No. _____

In the Supreme Court of the United States

JIAHAO KUANG, ET AL.,

Petitioners,

V.

U.S. DEPARTMENT OF DEFENSE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On October 13, 2017, the U.S. Department of Defense departed from its longstanding practice and adopted a new policy requiring U.S. lawful permanent residents who enlist in the military—but not U.S. citizens—to await the results of certain background checks before beginning basic training. Petitioners challenged that policy under the Administrative Procedure Act, and the district court granted a preliminary injunction. The Ninth Circuit reversed—not on the merits, but because it concluded that the Department of Defense's policy was immune from judicial review. The Ninth Circuit did not rely on any constitutional or statutory provision limiting such review. Instead, the panel applied a judge-made test adopted in *Mindes v. Seamen*, to determine "when internal military affairs should [and should not] be subjected to court review." 453 F.2d 197, 199 (5th Cir. 1971).

The questions presented are:

1. Whether courts can evade their constitutional and statutory duty to review military decisions under the so-called "*Mindes* test," or whether claims seeking injunctive relief against the military are reviewable so long as they do not present a nonjusticiable political question or otherwise fall outside the court's subject-matter jurisdiction.

2. Whether a DoD policy that requires all legal permanent resident enlistees—but not their U.S.-citizen counterparts—to suffer unjustified delays before beginning their military careers is judicially reviewable.

PARTIES TO THE PROCEEDINGS

Petitioners are named plaintiffs Jiahao Kuang and Deron Cooke, and a class of legal permanent residents who have signed enlistment contracts with the military but have not been permitted to begin initial entry training because of the Department of Defense's October 13, 2017 policy. *See* App. 15a-16a, 19a. Respondents are the United States Department of Defense and Mark Esper, in his official capacity as the Acting Secretary of Defense. Secretary Esper has been automatically substituted as a party to these proceedings pursuant to this Court's Rule 35(3).

LIST OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioners state that there are no proceedings directly related to this case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Named plaintiffs Jiahao Kuang and Deron Cooke and the represented class respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-5a) is unreported but available at 778 F. App'x 418. The order of the court of appeals denying DoD's motion for an emergency stay pending appeal (App. 88a-90a) is unreported. The order of the court of appeals denying rehearing en banc (App. 91a-92a) is unreported. The district court's order granting class certification, denying DoD's motion to dismiss, and granting petitioners' motion for a preliminary injunction (App. 6a-87a) is reported at 340 F. Supp. 3d 873.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2019. App. 1a. The court of appeals denied rehearing en banc on November 1, 2019. App. 91a. On January 21, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 30, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App. 93a-103a.

INTRODUCTION

In 1971, the Fifth Circuit created a multi-factored, prudential test for determining when military decisions should be subjected to judicial review. *Mindes v. Seamen*, 453 F.2d 197, 199 (5th Cir. 1971). The so-called "*Mindes* test" looks to (i) the "nature and strength" of the plaintiff's claim, (ii) the seriousness of the plaintiff's injury, (iii) the "interference with the military function" that would be considered, and (iv) the degree of "military expertise or discretion" involved. *Id.* at 201. Balancing those factors, the court then decides whether to review the challenged decision on the merits or dismiss the case as nonjusticiable. The *Mindes* test is not grounded in any constitutional or statutory limitation on judicial review. It conflates the concept of justiciability with the merits, by importing a short-circuited consideration of the merits into the distinct, threshold question of reviewability. And it has never been adopted or applied by this Court.

Notwithstanding its weak doctrinal foundation, *Mindes* has played an outsized role in court of appeals decisions for nearly a half century. All but one circuit has weighed in on whether or when to apply the *Mindes* test to claims challenging military decisions, and the 11 courts of appeals that have are badly fractured. Some courts of appeals (like the Ninth Circuit in this case) have adopted and applied the *Mindes* test to deny judicial review. Others have adopted the *Mindes* test for some claims and not others. And others still have rejected it entirely. The conflict is deep, entrenched, and important: whether military decisions are subject to judicial review should not depend on the circuit in which the case is brought.

The Ninth Circuit's decision in this case exemplifies the problem with *Mindes* and provides an ideal vehicle for this Court's review. In a two-page memorandum with a single sentence of explanation, the Department of Defense (DoD) departed from its longstanding policy of treating legal permanent resident (LPR) enlistees the same as U.S. citizens enlistees for purposes of accession to the military. For decades, DoD had allowed both LPRs and U.S. citizens to begin basic training before their background checks were completed. Then, in 2017, DoD abruptly reversed course and announced that LPRs, as a class, would no longer be able to access into military service until their background checks were complete. Petitioners challenged this new policy as arbitrary, class-wide discrimination in violation of the Constitution and the Administrative Procedure Act (APA)—and the district court found a likelihood of success and granted a preliminary injunction. But, applying *Mindes*, the Ninth Circuit refused to even review the policy.

The application of *Mindes* in this case was both wrong and outcome-determinative. But for *Mindes*, petitioners would have had their day in court. This Court's review is needed to remind courts that they do not have discretion to decline to review otherwise justiciable military decisions simply as a matter of perceived prudence.

STATEMENT OF THE CASE

1. Foreign nationals have served in the United States military since the Founding.[1] Congress has codified this longstanding tradition in various statutes dating back at least to the Civil War.[2] Today's enlistment statute—which has existed in its present form since 1968—states that legal permanent residents (LPRs) can enlist in "any armed force." 10 U.S.C. § 504(b)(1)(B). It also exempts LPRs who serve in the military from the five-year residency requirement ordinarily needed for them to naturalize as U.S. citizens. 8 U.S.C. §§ 1439(a), 1440(a). The enlistment statute also authorizes DoD to enlist foreign nationals whom the agency deems "vital to the national interest," under what DoD calls its Military Accessions Vital to the National Interest (MAVNI) program. App. 11a-12a (quoting 10 U.S.C. § 504(b)(2)(A)). But the statute treats MAVNI recruits differently than LPRs in one important respect: no MAVNI enlistee "may report to initial training until after [DoD] has completed all required background investigations . . . regarding that person." 10 U.S.C. § 504(b)(3)(A). The statute contains no such limitation for LPRs.

DoD performs background checks for all enlistees—U.S. citizens, LPRs, and MAVNI enlistees. 32 C.F.R. § 66.6(b)(8)(vi). For decades, DoD allowed U.S. citizens and LPRs alike to begin basic training pending the results of those background checks. *See*

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[1] Zachary R. New, *Ending Citizenship for Service in the Forever Wars*, 129 Yale L.J. Forum 552, 554 (2020).

[2] *See* Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 Seton Hall L. Rev. 400, 408-30 (2000).

id. § 66.6(b)(8)(vi)(A) (providing that "[a]n applicant may be accessed . . . provided that a [background check] was submitted and accepted" by the investigating agency and did not contain any "disqualifying background information"); App. 14a-15a. That is, LPRs were permitted to access into military service on the same basis as U.S. citizens—*i.e.*, before completion of their background checks. *Id.*

On October 13, 2017, DoD abruptly changed this practice. App. 104a. Without initiating a rulemaking process or seeking public comment, DoD issued a new policy (the October 13 Policy) announcing that LPRs could no longer ship to basic training before completion of their background checks. App. 104a-06a. The new October 13 Policy applied to all LPRs, regardless of whether they posed heightened security risks (such as suspicious foreign contacts, particular criminal backgrounds, or known ties to terrorist groups). App. 104a-05a. But the new Policy did not apply to any U.S. citizens, even if they *did* pose such risks. App. 104a-06a. For the first time in the history of LPR enlistment, DoD categorically distinguished between U.S. citizens and LPRs as a class.

DoD's justification for this dramatic policy shift was brief. Its two-page memorandum did not mention national security. *Id.* The memorandum did not acknowledge that DoD was enacting a new policy that departed from decades of DoD practice. *See id.* And the memorandum did not explain why DoD was treating LPRs differently than U.S. citizens. DoD said only that it was now requiring background investigations to be completed "prior to such foreign national's entry into [military] service," "[i]n order to facilitate process efficiency and the appropriate

sharing of information . . . for the accession of [LPRs]." App. 104a-05a.

In the months that followed, LPR accessions plummeted. *See* CA9 ECF No. 12, at Add. 79. Those LPRs who did enlist experienced average delays of 350 days while their background checks were pending. App. 32a. During this period, LPRs had to defer civilian employment and educational opportunities. *See* App. 16a, 83a. They were also unable to claim expedited naturalization, a key benefit that enticed many LPRs to enlist in the first place. App. 83a-84a. And they lost pay and suffered the stigma of discrimination on the basis of their nationality. *See* App. 84a; ER277-79.

2. On June 21, 2018, petitioners filed suit against DoD and the Secretary of Defense (together, DoD) on behalf of an LPR class who had signed enlistment contracts with the U.S. military, but had been prevented from entering military service as a result of the October 13 Policy. App. 17a. Petitioners asserted claims under both the Constitution and the Administrative Procedure Act (APA), alleging that the October 13 Policy was arbitrary and capricious, 5 U.S.C. § 706(2)(A), and that petitioners' accession was being unreasonably delayed, *id.* § 706(1). App. 17a.

On October 19, 2018, DoD filed the administrative record, which it certified as containing all unclassified information that DoD had considered in adopting the October 13 Policy. App. 18a. The 162-page record contained only: (1) the two-page memorandum implementing the October 13 Policy; (2) several DoD memoranda concerning the MAVNI program; (3) a summary of a 2017 study on "gaps" in DoD's LPR vetting process; (4) a memorandum concerning certifications of service for naturalization purposes;

and (5) 137 pages of publicly available DoD regulations and guidance. App. 71a-72a. DoD also represented that it had considered classified information in adopting the October 13 Policy but did not include that information in the record. App. 72a-74a.

On July 19, 2019, petitioners moved for a preliminary injunction based on their arbitrary-and-capricious APA claim. App. 17a. Petitioners explained that the administrative record was so devoid of support for the October 13 Policy that immediate relief was warranted. DoD opposed the motion and also moved to dismiss the entire case under the so-called "*Mindes* test," which governs the reviewability of challenges to internal military decisions in the Ninth Circuit. *See Mindes v. Seamen*, 453 F.2d 197 (5th Cir. 1971); *Wallace v. Chappell*, 661 F.2d 729, 737-38 (9th Cir. 1981) (adopting the test), *rev'd on other grounds*, 462 U.S. 296 (1983).

3. The district court denied the motion to dismiss and entered the preliminary injunction.

On the question of reviewability, the district court applied the *Mindes* test and found that petitioners' APA and constitutional claims were subject to review. App. 27a-36a. *First*, the court held that the "nature" and "strength" of petitioners' claims, which alleged arbitrary discrimination against LPRs, favored review. App. 31a-32a. *Second*, it found that petitioners' injuries, including damage to their military and civilian careers and delay in their ability to seek expedited naturalization, favored review. App. 32a-33a. *Third*, the court found no interference with military functions, because the relief petitioners requested would not require DoD to "ignore the national security concerns that gave rise to the

October 13 Memo," since DoD could always "adopt a policy that is justified by its purported concerns." App. 35a (citation omitted). And *finally*, because petitioners' challenge asked the court to evaluate class-wide discrimination and to judge the sufficiency of DoD's administrative record, its resolution would not require the court to intrude on areas of military expertise. App. 36a.

As to petitioners' request for preliminary injunctive relief, the district court found all four factors met. The court first held that petitioners were likely to succeed on the merits of their APA claim. The court noted that although DoD claimed it had relied on classified information in adopting the October 13 Policy, it had not sought to present that information for *in camera* review; instead, it "simply withheld all of the relevant facts." App. 78a. Nor, the court continued, did the small collection of documents that DoD chose to produce support its decision. As the court explained, the bulk of the administrative record had nothing to do with the October 13 Policy or LPRs, and the "only quasi-factual elements of the record related to LPRs"—a summary of a 2017 study about DoD's *own* failure to investigate LPRs and a single sentence about LPRs' "risk factors" in a memorandum concerning the MAVNI program—did not support the October 13 Policy. App. 78a-81a.

The district court found that the other preliminary injunction factors supported relief as well. The court held that the October 13 Policy threated irreparable injury to petitioners by damaging their careers and delaying their eligibility for naturalization. App. 82a-84a. The court also held that the balance of equities and the public interest favored relief because DoD had put forward no evidence to support its asserted,

extra-record national security concerns. App. 85a-86a. Moreover, the court found that there was "substantial, uncontradicted evidence"—including from a former Secretary of the Army—that the October 13 Policy actually "impairs the military's recruitment goals and undermines military readiness" by delaying LPR accessions. App. 85a.

4. DoD appealed, and filed an emergency motion to stay the district court's injunction pending appeal. A divided motions panel declined to grant the stay. App. 88a-90a.

