reviewable (assuming certain threshold requirements are met, as they are in this case), we inquire into (1) the nature and strength of the plaintiffs' claim, (2) the potential injury to the plaintiffs if review is refused, (3) the extent to which review would interfere with military functions, and (4) the extent to which military discretion or expertise is involved. *Khalsa v. Weinberger*, 779 F.2d 1393, 1398 (9th Cir. 1985); *Wallace v. Chappell*, 661 F.2d 729, 732–33 (9th Cir. 1981).

"[C]onstitutional claims give more weight to an argument for reviewability [than statutory claims]." *Khalsa*, 779 F.2d at 1401 (emphasis omitted); *see Gonzalez v. Dep't of Army*, 718 F.2d 926, 930 (9th Cir. 1983) ("Constitutional claims ordinarily carry greater weight than those resting on a statutory or regulatory base . . . .") (alteration omitted) (quoting *Wallace*, 661 F.2d at 733).

[1] We adopted the *Mindes* test as to constitutional claims in *Wallace v. Chappell*, 661 F.2d 729, 733 (9th Cir. 1981), and as to statutory claims in *Khalsa v. Weinberger*, 779 F.2d 1393, 1401 (9th Cir. 1985) ("[T]he *Mindes* test also applies to statutory claims against the military.").

Although Plaintiffs raise constitutional claims in their complaint, they relied on their APA claim[2] to support the motion for preliminary injunction. Plaintiffs point to no prior case in which an APA-based challenge to an internal military policy survived *Mindes* scrutiny.

The district court concluded that Plaintiffs' arbitrary-and-capricious claim was strong on the merits because DOD had "simply withheld all of the relevant facts." The administrative record, however, reveals at least two factual underpinnings for DOD's decision to adjust the accession timeline for LPR recruits.[3] First, preexisting guidelines published by the Office of the Director of National Intelligence ("DNI") instruct national-security adjudicators to consider recruits' "allegiance to the United States," "foreign influence," and "foreign preference" when conducting background screenings, all of which have self-evident implications for LPRs. Second, a 2017 DOD study identified several difficulties in screening LPR recruits that did not occur when screening citizens. DOD reasonably concluded that delaying the accession of LPR recruits would mitigate the risks identified by the DNI Guidelines and the 2017 DOD study.

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[2] In addition to their claim that the October 13 Memo was arbitrary and capricious, Plaintiffs also argued that the policy change was "not in accordance with law," *see* 5 U.S.C. § 706(2)(A). The district court dismissed the latter claim.

[3] The record also included internal DOD memos regarding the potential security risk of other noncitizen recruits.

As for the second *Mindes* factor, we identify no grave injury that will result if the district court refuses to review Plaintiffs' arbitrary-and-capricious claim. Plaintiffs were not entitled to quick or immediate accession on enlistment, and they were expressly advised, both by their contracts and by the delayed-entry statute itself, that accession might not take place for up to two years after enlistment. The record also does not support Plaintiffs' contention that they suffer stigma from delayed accession. *Cf. Wenger v. Monroe*, 282 F.3d 1068, 1075 (9th Cir. 2002).

Assessing the third and fourth *Mindes* factors, we observe that military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Gonzalez*, 718 F.2d at 930. Of course, we are not compelled to be credulous. Assertions by the military that are "palpably untrue or highly questionable" merit little deference. *Khalsa*, 779 F.2d at 1400 n.4. But DOD's claim to expertise in this case is not seriously in doubt, and its assertions about national-security risks are not far-fetched.

We conclude that judicial review is foreclosed. We therefore **VACATE** the preliminary injunction and **REMAND** the case with instructions to dismiss the 5 U.S.C. § 706(2)(A) claim pursuant to the *Mindes* doctrine.

ATTACHMENT 2

FILED

NOV 1 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIAHAO KUANG; DERON COOKE, on behalf of themselves and those similarly situated,

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Respondents–Appellants.

No. 18-17381

D.C. No.
3:18–cv–03698–JST
Northern District of California,
San Francisco

ORDER

Before: GOULD and IKUTA, Circuit Judges, and PEARSON,* District Judge.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellee's Petition for Rehearing En Banc is DENIED.

* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.