On July 2, 2019, a Ninth Circuit merits panel (including the dissenting judge from the motions panel) reversed, in a five-page, unpublished decision. App. 1a-5a. The panel did not reach the merits of petitioners' APA claim or consider the other preliminary injunction factors. Instead, it held that the claim was unreviewable under the *Mindes* test.

First, the court of appeals concluded that the nature of petitioners' claim did not favor review because it was statutory and not constitutional. App. 3a-4a ("[C]onstitutional claims ordinarily carry greater weight than those resting on a statutory . . . base." (citation omitted)). The court also questioned the strength of petitioners' APA claim because it believed there was some "factual" support for the October 13 Policy. App. 4a. *Second*, the court held that petitioners' injuries were not "grave" because petitioners "were not entitled to quick or immediate accession on enlistment." App. 5a. *Third*, the court found there would be interference with military functions because "military decisions about national security and personnel," like the October 13 Policy, "are inherently sensitive and generally reserved to military discretion." *Id.* And *fourth*, the court

deferred to DoD's assertion of "national security risks" because its "expertise in this case is not seriously in doubt" and its assertions were "not far-fetched." *Id.* The court accordingly vacated the district court's injunction and remanded the case with instructions to dismiss petitioners' APA claim.

5. On July 30, 2019, shortly after the Ninth Circuit's decision, DoD issued a memorandum implementing a new Expedited Screening Protocol (ESP), which temporarily supplanted the October 13 Policy. App. 107a-29a. The ESP provides "uniform and consistent standards for a centralized process for the screening and vetting of individuals requiring access to DoD systems, facilities, personnel, information, or operations, for allegiance, foreign preference, or foreign influence concerns." App. 108a.

Unlike the October 13 Policy, which categorically singled out LPRs for disfavored treatment, the ESP uses a recruit's citizenship as only one of many "potential risk indicators." App. 117a. Others include residential history, education, family information, and foreign contacts, activities, business investments, travel, and military service. *Id.*[3] That is, the ESP (in marked contrast to the October 13 Policy) grounds the military's assessment of national security risk in a holistic analysis of multiple factors—applicable to LPRs and U.S. citizens alike.

On its face, the ESP does not permanently replace the October 13 Policy but instead holds it in abeyance. App. 109a. And DoD has reserved the right to "reinstate[]" the October 13 Policy if it sees fit. *Id.*

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[3] *See* Form SF-86, Questionnaire for National Security Positions (rev. Dec. 2010), https://www.opm.gov/forms/pdf_fill/sf86-non508.pdf.

DoD is currently evaluating the effectiveness of the ESP, which is set to expire on July 30, 2020. *Id.*

6. Because the ESP did not purport to rescind the October 13 Policy, petitioners filed a petition for rehearing en banc. On November 1, 2019, the court of appeals denied rehearing.[4]

REASONS FOR GRANTING THE PETITION

This petition asks the Court to consider the viability of the so-called "*Mindes* test." More than forty years ago, the Fifth Circuit adopted a judge-made, multi-factored, prudential test to determine whether and when a court should review military decisions. And for more than forty years, the courts of appeals have fractured—extensively and intractably—over whether or to what extent to adopt *Mindes*. Nearly every circuit has weighed in on this conflict, and the divergent approaches implicate fundamental disagreements over the judiciary's role in policing access to federal courts. The Ninth Circuit is on the wrong side of the split. *Mindes* cannot be squared with this Court's case law, and its application here to bar review of petitioners' claim is a prime example of its fatal flaws. This Court's review is warranted and this case presents an ideal vehicle for that review.

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[4] On November 21, 2019, DoD filed a motion for reconsideration of the district court's prior denial of its motion to dismiss petitioners' entire complaint based on the Ninth Circuit's *Mindes* analysis. N.D. Cal. ECF No. 216. The district court has since stayed the case, pending DoD's review of the ESP. N.D. Cal. ECF Nos. 129, 131.

I. This Court Should Grant Review To Consider The Viability Of The "*Mindes* Test" Of Justiciability

In 1971, the Fifth Circuit decided a case called *Mindes v. Seamen*, 453 F.2d 197 (5th Cir. 1971). The plaintiff, an Air Force captain, challenged his separation from military service. *Id.* at 198. The district court dismissed his complaint for lack of jurisdiction, but the Fifth Circuit reversed, finding that plaintiff had raised a non-frivolous federal question. *Id.* To guide the district court on remand, the Fifth Circuit undertook a "somewhat detailed analysis of when internal military affairs should be subjected to court review." *Id.* In so doing, the court of appeals crafted a "judicial policy akin to comity," which in that court's view balanced the need to protect service members with "the proper concern that [judicial] review might stultify the military in the performance of its vital mission." *Id.*

Mindes prescribes a two-part test for assessing the reviewability of a claim involving "internal military affairs." *Id.* at 199. At the first step, the court asks whether the plaintiff: (1) has alleged "the deprivation of a constitutional right" or a "violation of applicable statutes or . . . regulations"; and (2) has exhausted "available intra-service corrective measures." *Id.* at 201. If both criteria are satisfied, the court then weighs four factors: (1) "[t]he nature and strength of the plaintiff's challenge to the military determination"; (2) "[t]he potential injury to the plaintiff if review is refused"; (3) "[t]he type and degree of anticipated interference with the military function"; and (4) "[t]he extent to which the exercise of military expertise or discretion is involved." *Id.*

The first factor favors review if the issues at stake rank high on the "whole scale of values—compare haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty." *Id.* at 201. "Constitutional claims [are] normally"—but not always—"more important than those having only a statutory or regulatory base." *Id.* And "[a]n obviously tenuous claim of any sort must be weighted in favor of declining review." *Id.* The second factor is the plaintiff's "potential injury if review is refused." *Id.* The third factor weighs against review only "if the interference would be such as to seriously impede the military in the performance of vital duties." *Id.* The fourth factor requires the court to "defer to the superior knowledge and experience of professionals," but only "in matters such as promotions or orders directly related to specific military functions." *Id.* at 201-02.

In the ensuing four decades, the so-called *Mindes* test has taken on a life of its own. There is a deep and entrenched circuit conflict on whether a court can decline to review military decisions based on this multi-factored, judge-made test. This Court has never adopted the *Mindes* test as its own. On the contrary, *Mindes* runs counter to this Court's precedent and turns the strong presumption that courts should review agency decisions on its head. Without this Court's intervention, the intractable divide among the courts of appeals will persist—and some courts will continue to pick and choose which military decisions to review based on amorphous factors that have no statutory or constitutional grounding. This Court's intervention is needed; the Ninth Circuit's invocation of *Mindes* was dispositive

here and this case presents the right vehicle for resolving this conflict once and for all.

A. The Courts Of Appeals Are Deeply Conflicted About The *Mindes* Test

Since the Fifth Circuit first adopted the *Mindes* test, the courts of appeals have fractured over whether (and how) to apply it when presented with claims against the military. Nearly every circuit has weighed in on this conflict. Three courts of appeals (including the Fifth and Ninth Circuits) have adopted and reaffirmed the *Mindes* test. Five other courts of appeals initially adopted the *Mindes* test, but have since rejected or questioned the doctrine, or limited its application. And three other courts of appeals have consistently rejected *Mindes* from the outset. This Court's intervention is needed to clarify whether and when military decisions are reviewable.[5]

1. Three courts of appeals have adopted and reaffirmed application of the *Mindes* test when considering whether to review military decisions. The Fifth Circuit, of course, adopted the test in *Mindes* itself—and has since repeatedly reaffirmed *Mindes*. *See West v. Brown*, 558 F.2d 757, 761 (5th Cir. 1977);

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[5] Despite the sheer number of courts of appeals cases adopting, rejecting, modifying, and limiting *Mindes*, this Court has had surprisingly few opportunities to grant review of this issue. Based on a review of readily available certiorari petitions, very few raised *Mindes* as a question presented, and those that did either arose early in the test's evolution (*i.e.*, before the current entrenched split had developed), or presented the type of challenge that would have been unreviewable in every circuit (*i.e.*, the outcome would not have changed). This petition presents the Court with an opportunity to review an issue that has produced an entrenched split in a case where the invocation of *Mindes* was outcome-determinative.

Meister v. Texas Adjutant Gen.'s Dep't, 233 F.3d 332, 341 (5th Cir. 2000); *Walch v. Adjutant Gen.'s Dep't of Texas*, 533 F.3d 289, 302 (5th Cir. 2008).

The Tenth Circuit adopted *Mindes* ten years later—in a split decision. *See Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981). In *Lindenau*, the court of appeals applied the test to bar review of a claim that challenged the military's ban on the enlistment of unwed single parents. *Id.* at 70-71. The majority recognized that the Third Circuit had recently rejected *Mindes* (as discussed below), but ultimately sided with the Fifth Circuit. *Id.* at 72. The concurring judge would have adopted the Third Circuit's approach. *See id.* at 74-75 (McKay, J., concurring in the judgment). Since *Lindenau*, the Tenth Circuit has continued to apply *Mindes*. *See, e.g.*, *Daugherty v. United States*, 73 F. App'x 326, 332 (10th Cir. 2003); *Costner v. Oklahoma Army Nat'l Guard*, 833 F.2d 905, 907 (10th Cir. 1987).

Later that same year, the Ninth Circuit also adopted *Mindes*. *See Wallace v. Chappell*, 661 F.2d 729 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983).[6] In *Wallace*, the court of appeals remanded for the district court to apply the *Mindes* factors to plaintiffs' claim of race discrimination in duty assignments. *Id.* at 737-38. Since then, the court has applied the test to both statutory and constitutional claims—including, most notably and

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[6] Though the Ninth Circuit explicitly adopted *Mindes* in *Wallace*, it had applied *Mindes* without discussion in one prior decision, *see Schlanger v. United States*, 586 F.2d 667, 671 (9th Cir. 1978), *cert. denied*, 441 U.S. 943 (1979), and affirmed a district court's decision applying *Mindes* in another, *Glines v. Wade*, 586 F.2d 675, 678 n.4 (9th Cir. 1978), *rev'd sub nom. Brown v. Glines*, 444 U.S. 348 (1980).

recently, in petitioners' case. *See, e.g.*, *Khalsa v. Weinberger*, 779 F.2d 1393, 1399-401 (9th Cir. 1985), *as amended* (1986); App. 2a-5a.

2. Five other courts of appeals initially adopted the *Mindes* test, but have since rejected, questioned, and/or limited its application.

The Eighth Circuit adopted *Mindes* shortly after the Tenth Circuit. *See Nieszner v. Mark*, 684 F.2d 562 (8th Cir. 1982). In *Nieszner*, the court of appeals affirmed dismissal under *Mindes* of an age discrimination claim against the Air Force. *Id.* at 563-64. Like the Tenth Circuit, the Eighth Circuit recognized contrary Third Circuit precedent, but aligned itself with the Fifth Circuit because of its belief that *Mindes* "fairly accommodates the[] competing interests" involved in judicial review of military decisions. *Id.* at 565. But the Eighth Circuit's adherence to *Mindes* was short-lived. Seven years later, the Eight Circuit rejected *Mindes*, after concluding that its "complex and unpredictable analysis . . . is not a viable statement of the law." *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1009-10 (8th Cir. 1989). In so holding, the Eighth Circuit noted that this Court "has entertained, on numerous occasions, suits involving facial constitutional challenges to military regulations or statutes." *Id.* at 1010 (collecting cases).

The First Circuit initially adopted *Mindes* too, after noting and rejecting the Third Circuit's different approach. *See Penagaricano v. Llenza*, 747 F.2d 55, 60 (1st Cir. 1984). In *Penagaricano*, the court of appeals applied *Mindes* to bar a service member's claim that he was discharged from the National Guard because of his "political ideas and affiliations." *Id.* at 58. But the First Circuit later concluded that

Mindes did not apply to claims for damages against the military under certain statutes. *Wright v. Park*, 5 F.3d 586, 590-91 (1st Cir. 1993) (overruling *Penagaricano* "to the extent that it mandates a different rule"). The First Circuit has not yet addressed whether *Mindes* continues to apply to claims for injunctive relief. *See, e.g.*, *Hernandez-Ortiz v. Diaz-Colon*, No. 97-1964, 1998 WL 27139, at *1 (1st Cir. Jan. 23, 1998) (per curiam).

The Fourth Circuit followed a similar path. *See Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985). In *Williams*, the court of appeals adopted *Mindes* and dismissed plaintiff's claim at the threshold for failure to exhaust intra-service remedies. *Id.* at 359. But that court too has recently questioned "the continued viability of the *Mindes* test in this circuit," observing that it had "applied [*Mindes*] only once in a published opinion" and that "other circuits have rejected [it] outright." *Aikens v. Ingram*, 811 F.3d 643, 648 n.5 (4th Cir. 2016). The Fourth Circuit has also held that, even if *Mindes* remains good law, it does not apply to allegations of "unconstitutional, ultra vires actions by National Guard officers." *Id.* at 648. Notwithstanding those decisions, the Fourth Circuit still applies *Mindes* in some cases—and did so as recently as this year. *See Roe v. Dep't of Def.*, 947 F.3d 207, 217-18 (4th Cir. 2020) (reviewing challenge to DoD policies regarding HIV-positive service members).

The Eleventh Circuit "adopted" *Mindes* by necessity—since it was binding authority, having been decided before the Fifth Circuit split. But that court of appeals has since recognized that the test "has eroded over time." *Winck v. England*, 327 F.3d 1296, 1303 & n.5 (11th Cir. 2003). And the court has

accordingly limited its application. In the Eleventh Circuit, *Mindes* "no longer applies to statutory claims," *id.* at 1303 n.5 (citing *Doe v. Garrett*, 903 F.2d 1455, 1463 n.15 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991)), or claims "for injuries that arise incident to service in the military, whether for monetary damages or injunctive relief." *Id.* (citing *Speigner v. Alexander*, 248 F.3d 1292, 1295 n.5, 1298 (11th Cir.), *cert. denied*, 534 U.S. 2056 (2001)). And the Eleventh Circuit has made clear that, "[c]onsistent with Supreme Court precedent," its cases "in no way bar[] facial challenges to military regulations." *Speigner*, 248 F.3d at 1298.

Mindes was most recently adopted by the Sixth Circuit. In *Harkness v. Secretary of the Navy*, the court of appeals declined review of an Establishment Clause challenge to a Navy chaplain's non-promotion and duty assignments. 858 F.3d 437, 444 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2648 (2018). But the Sixth Circuit adopted the test for constitutional claims only, and did not express an opinion as to "whether the *Mindes* framework should apply to non-constitutional claims." *Id.* at 444 n.2.

3. Three other courts of appeals have rejected *Mindes* from the outset—as doctrinally incoherent, legally indefensible, and inconsistent with this Court's case law.

As indicated above, the Third Circuit was the first court of appeals expressly to reject *Mindes*. *See Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981). In *Dillard*, the plaintiff challenged a generally applicable military regulation barring enlistment by single parents of minor children (the same regulation at issue in *Lindenau*). *Id.* at 318-19. The government urged the court to apply *Mindes* and conclude that the

claim was unreviewable. The Third Circuit refused. *Mindes*, the court explained, erroneously "intertwines the concept of justiciability with the standards to be applied to the merits of the case." *Id.* at 323.

The Third Circuit further held that *Mindes* could not be squared with this Court's precedents. The court of appeals explained that this Court's decisions in *Gilligan v. Morgan*, 413 U.S. 1 (1973) and *Orloff v. Willoughby*, 345 U.S. 83 (1953), had "established the basic parameters" of reviewability, and that "[o]nce a claim falls within these parameters, a court should review the claim on the merits." *Dillard*, 652 F.2d at 323. "Even if such a constitutional challenge appears weak or frivolous," the court continued, "jurisprudentially that claim should be rejected on the merits, rather than deemed to be non-justiciable by a federal court." *Id.* Applying those "parameters," the Third Circuit held that the plaintiff's "constitutional challenge brought against the military, which does not require a court to run the military, is justiciable." *Id.* at 322.

The D.C. Circuit reached a similar conclusion four years later, in *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989). In *Kreis*, a service member alleged that the Air Force's decision to deny him a promotion violated "principles established by prior" promotion decisions and, in the alternative, was "arbitrary and capricious." *Id.* at 1510 (citation omitted). The service member sought a retroactive promotion or, in the alternative, a correction of his military record. *Id.* at 1512.

Like the Third Circuit, the D.C. Circuit rejected *Mindes* because it "erroneously 'intertwines the concept of justiciability with the standards to be applied to the merits of [the] case.'" *Id.* (alteration in

original) (quoting *Dillard*, 652 F.2d at 323). Instead, the court of appeals applied *Gilligan* and *Orloff* in holding that the plaintiff's alternative claim (for correction of his military record) was justiciable, while his primary claim (for retroactive promotion) was not. *Id.* at 1511. The court explained that the alternative claim would "require the district court merely to evaluate, in light of familiar principles of administrative law, the reasonableness of the Secretary's decision not to take certain corrective action with respect to [plaintiff's] record." *Id.* The request for a retroactive promotion, by contrast, fell "squarely within the realm of nonjusticiable personnel decisions" because it "would require [the court] to second-guess the Secretary's decision about how best to allocate military personnel in order to serve the security needs of the Nation"—a task that was "inherently unsuitable to the judicial branch" and that "Congress has vested in the Secretary alone." *Id.*

The Seventh Circuit rejected *Mindes* for similar reasons in *Knutson* v. *Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993). In *Knutson*, the plaintiff sought reinstatement and money damages following his discharge, which (he alleged) violated his due process rights. *Id.* at 767. The district court held the claim unreviewable under *Mindes*, but the Seventh Circuit sided with the Third and D.C. Circuits and held that *Mindes* "erroneously 'intertwines the concept of justiciability with the standards to be applied to the merits of the case.'" *Id.* at 768 (quoting *Dillard*, 652 F.2d at 323). The Seventh Circuit ultimately denied review, but without first analyzing the nature and strength of the plaintiff's claim or "balancing [the] individual and military interests on each side." *Id.*

B. *Mindes* Conflicts With This Court's Precedents

The courts of appeals have struggled with *Mindes* for more than forty years, so much so that it has earned a moniker (*i.e.*, the "*Mindes* test") normally reserved for decisions of this Court. Yet this Court has never adopted *Mindes*. Indeed, the Court has never cited *Mindes*. And for good reason: the so-called "*Mindes* test" squarely conflicts with this Court's jurisprudence, in two important respects. *First*, *Mindes* erroneously layers a complex and unpredictable "reviewability" analysis on top of this Court's approach for assessing the justiciability of claims against the military. *Second*, it is precisely the sort of "prudential" limitation on judicial review that this Court has condemned as undermining separation-of-powers principles and impermissibly arrogating Congress's authority to decide which cases the federal courts will and will not hear.

1. As the Third, Seventh, and D.C. Circuits correctly recognized, this Court's decisions in *Orloff* and *Gilligan* set forth the "basic parameters" for assessing the justiciability of claims against the military. *Dillard*, 652 F.2d at 323.

In *Orloff*, the Army refused to commission as an officer a doctor who declined to answer certain questions about his prior involvement in "subversive organizations." 345 U.S. at 85-87, 89-91. The doctor filed a habeas petition arguing that the Army must either issue him a commission or discharge him—or, in the alternative, that he should be given a different duty assignment. *Id.* at 85-87. The Court agreed that the doctor was entitled to an assignment "within [the] doctor's field," since he had been inducted pursuant to

the Doctor's Draft Act. *Id.* at 84, 87; *see* 50 U.S.C. App. § 454(i)(1)(A) (1952) (authorizing the induction of doctors under the age of fifty). And while the Court ultimately rejected the doctor's argument that applicable statutes required "all personnel inducted under the Doctor's Draft Act and assigned to the Medical Corps be either commissioned or discharged"—it did so on the merits. *Orloff*, 345 U.S. at 88-89. The Court declined to review only one aspect of the doctor's claim—his specific duty assignment *within* the medical field—and only then because the Court believed it lacked jurisdiction to do so. *Id.* at 93-94 (holding that "it is not within the power of this Court by habeas corpus" to review "specific assignments to duty" or to "revise duty orders as to one lawfully in the service").

Two decades later, and two years after *Mindes* was decided, this Court again considered whether to review a decision involving the military. *Gilligan* involved the May 1970 campus shootings at Kent State University. 413 U.S. at 3. Students filed suit and sought an injunction "to restrain leaders of the [Ohio] National Guard from future violation of [their] constitutional rights." *Id.* The Sixth Circuit reversed the dismissal of plaintiffs' complaint and instructed the district court to determine whether there was "a pattern of training, weaponry and orders in the Ohio National Guard" that led to its use of excessive force in responding to civil unrest. *Id.* at 4 (citation omitted). This Court granted certiorari and reversed. *Id.* at 4, 12.

The Court concluded that the controversy was not justiciable and, in particular, that the requested relief was not available under the Constitution because it was a political question. *Id.* at 11-12. The Court

explained that "the questions to be resolved on remand are subjects committed expressly to the political branches of government." *Id.* at 10. The "relief sought," the Court noted, would require "continuing judicial surveillance" and "essentially professional military judgments" as to the Guard's weaponry and training. *Id.* at 6-7, 10. This would impermissibly intrude on "critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." *Id.* at 7. In so ruling, the Court made clear that "we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel." *Id.* at 11-12.

The Court has also refused to recognize a cause of action for damages "for injuries that 'arise out of or are in the course of activity incident to service.'" *United States v. Stanley*, 483 U.S. 669, 684 (1987) (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)); *see also Chappell v. Wallac*e, 462 U.S. 296, 299 (1983) (refusing to create a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). And, in *Feres*, the Court held that waiver of the United States' sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. § 2674, did not extend to tort claims brought by service members for injuries "incident to service." *Feres*, 340 U.S. at 146.[7] In so doing, this Court did

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[7] Current and former members of this Court have since criticized the so-called *Feres* doctrine. *See Daniel v. United States*, 139 S. Ct. 1713, 1714 (2019) (Thomas, J., dissenting from

not hesitate to exercise its jurisdiction and render these decisions on their merits.

Similarly, this Court has routinely reviewed challenges to military statutes, regulations, and policies. *See, e.g.*, *Weiss v. United States*, 510 U.S. 163, 165 (1994) (Appointments Clause and due process challenge to the military's method of appointing military judges and their indefinite terms of service); *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (Establishment Clause challenge to headgear regulation); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (equal protection challenge to the males-only draft); *Brown v. Glines*, 444 U.S. 348, 361 (1980) (First Amendment challenge to restriction on circulating petitions on military bases); *Parker v. Levy*, 417 U.S. 733, 761-62 (1974) (due process vagueness challenge to certain articles of the Uniform Code of Military Justice); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (equal protection challenge to statutory presumption that spouses of male service members, but not females, were dependents for purposes of allowances and benefits).

The line that emerges from *Gilligan*, *Orloff*, and this Court's other cases is clear: unless a plaintiff's claim presents a nonjusticiable political question, *Gilligan*, 413 U.S. at 6-9, or falls outside a court's jurisdiction, *Orloff*, 345 U.S. at 88-89, it must be reviewed. The claim may ultimately fail on its merits if it asks this Court to create a cause of action that Congress has not authorized, *Stanley*, 483 U.S. at 684, meets with an assertion of sovereign immunity, *Feres*, 340 U.S. at 146, or otherwise is barred by

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denial of certiorari); *United States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting).

statute or the Constitution. But this Court has never applied a judge-made, multifactor balancing test to determine whether claims challenging broadly applicable military policies that fall squarely within the jurisdiction of the federal courts are subject to review.

2. Indeed, this Court has repeatedly disapproved of judge-made "prudential" limitations on what claims courts will and will not hear.

Lexmark International, Inc. v. Static Control Components, Inc., 572 U.S. 118, 122-23 (2014), is a recent example. *Lexmark* was a Lanham Act false-advertising claim where the parties disputed whether the plaintiff had "prudential standing." *Id.* at 125. This Court firmly rejected that characterization of the issue. It was undisputed, the Court noted, that the plaintiff had Article III standing. *Id.* To nevertheless dismiss the claim on "prudential standing" grounds would be "in some tension with [the Court's] recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging."'" *Id.* at 126 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)). The proper inquiry was instead one of statutory interpretation—*i.e.*, "whether [the plaintiff] falls within the class of plaintiffs whom Congress has authorized to sue under [the statute]." *Id.* at 128. In conducting that inquiry, the Court cautioned that "[w]e do not ask whether in our judgment Congress *should* have authorized [the plaintiff's] suit, but whether Congress in fact did so." *Id.* As this Court explained, courts simply do not have the power to "limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.*

The Court made a similar point regarding so-called "prudential ripeness" a few months later, in *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (citation omitted). In that case, too, there was no question that plaintiffs had satisfied Article III. *Id.* at 161. In addressing an argument that "'prudential ripeness' factors" demonstrated "that the claims at issue are nonjusticiable," *id.* at 167 (citation omitted), the Court noted that the request "is in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging,'" *id.* (quoting *Lexmark*, 572 U.S. at 126). Ultimately, however, the Court declined to "resolve the continuing vitality of the prudential ripeness doctrine," because its requirements were "easily satisfied" there. *Id.*

These cases confirm what is implicit in this Court's consistent practice of reviewing military policies without reference to "prudential" concerns: doctrines that limit judicial review on the basis of such considerations—identified not by Congress, but by the courts themselves—are highly disfavored.

3. *Mindes* departs from the "parameters" set forth in *Orloff* and *Gilligan*, and erects judge-made, prudential barriers to justiciability—directly contrary to this Court's teachings.

Unlike *Orloff*, *Mindes* is not a rule of subject-matter jurisdiction. *Khalsa*, 779 F.2d at 1395-96. Unlike *Gilligan*, it is not grounded in the political question doctrine or other jurisdictional/separation-of-powers concerns. Nor does it spring from any statutory or other constitutional limitation on the scope of judicial review. *Mindes* described its test as "a judicial policy akin to comity." 453 F.2d at 199. It is "a prudential judgment that the military's decision

should not be reviewed in a judicial forum." *Khalsa*, 779 F.2d at 1395-96. And as several courts of appeals have held, it conflates "the concept of justiciability with the standards to be applied to the merits of the case." *Dillard*, 652 F.2d at 323; *Knutson*, 995 F.2d at 768*; Kreis*, 866 F.2d at 1512.

The tension between the *Mindes* test and this Court's cases is particularly stark in the context of the statutory cause of action provided under the APA. Congress has specifically authorized APA review of actions taken by the military in the territorial United States during peacetime. *See* 5 U.S.C. § 701(b)(1)(G) (authorizing review over actions taken by "*each* authority of the Government of the United States" except, among other authorities, "military authority exercised in the field in time of war or in occupied territory" (emphasis added)). As this Court explained in *Lexmark*, courts simply do not have the power to "limit a cause of action that Congress has created merely because 'prudence' dictates." 572 U.S. at 128. *Mindes* encourages courts to do exactly what this Court's teachings forbid.

C. This Case Presents An Ideal Vehicle

The Ninth Circuit's application of *Mindes* to deny judicial review in this case demonstrates that the conflict among the courts of appeals is alive and (un)well. Application of *Mindes* was dispositive here. And there is no other hindrance to this Court's review.

There can be no serious dispute that petitioners' claims would have been reviewed on their merits *but for* application of the *Mindes* test. If this case had been brought in the Third, Seventh, Eighth, or D.C. Circuit, justiciability easily would have been established under the "parameters" set forth in this

Court's decisions.[8] The court of appeals clearly had jurisdiction to review (unlike the habeas claim in *Orloff*), and this case does not present a political question (unlike the relief requested in *Gilligan*). As the district court explained, petitioners' APA claim does not ask the judicial branch to "run the military" (*Dillard*, 652 F.2d at 322)—or direct DoD to "ignore the national security concerns that gave rise to the October 13 Memo." App. 35a (citation omitted). On the contrary, it asks only that the unlawful policy be rescinded, leaving DoD free to "adopt a policy that is justified by its purported concerns." *Id*.

Nor does the ESP counsel against this Court's review. The ESP only holds the October 13 Policy "in abeyance" pending further review; it does not get rid of the October 13 Policy, nor does it promise to make a final decision by any specific date. App. 109a. If, after that review, DoD ultimately adopts the ESP on a permanent basis and rescinds the October 13 Policy, then this petition should be dismissed. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950). But DoD has not done that yet. The initial six-month review period was supposed to expire on January 30, 2020 (*i.e.*, on the day this petition was initially due), but DoD extended the review time for approximately three additional months. CA9 ECF No. 130; *see also* CA9 ECF No. 131. Based on the results of DoD's review, the October 13 Policy may be "held in abeyance for an additional period" or even "reinstated." App. 109a. The *Mindes* issue is

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[8] Review also would have been available had this case been brought in the Eleventh Circuit, which does not apply *Mindes* to statutory claims, and perhaps in the Sixth Circuit, which thus far has adopted *Mindes* only for constitutional claims.

dispositive and critically important, and the government should not be permitted to hold out the possibility of (much needed and welcome) relief as a reason to deny review.

II. DoD's Irrational, Facially Discriminatory Accession Policy Is Reviewable

Petitioners challenged DoD's October 13 Policy under both the Constitution and the APA, alleging that it facially discriminates against an entire class of persons: LPR enlistees.[9] Petitioners' challenge does not fall within any of the categories of cases that this Court has held to be nonjusticiable or otherwise outside the jurisdiction of the federal courts. Petitioners did not ask the court to review "particular duty orders" as to individual service members. *Orloff*, 345 U.S. at 88. They did not seek money damages for injuries suffered "incident to [military] service." *Stanley*, 483 U.S. at 684 (quoting *Feres*, 340 U.S. at 146). Nor did they ask the district court to "run the military," *Dillard*, 652 F.2d at 322, or otherwise present the court with a nonjusticiable political question, *Gilligan*, 413 U.S. at 6-9. There were no defensible grounds on which the Ninth Circuit could have abstained from judicial review.

1. Petitioners brought a facial challenge to a generally applicable policy that affects LPR enlistees on a class-wide basis. This Court has long

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[9] Petitioners sought injunctive relief only on the basis of their APA claim, but DoD moved to dismiss petitioners' complaint in its entirety and the district court denied that motion. App. 17a-18. DoD has since moved in the district court for reconsideration of that order in light of the Ninth Circuit's decision. N.D. Cal. ECF No. 126.

entertained such challenges, reviewing military policies involving gender discrimination,[10] religious discrimination,[11] race discrimination,[12] and the freedom of speech.[13] Claims like these are within the power and expertise of the courts to address—and remedy when warranted. *See Serv. Women's Action Network v. Mattis*, 320 F. Supp. 3d 1082, 1097 (N.D. Cal. 2018) (noting that, in both this Court and the lower courts, "scrutiny of discrimination by the military is not uncommon").

Petitioners' claims fall comfortably within this venerable tradition of judicial review. Petitioners challenged the October 13 Policy under the Constitution and the APA because it represents arbitrary, class-wide discrimination on the basis of alienage. For example, under the October 13 Policy, an LPR brought to the United States as a child, with no subsequent foreign ties, would be subject to an average accession delay of 350 days. App. 32a. At the same time, a U.S. citizen with significant foreign ties or other foreign influence risk factors (*i.e.*, foreign residence, travel, relatives, property, or investments) would access into the military immediately. *See* App. 15a. This is so even though LPRs, unlike U.S. citizens, are required to undergo a thorough background investigation just to obtain LPR status in

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[10] *E.g.*, *United States v. Virginia*, 518 U.S. 515, 520 (1996); *Rostker*, 453 U.S. at 67; *Schlesinger v. Ballard*, 419 U.S. 498, 521 (1975); *Frontiero*, 411 U.S. at 690-91.

[11] *E.g.*, *Goldman*, 475 U.S. at 509-10.

[12] *E.g.*, *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944).

[13] *E.g.*, *Brown*, 444 U.S. at 361.

the first place. *See* 8 U.S.C. § 1446. DoD has offered no persuasive explanation for this illogical result.

And yet, the Ninth Circuit upheld the October 13 Policy. Applying the *Mindes* test, the Ninth Circuit looked to the administrative record produced by Defendants and found two "factual underpinnings" for the October 13 Policy. App. 4a-5a. But those "factual underpinnings" provide no support for the October 13 Policy's class-wide discrimination on the basis of alienage—a fact that the Ninth Circuit might have discovered had it proceeded to a full merits review, rather than the abbreviated review for which *Mindes* calls.

First, the Ninth Circuit found that certain guidelines for conducting background checks—in effect since 1997 and applicable to the national security screening of *all* enlistees—were sufficient to justify the October 13 Policy. App. 4a; *see also* App. 14a-15a. But if anything, these guidelines support the opposite conclusion. Indeed, they emphasize that "[e]ach case must be judged on its own merits" because "*[b]y itself*, the fact that a U.S. citizen is also a citizen of another country is not disqualifying." ER105, 109. These guidelines were also implemented more than 20 years before the October 13 Policy was adopted—and during a period of time when DoD permitted LPRs and U.S. citizens to access in the same manner. The Ninth Circuit provides no explanation as to how guidelines that pre-dated the October 13 Policy can now be invoked as the "factual underpinning" for a new practice of discriminating against LPRs.

Second, the Ninth Circuit cited the summary of a 2017 study, which simply identified flaws in the *military's* process for adjudicating LPRs' background

screenings. App. 4a-5a. These "process" defects had no bearing on the military's decades-old practice of allowing LPRs to begin basic training pending completion of their background checks. *See* App. 78a-81a. Nor does the record reveal DoD's consideration of alternative means for addressing their own internal processing failures—for example, properly collecting and sharing information about LPRs. These are factors that should have defeated the October 13 Policy at the merits phase. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (noting that, "[a]t the very least [an obvious] alternative way of achieving the objectives of the [agency's action] should have been addressed"). But because *Mindes* authorizes an abbreviated merits analysis as part of its reviewability inquiry, the Ninth Circuit never made it to that phase.

Petitioners' APA challenge is particularly well suited to judicial review. As the D.C. Circuit has recognized, courts are more than capable of evaluating the "reasonableness of the [military's] decision," especially where an administrative record is available. *Kreis*, 866 F.2d at 1511. Here, petitioners' APA claim asserts only that DoD must provide rational explanations for its decisions, which must in turn be substantiated by a sufficient administrative record. *State Farm*, 463 U.S. at 43-44. This is black-letter APA law. There is nothing novel or problematic about applying this "familiar principles of administrative law" to the military. *Kreis*, 866 F.2d at 1511.

2. Nor does petitioners' requested remedy—rescission of the arbitrary and discriminatory October 13 Policy—amount to a "broad call on judicial power to assume continuing regulatory jurisdiction over

[military] activities." *Gilligan*, 413 U.S. at 5. Petitioners' requested relief would not interfere with military functions at all.

Petitioners never asked the district court to order the adoption of a particular accession policy. Rather, they asked the court to police the boundaries of the military's discretion in this area—which, broad though it may be, does not extend to irrational and invidious discrimination against LPRs. Thus, as the district court correctly recognized, petitioners' requested relief "will not mean that DoD must 'ignore the national security concerns that gave rise to the October 13 Memo,'" as DoD argued below; "[r]ather, DoD will have to adopt a policy that is justified by its purported concerns." App. 35a (citation omitted).

Indeed, as DoD's new ESP demonstrates, the degree of actual interference with military functions occasioned by the district court's order is nil. DoD has provisionally adopted a new policy that reviews all enlistees—LPRs and U.S. citizens alike—individually for foreign contacts and national security risk. As the district court emphasized, its preliminary injunction allows DoD to address its purported concerns in any manner that it wishes—so long as its policy complies with the APA, the Constitution, and any other applicable law. App. 34a-36a.

That is not to say that a court owes no deference to the military's assessment of national security concerns. Those concerns might well be appropriate for courts to consider in evaluating the *merits* of a constitutional or statutory challenge to military action, and this Court has often done precisely that. *See, e.g.*, *Brown*, 444 U.S. at 354; *Rostker*, 453 U.S. at 67. But the military's sweeping, talismanic assertion

of "national security" cannot defeat a court's power to hear and decide an otherwise justiciable claim.

* * *

Petitioners' claims clear every jurisdictional, justiciability, and remedial hurdle that can be found in this Court's precedents. Nevertheless, under the ill-defined, multifactor balancing test set forth in *Mindes*, the Ninth Circuit held that petitioners were not even entitled to have their claims heard. The same reasoning would allow the military to defeat *any* claim of open and notorious discrimination—for example, on the basis of race—without ever having to substantiate their alleged national security concerns. *Mindes* permits such an outcome because it allows the reviewing court to truncate its analysis of the military's stated justification, and on that basis find claims against the military "non-reviewable." This Court's jurisprudence teaches otherwise, and requires that courts exercise their duty to review military policies of broad application on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 30, 2020

APPENDIX

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

NOT FOR PUBLICATION

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*

778 F. App'x 418

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

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.

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

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

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]."

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[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.").

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). 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

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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.

identified by the DNI Guidelines and the 2017 DOD study.

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.

JIAHAO KUANG, et al., Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et al., Defendants.

Case No. 18-cv-03698-JST

United States District Court,
N.D. California.

Signed 11/16/2018

340 F. Supp. 3d 873

ORDER GRANTING CLASS CERTIFICATION, DENYING MOTION TO DISMISS, AND GRANTING PRELIMINARY INJUNCTION

Re: ECF Nos. 21, 31, 42, 44

JON S. TIGAR, United States District Judge

Before the Court are (1) Plaintiffs Jiahao Kuang and Deron Cooke's unopposed motion for class certification, ECF No. 31; (2) Plaintiffs' motion for a preliminary injunction, ECF No. 21; and (3) Defendants U.S. Department of Defense ("DoD") and Secretary of Defense James Mattis's motion to dismiss, ECF No. 42. The Court will grant the motion for class certification, deny the motion to dismiss, and grant the motion for preliminary injunction.

I. BACKGROUND

A. Factual Background[1]

In October 2007, an eight-year-old Jiahao Kuang moved with his father from China to the United

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[1] Given the cross-motions for preliminary injunction and to dismiss, as well as the production of the administrative record, the Court sets forth the facts and background of this litigation

States. ECF No. 24 ¶ 2. Kuang entered the United States on a CR2 visa, which is issued to children of a foreign spouse who is married or soon to be married to a U.S. citizen. *Id.* A month later, Kuang obtained his green card pursuant to his father's marriage. *Id.* ¶ 3. Since then, Kuang has resided with his family in San Leandro, California, as a lawful permanent resident ("LPR") of the United States. *Id.* ¶¶ 3-4.

On July 18, 2017, during the summer before his senior year of high school, Kuang enlisted in the U.S. Navy for a four-year term of active service, followed by a four-year term of reserve duty. ECF No. 24-1 at 2. Kuang enlisted in the military because of desire to serve his country. ECF No. 24 ¶ 11. In addition, Kuang was motivated by the promise of financial assistance with his future college education and the understanding that he would be eligible to naturalize (i.e. become a U.S. citizen) once he entered basic training. *Id.* ¶¶ 8, 12.[2] Relying on these representations, Kuang renewed his green card rather than applying to become a citizen through the much lengthier civilian process. *Id.* ¶ 8.

Kuang's enlistment contract provided that he would be eligible to "ship out," or enter active service,

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using record evidence. But in deciding the motion to dismiss, the Court relies only on the Complaint and other materials properly considered in that context.

[2] 8 U.S.C. § 1439(a) provides that "[a] person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating one year . . . may be naturalized" without meeting certain conditions. During designated periods of hostilities, there is no length-of-service requirement. *See id.* § 1440(a). The United States has been in a designated period of hostilities since the September 11, 2001 attacks. *See* ECF No. 57 at 149.

on July 5, 2018. ECF No. 24 ¶ 9; ECF No. 24-1 at 5. Kuang was placed in a Delayed Entry Program ("DEP") in the interim and attended monthly DEP meetings. ECF No. 24 ¶ 10.

At the age of twenty-two, Deron Cooke successfully applied for a green card based on his father's U.S. citizenship. ECF No. 25 ¶ 2. In July 2015, Cooke emigrated from Jamaica to the United States; he has maintained LPR status since then. *Id.* Cooke lives with his wife, who is a U.S. citizen, in Trenton, New Jersey. *Id.* ¶ 4.

On August 3, 2017, Cooke enlisted in the U.S. Air Force for a four-year term of active service, followed by a four-year term of reserve duty. ECF No. 25 ¶ 7; ECF No. 25-1 at 2. Cooke enlisted in order to give back to the United States, develop his career skills, and carry on his family's tradition of service in the military and law enforcement. ECF No. 25 ¶ 9. Upon enlisting, Cooke was also informed that he would be eligible for an expedited naturalization process through the military. *Id.* ¶ 10.

Two weeks later, Cooke entered into an employment contract with the Air Force for an auto mechanic position, with a scheduled ship-out date of November 15, 2017. ECF No. 25 ¶ 8; ECF No. 25-2. Cooke was also placed in a DEP and began attending biweekly drills. ECF No. 25 ¶ 11.

B. Lawful Permanent Residents

In order to become LPRs, Kuang and Cooke had to undergo an application and screening process. As part of this process, LPR applicants must provide detailed information regarding their background (such as employment history and prior addresses), provide fingerprints, photos, and a signature, as well as

participate in an in-person interview. *See, e.g., I-485, Application to Register Permanent Residence or Adjust Status*, U.S. Citizenship and Immigration Servs. (Apr. 11, 2018), https://www.uscis.gov/i-485; *Green Card*, U.S. Citizenship and Immigration Servs. (Feb. 22, 2018), https://www.uscis.gov/greencard; *Fact Sheet: Immigration Security Checks—How and Why the Process Works*, U.S. Dep't of Homeland Security (Apr. 25, 2006), https://www.uscis.gov/sites/default/files/files/pressrelease/security_checks_42506.pdf at 1-2 [hereinafter "*Fact Sheet* "].[3] The Department of Homeland Security ("DHS") conducts an interagency background check for every applicants, as well as FBI fingerprint and name checks for many of those applicants, which reveal foreign criminal history. *See Fact Sheet* at 2.

LPR applicants may be denied for a multitude of reasons, including criminal history and security risk grounds. *See* 8 U.S.C. § 1182(a)(2), (3).

C. Military Enlistment and Accession Process

Kuang and Cooke are far from the only LPRs to enlist in the U.S. military. Approximately 5,000 LPRs do so every year. ECF No. 22-1 at 4. The process by which LPRs are enlisted and shipped into active military service ("accession") is governed by various statutory, regulatory, and DoD policy requirements. Because these requirements are at the heart of this dispute, the Court reviews them in some detail here.

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[3] The Court takes judicial notice of these publicly available government documents, whose authenticity or accuracy is not disputed. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

First, Congress has enacted certain statutory requirements governing who may enlist in the military. *See* 10 U.S.C. § 504. "No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force," except that the relevant Secretary may authorize a meritorious exception for a deserter or convicted felon. *Id.* § 504(a).

Second, and most relevant here, Congress has established citizenship or residency requirements for military service. In general, "[a] person may be enlisted in any armed force only if the person is one of the following:" (1) "[a] national of the United States"; (2) "[a]n alien who is lawfully admitted for permanent residence"; or (3) "[a] person described in [the Department of Defense State Partnership Program, 10 U.S.C. § 341]" of compacts between the United States and the Federated States of Micronesia, the Republic of the Marshall Islands, and Palau. *Id.* § 504(b)(1).[4]

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[4] Section 504(b)(1) provides in full:

(b) Citizenship or residency. – (1) A person may be enlisted in any armed force only if the person is one of the following:

(A) A national of the United States, as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(B) An alien who is lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).

(C) A person described in section 341 of one of the following compacts:

(i) The Compact of Free Association between the Federated States of Micronesia and the United States (section 201(a) of Public Law 108-188 (117 Stat. 2784; 48 U.S.C. 1921 note)).

Congress also provided for individualized exceptions to these citizenship requirements. Section 504(b)(2) permits the relevant Secretary to authorize the enlistment of someone who does not fall into any of the categories of section 504(b)(1), if the Secretary determines that the "person possesses a critical skill or expertise – (A) that is vital to the national interest; and (B) that the person will use in the primary daily duties of that person as a member of the armed forces." Recruits enlisted under section 504(b)(2) are subject to additional procedures prior to entering active service, however. A person enlisted under section 504(b)(2) may not "report to initial training until after the Secretary concerned has completed all required background investigations and security and suitability screening as determined by the Secretary of Defense regarding that person." 10 U.S.C. § 504(b)(3)(A).[5] These applications were processed

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(ii) The Compact of Free Association between the Republic of the Marshall Islands and the United States (section 201(b) of Public Law 108-188 (117 Stat. 2823; 48 U.S.C. 1921 note)).

(iii) The Compact of Free Association between Palau and the United States (section 201 of Public Law 99-658 (100 Stat. 3678; 48 U.S.C. 1931 note)).

[5] Sections 504(b)(2) and (b)(3) provide in full:

(2) Notwithstanding paragraph (1), and subject to paragraph (3), the Secretary concerned may authorize the enlistment of a person not described in paragraph (1) if the Secretary determines that such person possesses a critical skill or expertise–

(A) that is vital to the national interest; and

(B) that the person will use in the primary daily duties of that person as a member of the armed forces.

(3)(A) No person who enlists under paragraph (2) may report to initial training until after the Secretary concerned has

pursuant to the Military Accessions Vital to the National Interest ("MAVNI") pilot program. *See generally*, *Kirwa v. U.S. Dep't of Def.*, 285 F.Supp.3d 257, 263 (D.D.C. 2018); ECF No. 57 at 146-48.

DoD has promulgated additional regulations governing the accessions process, including "standards for age, aptitude, citizenship, dependents, education, medical, character/conduct, physical fitness, and other disqualifying conditions, which are cause for non-qualification for military service." 32 C.F.R. § 66.1(b). Per DoD's regulations, its policy is to "[u]se common entrance qualification standards for enlistment, appointment, and induction into the Military Services," "[a]void inconsistencies and inequities based on ethnicity, gender, race, religion, or sexual orientation in the application of these standards by the Military Services," and "[j]udge the suitability of individuals to serve in the Military Services on the basis of their adaptability, potential to perform, and conduct." *Id.* § 66.4.

Concerning citizenship, DoD regulations incorporate the requirements of § 504(b). *See* § 66.6(b)(2)(i). DoD additionally requires that a

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completed all required background investigations and security and suitability screening as determined by the Secretary of Defense regarding that person.

(B) A Secretary concerned may not authorize more than 1,000 enlistments under paragraph (2) per military department in a calendar year until after—

(i) the Secretary of Defense submits to Congress written notice of the intent of that Secretary concerned to authorize more than 1,000 such enlistments in a calendar year; and

(ii) a period of 30 days has elapsed after the date on which Congress receives the notice.

service member be a U.S. citizen "[t]o be eligible for appointment as a commissioned officer," although the requirement may be waived on an individual basis, "but only for an original appointment in a grade below the grade of major or lieutenant commander." *Id.* § 66.6(b)(2)(ii).

DoD regulations also seek "to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline." *Id.* § 66.6(b)(8). Consistent with this goal, the regulations disqualify applicants with certain criminal records, prior dishonorable conduct in military service, or who have "exhibited antisocial behavior or other traits of character that may render the applicant unfit for service." *Id.* § 66.6(b)(i)-(v).

Moreover, DoD generally deems ineligible an applicant who "[r]eceives an unfavorable final determination by the DoD Consolidated Adjudication Facility on a completed National Agency Check with Law and Credit (NACLC) or higher-level investigation, which is adjudicated to the National Security Standards in accordance with Executive Order 12968, during the accession process." *Id.* § 66.6(b)(vi). Notwithstanding this background investigation requirement, DoD permits – but does not require – that:

> An applicant may be accessed (including shipping him or her to training or a first duty assignment) provided that a NACLC or higher-level investigation was submitted and accepted by the investigative service provider (Office of Personnel Management (OPM)) and an advanced fingerprint was conducted, and OPM

> did not identify any disqualifying background information.

Id. § 66.6(b)(vi)(A).

In addition to these regulations, DoD has issued further guidance regarding investigations for accessing service members. DoD Manual 5200.02, *Procedures for the DoD Personnel Security Program*, explains that "[t]he appointment, enlistment, and induction of each member of [the military] will be based on a favorably adjudicated PSI ['personnel security investigation']." ECF No. 57 at 74 § 4.2(a). In turn, the manual provides that "[t]he NACLC, or its equivalent, is the minimum investigation required for entry into the Military Departments." ECF No. 57 at 74. Currently, the government employs a "Tier 3" investigation (out of a five-tier scale of intensity) as the equivalent of the NACLC. *See* ECF No. 22-5 at 1-2; ECF No. 57 at 95 § 7.6(b)(2).

Based on the results of this investigation, DoD renders a Military Service Suitability Determination ("MSSD") and National Security Determination ("NSD"). ECF No. 42 at 22-23; ECF No. 57 at 1-2. To determine the applicant's "national security eligibility," DoD uses uniform adjudicative guidelines issued by the Director of National Intelligence ("DNI"). ECF No. 57 at 94 § 7.4. A favorable NSD does not authorize the applicant for access to classified information.[6] The current DNI Guidelines

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[6] "National security eligibility determinations are a function distinct from granting access to classified national security information." ECF No. 57 at 93 § 7.1(a)(1). Indeed, "[o]nly U.S. citizens are eligible for access to classified information," unless approved through a separate, limited program. *Id.* at 89 § 6.1.

articulate thirteen categories of criteria that must be considered in determining the security risk posed by an individual. *Id.* at 33. Among those are information relevant to the individual's allegiance to the United States, susceptibility to foreign influence, and preference for foreign nations over the United States. *Id.* at 35-38. (For convenience, the Court refers to the entire process of the Tier 3 investigation and resulting MSSD and NSD as the "background investigation" throughout the remainder of this Order.)

At the time Kuang and Cooke enlisted, DoD's policy "allow[ed] for LPR recruits to ship to initial military training as long as their background investigation had been initiated, and they had cleared all other entry screening requirements." *DoD Announces Policy Changes to Lawful Permanent Residents and the Military Accessions Vital to the National Interest (MAVNI) Pilot Program*, U.S. Dep't of Def. (Oct. 13, 2017), https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1342317/dod-announces-policy-changes-to-lawful-permanent-residents-and-the-military-acc/. U.S. citizens were likewise able to begin basic training while their background investigations were in progress. ECF No. 23 ¶¶ 14-15.

On October 13, 2017, DoD Under Secretary of Defense for Personnel and Readiness A.M. Kurta issued a memo implementing a new policy for background investigations for LPRs ("October 13 Memo"). ECF No. 57 at 5-6. The October 13 Memo explained that "[i]n order to facilitate process efficiency and the appropriate sharing of information for security risk based suitability and security decisions for [LPRs]," DoD would require a completed

background investigation before an LPR could enter "Active, Reserve or Guard Service." ECF No. 57 at 5.

D. Subsequent Events

The October 13 Memo's policy change prevented Kuang and Cooke from entering active service on their projected ship-out dates. ECF No. 24 ¶ 14; ECF No. 25 ¶ 13.

In May 2018, a recruiter informed Kuang that his ship-out date had been delayed until January 17, 2019. ECF No. 24 ¶ 14. In the interim, Kuang was informed that his career track designation had been switched from personnel specialist to one that does not receive a "designated position or career path and [is] usually assigned manual labor responsibilities," *id.* ¶ 15, despite Kuang's experience with computers, *id.* ¶ 5. In anticipation of entering active service, Kuang did not apply to college, and continues to be hampered in his pursuit of interim employment and education due to uncertainty regarding when he will be permitted to enter the military. *Id.* ¶¶ 18-22.

Unaware of the October 13 Memo, Cooke resigned from his job on October 27, 2017, in preparation for his November 15 ship-out date. ECF No. 25 ¶ 12. Although he was able to reclaim that job when informed of DoD's new policy, his ability to further his civilian career or take advantage of his employer's education benefits is hampered by his looming military service. *Id.* ¶ 16. A recruiter has also informed Cooke that the auto mechanic position for which he originally enlisted may no longer be available when he is ultimately able to enter active service. *Id.* ¶ 18.

To date, neither Kuang nor Cooke has received notification from DoD of a completed background investigation.

E. Procedural History

On June 21, 2018, Kuang and Cooke ("Plaintiffs") filed this putative class action lawsuit on behalf of all similarly situated LPRs. *See* ECF No. 1 ("Compl."). Plaintiffs raised four claims. First, Plaintiffs alleged that the October 13 Memo violated their equal protection rights by unjustifiably discriminating against LPRs. *Id.* ¶¶ 88-94. Second, Plaintiffs alleged that the memo violated their substantive due process rights to pursue their chosen profession of military service. *Id.* ¶¶ 95-101. Third, Plaintiffs asserted that DoD had unlawfully withheld or unreasonably delayed their entrance into military service, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1). Compl. ¶¶ 102-108. Finally, Plaintiffs raised another APA claim under 5 U.S.C. § 706(2), contending that the October 13 Memo exceeded DoD's lawful authority and was otherwise arbitrary and capricious. Compl. ¶¶ 109-119. Plaintiffs requested declaratory and injunctive relief on these claims. *Id.* ¶¶ 120-121.

On July 19, 2018, Plaintiffs filed a motion for a preliminary injunction, solely on the basis of their 5 U.S.C. § 706(2) claim. ECF No. 21 at 9 n.9. Plaintiffs subsequently filed a motion to certify a class of similarly situated LPRs. ECF No. 31. When DoD expressed its intent to file a motion to dismiss, the Court approved a consolidated briefing schedule on the motion to dismiss and the preliminary injunction. ECF No. 36. DoD later filed a notice of non-opposition to class certification, in which the parties agreed to

slight modifications in the class definition. *See* ECF No. 40-1.

On September 6, 2018, DoD filed its motion to dismiss. ECF No. 42. After briefing on the preliminary injunction and motion to dismiss were complete, DoD produced the administrative record on October 19, 2018, pursuant to Court order. ECF No. 57. The Court permitted the parties to file supplemental briefs regarding any relevant information in the administrative record. ECF Nos. 64, 65.

II. MOTION FOR CLASS CERTIFICATION

The Court first considers Plaintiffs' unopposed motion for class certification. ECF No. 31.

A. Legal Standard

Class certification under Rule 23 is a two-step process. First, a plaintiff must demonstrate that the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a) are met.

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*,

564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)).

Second, a plaintiff must also establish that one of the bases for certification in Rule 23(b) is met. Here, Plaintiffs invoke Rule 23(b)(1)(A) and (b)(2). ECF No. 31 at 15. DoD does not oppose the motion. ECF No. 40-1. A plaintiff invoking Rule 23(b)(1)(A) must establish that prosecuting separate actions would create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." A plaintiff invoking Rule 23(b)(2) must establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The party seeking class certification bears the burden of demonstrating by a preponderance of the evidence that all four requirements of Rule 23(a) and at least one of the three requirements under Rule 23(b) are met. *See Dukes*, 564 U.S. at 350-51, 131 S.Ct. 2541.

B. Discussion

As modified, Plaintiffs' proposed class consists of:

> [A]ll persons who (i) are lawful permanent residents of the United States; (ii) have signed an enlistment contract with the U.S. military; and (iii) pursuant to Defendants' October 13 memo, have not been permitted to begin initial entry training, commonly referred to as "boot camp," pending completion of their MSSDs and NSDs.

ECF No. 40-1 at 2 (footnote omitted).

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." The record indicates that roughly 5,000 LPRs enlist each year. ECF No. 22-1 at 4. Plaintiffs estimate, and DoD does not dispute, that an estimated 3,500 of those LPRs fell within the class definition as of August 1, 2018. ECF No. 31 at 11.

The Court therefore concludes that this requirement is met.

2. Commonality

A Rule 23 class is certifiable only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). For the purposes of Rule 23(a)(2), "even a single common question" is sufficient. *Wal-Mart*, 564 U.S. at 359, 131 S.Ct. 2541 (citation and internal alterations omitted). The common contention, however, "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350, 131 S.Ct. 2541. "What matters to class certification . . . is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (alteration in original) (citation omitted).

Here, Plaintiffs' claims are primarily facial challenges to the validity of DoD's policy, which applies equally on a classwide basis. Whether DoD's policy is valid, and the scope of Plaintiffs' entitlement to relief, if any, are questions eminently capable of classwide resolution. *See Garcia v. Johnson*, No. 14-

CV-01775-YGR, 2014 WL 6657591, at *14 (N.D. Cal. Nov. 21, 2014).

Accordingly, the Court holds this requirement is met.

3. Typicality

In certifying a class, courts must find that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' " *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

The Court finds that proposed class representatives Jiahao Kuang and Deron Cooke are typical of the class they seek to represent. As discussed above, this action is based on a single course of conduct, i.e. DoD's adoption of the October 13 Memo. Moreover, as a result of this conduct, named Plaintiffs and putative class members have all suffered, and continue to suffer, the same general injury in the form of delayed shipment to basic training. *See Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

4. Adequacy

The Court must also find that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In considering the adequacy of the proposed class representatives, the Court addresses two questions: "(a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000). This requirement " 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Among other functions, these requirements serve as ways to determine "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157 n.13, 102 S.Ct. 2364.

Here, named Plaintiffs have a similar alleged injury as the rest of the proposed class, and their claims are not based on any conduct that is unique to them. There are no apparent conflicts between named Plaintiffs, their counsel, and the proposed class, nor is there any reason to believe that they will not prosecute the action vigorously or adequately protect the absent class members' interests. *See id.*

Therefore, the Court finds that Plaintiffs have established that this requirement is satisfied.

5. Rule 23(b)

In addition to meeting the four requirements of 23(a), the proposed class must satisfy one of the Rule 23(b) requirements.

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." *Wal–Mart*, 564 U.S. at 360, 131 S.Ct. 2541. "These requirements are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons*, 754 F.3d at 688 (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2011)). "That inquiry does not require an examination of the viability or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that all members of the class have suffered identical injuries." *Id.* "The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez*, 591 F.3d at 1125.

Here, Plaintiffs seek unitary declaratory and injunctive relief related to the October 13 Memo.

Compl. ¶¶ 120-121. The Court finds that this relief, if granted, would be appropriate to the class as a whole. Therefore, this requirement is met. *See Parsons*, 754 F.3d at 688.

Because the Court finds that the class is appropriately certified under Rule 23(b)(2), it need not address the requirements of Rule 23(b)(1)(A). *See Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, No. 14-CV-05596-JST, 2015 WL 5569462, at *3 (N.D. Cal. Sept. 22, 2015).

6. Appointment of Class Counsel

Plaintiffs also seek appointment of their attorneys as class counsel. ECF No. 31 at 17-18.

Under Rule 23(g), which governs the appointment of class counsel, the Court must consider: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action"; (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing this class." Fed. R. Civ. P. 23(g)(1)(A). In addition, the Court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

The Court concludes that Plaintiffs' counsel should be appointed class counsel. Counsel have substantial experience in class actions and other complex civil litigation. *See* ECF No. 32 ¶¶ 3, 5-6; ECF No. 33 ¶¶ 3-6, 8-9, 11-12. Counsel have vigorously prosecuted this case thus far, *see* ECF No. 32 ¶ 9; ECF No. 33 ¶ 14, and there is no evidence before the Court that they will not continue to do so.

Nor is there any evidence that counsel has interests with conflict those of the class. *See Marsh v. First Bank of Delaware*, No. 11-cv-05226-WHO, 2014 WL 554553, at *15 (N.D. Cal. Feb. 7, 2014). Accordingly, the Court concludes that the Rule 23(g) factors are met.

7. Conclusion

For the foregoing reasons, the Court hereby certifies a class defined as follows:

All persons who

(i) are lawful permanent residents of the United States;

(ii) have signed an enlistment contract with the U.S. military; and

(iii) pursuant to Defendants' October 13 memo, have not been permitted to begin initial entry training, commonly referred to as "boot camp," pending completion of their MSSDs and NSDs.

Plaintiffs Jiahao Kuang and Deron Cooke are appointed Class Representatives.

Plaintiffs' counsel, Latham & Watkins LLP, the American Civil Liberties Union of Southern California, and the American Civil Liberties Union of Northern California, are appointed Class Counsel.

III. MOTION TO DISMISS

The Court next considers DoD's motion to dismiss. ECF No. 42.

A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." While a complaint need not contain detailed factual allegations, facts pleaded by a plaintiff must

be "enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter that, when accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While this standard is not a probability requirement, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks and citation omitted). In determining whether a plaintiff has met this plausibility standard, the Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Discussion

DoD first urges the Court to dismiss this action wholesale, arguing that the military considerations involved render the entire case nonjusticiable. ECF No. 42 at 25-28. Alternatively, DoD argues that Plaintiffs have failed to state a claim under equal protection or substantive due process.

DoD also contends that Plaintiffs' APA claims are unreviewable because they are committed to agency discretion by law, pursuant to 5 U.S.C. § 701(a)(2). *Id.* at 39. DoD further argues in the alternative that

Plaintiffs have failed to state a claim under either § 706(1) or § 706(2), at least in part.

1. Nonjusticiability

The Constitution vests Congress and the President with "broad constitutional power" for establishing the U.S. armed forces and employing them for the protection of the United States's security. *Schlesinger v. Ballard*, 419 U.S. 498, 510, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) (citing U.S. Const. art. I § 8 cls. 12-14, art. II § 2 cl.1). Courts therefore give "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). In so doing, however, the Supreme Court has cautioned that neither the President nor "Congress is free to disregard the Constitution when it acts in the area of military affairs." *Id.* at 67, 101 S.Ct. 2646.

In evaluating such claims, a court must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986)), or "the composition, training, equipping, and control of a military force," *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973).

a. *Mindes* Test

To determine whether a challenge to an internal military decision is justiciable, the Ninth Circuit has generally applied a version of the test first articulated in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), and adopted in *Wallace v. Chappell*, 661 F.2d 729 (9th

Cir. 1981), *rev'd on other grounds sub nom. Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). Application of the *Mindes* test is not jurisdictional in nature; rather, it represents "a prudential judgment that the military's decision should not be reviewed in a judicial forum" and is equivalent to a failure to state a claim upon which relief can be granted. *Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir.), *reaff'd*, 787 F.2d 1288 (1985).

Under this test, "an internal military decision is unreviewable unless the plaintiff alleges (a) violation of [a recognized constitutional right], a federal statute, or military regulations; and (b) exhaustion of available intraservice remedies." *Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Apr. 17, 2002) (alteration in original) (quoting *Khalsa*, 779 F.2d at 1398). If those prerequisites are met, a court then determines whether judicial review is appropriate by weighing four factors: "(1) The nature and strength of the plaintiff's claim; (2) The potential injury to the plaintiff if review is refused; (3) The extent of interference with military functions; and (4) The extent to which military discretion or expertise is involved." *Wenger*, 282 F.3d at 1072 (citation omitted). Courts generally consider the third and fourth factors together. *Id.* at 1075.

b. Applicability of *Mindes* Test

As a threshold matter, the parties dispute whether the *Mindes* test applies.

In arguing that it does, Defendants place great weight on *Khalsa.* In that case, an applicant for military service, who was a member of the Sikh faith, brought constitutional and APA challenges to the

Army's appearance regulations. 779 F.2d at 1394-95. The applicant argued that *Mindes* did not apply, reasoning that the Army's regulations were "not 'internal' in scope because they effectively prevent[ed] certain citizens from enlisting." *Id.* at 1396. The court rejected this argument, concluding that regulations governing soldiers' appearance were clearly internal, and opining that "[a]lmost any regulation may cause a particularly sensitive civilian to decide that he or she could not take the statutory enlistment oath to follow all orders." *Id.* at 1397. The court also cited with approval out-of-circuit cases applying the *Mindes* test to regulations prohibiting single parents with custody of minor children from enlisting. *Id.* at 1396.[7] *Khalsa* thus strongly suggests that a policy governing the processing of background investigations is an internal decision subject to *Mindes*. And contrary to Plaintiffs' assertion, ECF No. 46 at 14, the *Khalsa* court was clear that "the *Mindes* test also applies to statutory claims against the military," including the APA challenge at issue there. 779 F.2d at 1401.

Plaintiffs argue that "[i]n considering the reviewability of APA claims in the military context, courts typically have not considered the *Mindes* factors," citing *Garrett v. Lehman*, 751 F.2d 997, 1006 (9th Cir. 1985) and *Kirwa v. U.S. Dep't of Def.*, 285 F.Supp.3d 21, 35 (D.D.C. 2017). ECF No. 46 at 14. But neither *Garrett* nor *Kirwa* even mentions

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[7] DoD likewise relies on these same cases. *See* ECF No. 42 at 26 (citing *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981); *West v. Brown*, 558 F.2d 757 (5th Cir. 1977); *Henson v. Alexander*, 478 F.Supp. 1055 (W.D. Ark. 1979)).

Mindes.[8] ECF No. 46 at 14. And while the Ninth Circuit[9] has sometimes declined to apply the *Mindes* test to the facial validity (constitutionally or otherwise) of a military regulation or policy,[10] it has never overruled *Khalsa*.

Not only is *Khalsa* still good law, but Plaintiffs have provided no good way to distinguish the reviewability of the regulations in *Khalsa* from the policy at issue here. Accordingly, the Court must apply the *Mindes* test. In applying that test, the Court takes into account the Ninth Circuit's observation that, notwithstanding its deference to the military, it has "consistently entertained servicemembers' constitutional challenges to military policies on the merits." *Wilkins v. United States*, 279 F.3d 782, 788 (9th Cir. 2002); *see also Pruitt v.*

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[8] Furthermore, *Kirwa* was decided by the District of the District of Columbia. Unlike the Ninth Circuit, "the D.C. Circuit has not expressly adopted the *Mindes* test" and there is some doubt as to whether it would ever do so. *Doe v. Rumsfeld*, 297 F.Supp.2d 119, 127 (D.D.C. 2003); *see also Cargill v. Marsh*, 902 F.2d 1006, 1007 (D.C. Cir. 1990) ("[T]his court rejected the *Mindes* test in *Kreis v. Secretary of Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989).")

[9] The Supreme Court has never addressed the *Mindes* test.

[10] *See, e.g.*, *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1473 n.2, 1476 (9th Cir. 1994) (adjudicating merits of DoD policy requiring discharge for homosexual conduct without mentioning or applying *Mindes*); *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437, 1445-46 (9th Cir. 1988) (concluding that *Mindes* test barred review of service members' constitutional challenges to individual non-retention decisions, but addressing on the merits constitutional and statutory challenges to the National Guard regulation authorizing those non-retention decisions without mentioning or applying *Mindes*).

Cheney, 963 F.2d 1160, 1166 (9th Cir. 1991) (cautioning that "military decisions by the Army are not lightly to be overruled by the judiciary" but explaining that this deference is "best applied in the process of judging whether the reasons put forth on the record for the Army's discrimination against [plaintiff] are rationally related to any of the Army's permissible goals").

Because DoD agrees that the two threshold elements are met, ECF No. 42 at 27, the Court turns to the four *Mindes* factors.

c. Nature and Strength of Claims

Here, the nature of Plaintiffs' claims favors review. Claims of a constitutional nature are "normally more important than those having only a statutory or regulatory base" for purposes of this factor. *Khalsa*, 779 F.2d at 1399 (quoting *Mindes*, 453 F.2d at 201). Further, Plaintiffs claim that DoD has arbitrarily subjected them to substantial delays in their ability to begin their military careers. Unlike a "haircut regulation," this is not at "the least significant end of the constitutional scale." *Khalsa*, 779 F.2d at 1399. Rather, it significantly "impedes the ability of [LPRs] to serve in the military." *Serv. Women's Action Network v. Mattis ("SWAN")*, 320 F.Supp.3d 1082, 1093 (N.D. Cal. 2018).

The strength of Plaintiffs' claims also supports review. As discussed in greater detail below, this is not a case where the "claims are meritless." *Christoffersen*, 855 F.2d at 1443; *see also Khalsa*, 779 F.2d at 1399 (claim failed under Ninth Circuit precedent denying similar claim under "highest possible level of scrutiny"); *Gilliam v. Miller*, 973 F.2d 760, 764 (9th Cir. 1992) (holding that *Mindes* test

barred review of APA claim where defendants did not act in federal capacity, and plaintiffs therefore could not state a claim). "Where a facially sufficient claim of violation of the right [alleged] is involved, the first *Mindes* factor favors review." *Sandidge v. Washington*, 813 F.2d 1025, 1026 (9th Cir. 1987). Here, Plaintiffs have demonstrated not only facially sufficient claims, but at this stage, have shown a likelihood of success on the merits of those claims.

Accordingly, the first *Mindes* factor weighs in Plaintiffs' favor.

d. Potential Injury

Here, Plaintiffs are a class of LPRs who allege that, because of the challenged policy, they are subject to delays averaging at least 350 days before they can enter military service. *See* Compl. ¶¶ 25-28. As explained in greater detail below, the Court concludes that this potential injury supports review.

DoD contends that courts have traditionally given "little weight to the injury flowing from the denial of enlistment." ECF No. 42 at 27 (quoting *Khalsa*, 779 F.2d at 1399). Here, however, Plaintiffs are not denied the right to enlist, but have already signed enlistment contracts. Rather than simply "having to choose another career," *Khalsa*, 779 F.2d at 1400, Plaintiffs allege that they are stuck in limbo where both their military and interim career prospects are impaired. *See* Compl. ¶ 74; *cf. Sandidge*, 813 F.2d at 1027 (finding "claims of adverse impact on other job opportunities ... speculative" where plaintiff had not applied for a single job); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) (finding "inconvenience of moving [plaintiff's] household" for military transfer

not significant where "he has not been demoted or discharged").

Moreover, the delay in Plaintiffs' ability to enter active service delays their ability to obtain the expedited naturalization available to service members who enter basic training. Compl. ¶ 75; 8 U.S.C. § 1440(a); *cf. Kirwa*, 285 F.Supp.3d at 42 ("[D]elaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm."). This goes beyond the mere economic injury that "the Ninth Circuit has recognized . . . is enough to establish an injury for purposes of the second *Mindes* factor." *SWAN*, 320 F.Supp.3d at 1094 (citing *Christoffersen*, 855 F.2d at 1444).

The Court's conclusion is bolstered by the size of the class represented by Plaintiffs. As noted above, Plaintiffs represent, and DoD does not dispute, that they represent a class of at least 3,500 LPRs who are subject to this injury. ECF No. 31 at 11. Here, the number of service members affected multiplies the potential injury if the Court were to refuse review. Common sense dictates that the Court consider the number of persons affected in determining potential injury. In the event that Plaintiffs' underlying claims are meritorious, all of those LPRs, and all future LPR enlistees will be unjustly subjected to the injuries identified above. When faced with situations where large groups of service members might be injured by potentially unconstitutional policies, "[t]he Ninth Circuit has consistently entertained [their] constitutional challenges to military policies on the merits." *Wilkins*, 279 F.3d at 788.

The Court thus concludes that the second *Mindes* factor supports review.

e. Interference and Military Expertise

The *SWAN* court provided a helpful synthesis of the governing precedent relevant to the third and fourth *Mindes* factors. The court explained that "a proper assessment of the degree of interference threatened by a lawsuit is informed by whether the Court will be required to scrutinize particular personnel decisions (such as an assignment) by many decisionmakers (as in *Gonzalez* [*v. Dep't of Army*, 718 F.2d 926 (9th Cir. 1983)]) or called upon to take on a comprehensive, ongoing supervisory role, displacing military management over a broad range of policy decisions (as in *Gilligan*[, 413 U.S. 1, 93 S.Ct. 2440])." *SWAN*, 320 F.Supp.3d at 1095. In *Gonzalez*, for instance, the plaintiff argued that he had been subject to intentional race discrimination in promotion decisions, and so plaintiff would have to be able to examine his superior officers over a ten-year period "to determine the grounds and motives for their ratings" in performance reviews. 718 F.2d at 930; *see also Sandidge*, 813 F.2d at 1027 ("The officers who evaluated Sandidge would have to be examined to determine the grounds and motives for their ratings of him, and other evidence of his performance would have to be gathered for the year in question."). In *Gilligan*, plaintiffs requested that the district court "establish standards for the training, kind of weapons and scope and kind of orders to control the action of the National Guard," as well as "assume and exercise a continuing judicial surveillance" to ensure compliance with those standards. 413 U.S. at 6, 93 S.Ct. 2440.

The Court further agrees with the *SWAN* court that the concerns underlying those scenarios apply with far less force when plaintiffs request that

"discrete policies be held unconstitutional and thereby enjoined." 320 F.Supp.3d at 1095. The Court acknowledges that, unlike in the gender integration issues in *SWAN*, *id.* at 1097, the military undoubtedly has particular expertise in conducting military background investigations and making national security determinations and is vested with a corresponding discretion in those endeavors. ECF No. 52 at 11.

But DoD overstates the extent of interference judicial review would create here. As will become clear below, Plaintiffs' main claim, although brought under multiple doctrines, is that DoD's policy lacks adequate justification.[11] If the Court agrees, it will not mean that DoD must "ignore the national security concerns that gave rise to the October 13 Memo." ECF No. 42 at 28. Rather, DoD will have to adopt a policy that is justified by its purported concerns. *See City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (quoting *Hills v. Gautreaux*, 425 U.S. 284, 293-94, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976)). And "given the equitable nature of injunctive relief," courts routinely "tailor a remedy to ensure that it" does not unduly burden important interests. *McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2538, 189 L.Ed.2d 502 (2014).

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[11] To the extent that Plaintiffs claim that DoD's policy *violates* 10 U.S.C. § 504(b), invalidating the policy on that basis will not interfere with military discretion because it will mean that Congress did not vest DoD with the discretion or authority to adopt the policy.

DoD is correct that reviewing Plaintiffs' challenge will inevitably involve some judicial evaluation of areas of military expertise, but that is why the Court's deference is "best applied in the process of judging whether the reasons put forth on the record for [DoD's] discrimination against [LPRs] are rationally related to any of [DoD's] permissible goals." *Pruitt*, 963 F.2d at 1166. DoD does not contend that such deferential review is logistically impracticable in this case, just that it is unwarranted. Moreover, DoD concedes that such review would be appropriate, notwithstanding the asserted degree of interference, were the challenged policy a sufficiently egregious constitutional violation. ECF No. 52 at 12 (resting its argument for lack of reviewability on the asserted weakness of Plaintiffs' argument). As explained above, the Court's initial evaluation of the merits and the potential injury to Plaintiffs differs markedly from DoD's analysis.

Considering all the *Mindes* factors, the Court finds it prudent to review Plaintiffs' claims.

2. Equal Protection

The Court next addresses whether Plaintiffs have adequately stated a claim under equal protection.

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *Windsor*, 570 U.S. at 774, 133 S.Ct. 2675 (citing *Bolling v. Sharpe*, 347 U.S. 497, 499-500, 74 S.Ct. 693, 98 L.Ed. 884 (1954)); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." (citation

omitted)). While "[t]he first step in equal protection analysis is to identify the [government's] classification of groups," *Wilson v. Lynch*, 835 F.3d 1083, 1098 (9th Cir. 2016) (citation omitted), the parties do not dispute that the October 13 Memo draws a facial classification based on whether an enlisted service member is a U.S. citizen or an LPR, *see* ECF No. 22-2 at 2. The Court therefore proceeds to decide the level of scrutiny that applies. *See Wilson*, 835 F.3d at 1098.

a. Level of Scrutiny

The Supreme Court has long recognized aliens as a "prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate" in the equal protection analysis. *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) (observing that aliens "are already subject to disadvantages not shared by the remainder of the community," such as, among other things "not [being] entitled to vote"). Accordingly, "state classifications based on alienage are subject to strict scrutiny review." *Korab v. Fink*, 797 F.3d 572, 577 (9th Cir. 2014).

Strict scrutiny does not apply here, however, because "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 86-87, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). Where the federal government acts, "overriding national interests may provide a

justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State" without violating equal protection. *Hampton*, 426 U.S. at 101, 96 S.Ct. 1895. But the Supreme Court has rejected "the extreme position" that "the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." *Id.* Instead, "federal statutes regulating alien classifications are subject to the easier-to-satisfy rational-basis review." *Korab*, 797 F.3d at 577 (citing *Hampton*, 426 U.S. at 103, 96 S.Ct. 1895).

Plaintiffs concede that strict scrutiny does not apply, but they argue that courts nonetheless "apply a more 'active' form of rational basis review 'when a classification adversely affects unpopular groups.' " ECF No. 46 at 17 (quoting *Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011)). The distinguishing feature of this type of "active" review is that courts examine "*whether the government ha[s] established on the record* a rational basis for the challenged discrimination." *Pruitt*, 963 F.2d at 1166 (citing *High Tech Gays*, 895 F.2d at 576-77).

Plaintiffs' cases do not establish that "active" rational basis review applies to federal *legislative* classifications based on citizenship. Because the federal government's authority in this arena is "substantially different," *Mathews*, 426 U.S. at 87, 96 S.Ct. 1883, Plaintiffs' reliance on equal protection cases involving state action under the Fourteenth Amendment is misplaced. *See* ECF No. 46 at 17; *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053,

1065-67 (9th Cir. 2014) (state law);[12] *Dandamudi v. Tisch*, 686 F.3d 66, 72 (2d Cir. 2012) (same); *Diaz*, 656 F.3d at 1010 (same).[13]

If this case involved an equal protection challenge to a legislative act of Congress, the Court would be inclined to agree with DoD that the appropriate "question . . . is whether there is any conceivable rational basis justifying [the October 13 Memo's] distinction." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 309, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Under this standard, the government " 'has no obligation to produce evidence to sustain the rationality of a statutory classification'; '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " *Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th

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[12] In *Arizona Dream Act Coalition*, the Ninth Circuit did not decide whether to apply the strict scrutiny necessary for "state action that discriminates against noncitizens authorized to be present in the United States" or the rational basis review that governs noncitizens present "in violation of federal law." 757 F.3d at 1065 n.4 (quoting *Plyler v. Doe*, 457 U.S. 202, 223, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)).

[13] Similarly, because this exception to strict scrutiny protection for suspect classes derives from "the paramount federal power over immigration and naturalization," *Hampton*, 426 U.S. at 100, 96 S.Ct. 1895, Plaintiffs' reliance on cases involving a Congressional classification based on homosexuality – where the federal government lacks any special constitutional power – is also inapposite. *See* ECF No. 46 at 17-18; *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 5 (1st Cir. 2012) (federal benefits to same-sex spouses); *cf. Witt v. Dep't of Air Force*, 527 F.3d 806, 819-21 (9th Cir. 2008) (applying heightened scrutiny to substantive due process challenge to "Don't Ask, Don't Tell" legislation).

Cir. 2000) (quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)).

But it is not so clear that the government bears no evidentiary burden in the context of agency action. For instance, the *Beach Communications* Court explained that, "because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." 508 U.S. at 315, 113 S.Ct. 2096. In contrast, it is a bedrock principle of administrative law that "an agency's action must be upheld, if at all, on the basis *articulated by the agency itself*." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (emphasis added); *see also Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S.Ct. 2117, 2127, 195 L.Ed.2d 382 (2016) ("Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all. In light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision."); *SEC v. Chenery*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) (explaining the "simple but fundamental rule of administrative law" that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency"). Indeed, when the Ninth Circuit has applied rational basis scrutiny to equal protection challenges to military *regulations*, it has "required the

government to establish on the record that its policy had a rational basis." *Pruitt*, 963 F.2d at 1166.[14]

The Court need not directly resolve this issue here, because Plaintiffs claim both that DoD's policy lacks a rational basis under equal protection principles and, for that same reason, is also arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A). *See* Compl. ¶¶ 90-92, 111-12. The Ninth Circuit has explained how to proceed when confronted with this situation: "[T]he equal protection argument can be folded into the APA argument, since no suspect class is involved and the only question is whether the defendants' treatment of [LPRs] was rational (i.e., not arbitrary and capricious)." *Ursack Inc. v. Sierra Interagency Black Bear Grp.*, 639 F.3d 949, 955 (9th Cir. 2011); *see also* 5 U.S.C. § 706(2)(B) (requiring a court to set aside agency action "contrary to

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[14] This distinction between rational basis review of legislative versus administrative action finds further support in the *Hampton* Court's analysis, which concerned a Civil Service Commission regulation barring residential aliens from civil service employment. 426 U.S. at 98, 96 S.Ct. 1895. The Supreme Court explained that "[s]ince these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency." *Id.* at 116, 96 S.Ct. 1895. The Supreme Court invalidated the rule, reasoning that the agency had failed to comply with its "obligation to perform its responsibilities with some degree of expertise, and to make known the reasons for its important decisions" because "nothing in the record" evidenced proper support for the rule. *Id.* at 115, 96 S.Ct. 1895.

constitutional right, power, privilege, or immunity"). The Court then examines whether "*[t]he record indicates* that [the government] had a rational basis" for its decision. *Ursack*, 639 F.3d at 958 (emphasis added); *see also Grant Med. Ctr. v. Hargan*, 875 F.3d 701, 708 (D.C. Cir. 2017) ("Accordingly, we consider [the equal protection and APA] arguments together, reversing only if the agency offers insufficient reasons for treating similar situations differently."); *Nazareth Hosp. v. Sec'y U.S. Dep't of Health & Human Servs.*, 747 F.3d 172, 180 (3d Cir. 2014) (holding that "[r]eview of an equal protection claim in the context of agency action" requires the court to "consider whether the Secretary set forth a satisfactory, rational explanation for her actions here"); *Cooper Hosp. / Univ. Med. Ctr. v. Burwell*, 179 F.Supp.3d 31, 47 (D.D.C. 2016), *aff'd sub nom. Cooper Hosp. Univ. Med. Ctr. v. Price*, 688 F. App'x 11 (D.C. Cir. 2017) (explaining that "if the challenge is to an agency action, the equal-protection challenge is subsumed within the APA challenge," but "[w]hen the disparate treatment is the result of congressional action . . . both the burden and the permissible kinds of argument shift in favor of the government").

b. Fit

DoD does not dispute that the October 13 Memo facially discriminates against LPRs. Rather, in support of its motion to dismiss, DoD argues exclusively that this discrimination is supported by a rational basis. ECF No. 42 at 31-34. As just explained, this argument requires the Court to consider whether DoD has set forth adequate support in the administrative record. Therefore, it is not appropriate to decide this issue in the context of DoD's motion. *See Khoja v. Orexigen Therapeutics, Inc.*, 899

F.3d 988, 998 (9th Cir. 2018) ("Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure."); *cf. Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 721 (9th Cir. 2011) ("If the district court intended to make a ruling on the merits of Pinnacle's APA claim, based on consideration of the full administrative record, it could have converted its decision into a Rule 56 summary judgment ruling. But it did not do so.").[15]

The Court thus denies DoD's motion to dismiss Plaintiffs' equal protection claim.

3. Substantive Due Process

The Court next examines whether Plaintiffs have adequately stated a claim based on substantive due process.

a. Legal Standard

"The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that . . . interferes with rights implicit in the concept of ordered liberty." *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007), *aff'd*, 553 U.S. 591, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008) (alteration in original) (citation omitted). In order to state a substantive due process claim, a plaintiff must identify "a liberty or property interest protected by the Constitution." *Id.* (quoting *Wedges/Ledges of*

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[15] At the hearing on these motions, the parties expressly asked the Court not to convert DoD's motion to dismiss to a motion for summary judgment.

Cal., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994)).

Courts have found a liberty interest based on "some generalized due process right to choose one's field of private employment." *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999); *see also Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999) ("[I]t is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations." (quoting *Wedges/Ledges of Cal.*, 24 F.3d at 65 n.4)). However, courts have recognized an infringement that implicates this liberty interest only where the governmental action creates "a complete prohibition of the right to engage in a calling, and not [a] sort of brief interruption." *Engquist*, 478 F.3d at 997 (alteration in original) (quoting *Conn*, 526 U.S. at 292, 119 S.Ct. 1292). This right protects against "government legislation or regulation," and also "extreme cases" where "government employer actions . . . foreclose access to a particular profession to the same degree as government regulation." *Id.* at 997-98.

Even where the restriction amounts to a complete prohibition, the right infringed is not fundamental, *see Dittman*, 191 F.3d at 1031, and is therefore "subject to reasonable governmental regulation," *Conn*, 526 U.S. at 292, 119 S.Ct. 1292. Accordingly, "a plaintiff can make out a substantive due process claim if she is unable to pursue an occupation and this inability is caused by government actions that were arbitrary and lacking a rational basis." *Engquist*, 478 F.3d at 997.

b. Discussion

Here, Plaintiffs claim that DoD's policy impermissibly burdens their right to pursue a military career by forcing them to wait until their background investigations have been completed. Compl. ¶ 99; ECF No. 46 at 22.

As an initial matter, the Court first addresses the nature of the substantive due process violation alleged. *See Chavez v. Martinez*, 538 U.S. 760, 775–76, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) ("[The Supreme Court] requires a careful description of the asserted fundamental liberty interest for the purposes of substantive due process analysis" (internal quotation marks and citation omitted)); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015) ("Accordingly, we must formulate the asserted right by carefully consulting both the scope of the challenged regulation and the nature of Plaintiffs' allegations.").

Plaintiffs argue that the October 13 Memo interferes with their liberty interest in pursuing a military career. The Court observes that the parties have cited no case concerning government restrictions on entry into a wholly public profession,[16] rather than a "field of private employment." *Conn*, 526 U.S. at 292, 119 S.Ct. 1292; *see also Greene v. McElroy*, 360 U.S. 474, 492, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959) ("[T]he right to hold specific *private* employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

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[16] Because the parties have provided no information to the contrary, the Court assumes without deciding that there is no relevant and available private analogue to U.S. military service.

(emphasis added)); *but see Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) ("A State cannot exclude a person from the practice of law or from *any other occupation* in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." (emphasis added)). Given the dearth of authority, the Court assumes for purposes of this motion that the standard applicable to private professions governs: "[r]egulations on entry into a profession, as a general matter, are constitutional if they have a rational connection with the applicant's fitness or capacity to practice the profession." *Dittman*, 191 F.3d at 1030 (quoting *Lowe v. SEC*, 472 U.S. 181, 228, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring)).

DoD relies on *Engquist* to argue that Plaintiffs' claim is only available in "extreme cases." ECF No. 52 at 16 (quoting *Engquist*, 478 F.3d at 998). But *Engquist* concerned a state government's treatment of a single employee, 478 F.3d at 990-91, rather than a generally applicable rule governing all or a subset of public employees. The *Engquist* court therefore addressed when the government's treatment of a single employee operated as the equivalent of "legislative action that effectively banned a person from a profession." *Id.* at 998. In that context, the court explained that an employer action must be so "extreme" that it accomplishes the same result "as if the government had yanked the license of an individual in an occupation that requires licensure." *Id.* (citation omitted). Therefore, *Engquist* supports

the Court's conclusion that licensing cases provide the appropriate framework for Plaintiffs' claim.[17]

To the extent DoD argues that Plaintiffs fail to state a claim because the October 13 Memo does not impose a "complete prohibition," the Court disagrees. *Cf.* ECF No. 42 at 34 ("But the October 13 Memo does not prevent LPRs from serving in the military – it merely requires the completion of their background investigations before they enter service."). Supreme Court and Ninth Circuit precedent make clear that licensing requirements, which are *prerequisites* to entry into the profession, are subject to this type of rational basis scrutiny, even if they are not lifetime bans that could never be satisfied by the challengers. *See, e.g.*, *Conn*, 526 U.S. at 292, 119 S.Ct. 1292 (citing as an example of reasonable regulation precedent "upholding a requirement of licensing before a person can practice medicine") (citing *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889)); *Dittman*, 191 F.3d at 1032-33 (requirement to disclose social security number to obtain acupuncture license).

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[17] The Court is not persuaded by DoD's assertion that "Plaintiffs must allege behavior that is 'so egregious' and 'outrageous' as to 'shock the contemporary conscience.' " ECF No. 42 at 34 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 850, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). *Lewis* involved "a high-speed automobile chase," *id.* at 836, 118 S.Ct. 1708, and the Supreme Court explained that "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue," 523 U.S. at 846, 118 S.Ct. 1708 (emphasis added). Given that subsequent Ninth Circuit cases involving regulation of entry into a profession have not required allegations of conscience-shocking behavior, the Court concludes that this standard is inapposite. *See, e.g.*, *Franceschi v. Yee*, 887 F.3d 927, 938 (9th Cir. 2018); *Dittman*, 191 F.3d at 1032-33.

Here, Plaintiffs cannot enter military service until DoD completes their investigations. Cooke, for instance, has been unable to begin basic training for more than a year, and Plaintiffs' complaint alleges that the type of investigations DoD is likely to conduct "take 350 days to complete on average." Compl. ¶ 27. This is "not the sort of brief interruption" the Supreme Court referenced in *Conn*, 526 U.S. at 292, 119 S.Ct. 1292, where the plaintiff lawyer was prevented from attending a single grand jury hearing with his client, *id.* at 288-89, 119 S.Ct. 1292.

The Court therefore turns to the justification underlying the October 13 Memo. Plaintiffs do not argue that DoD's background investigation and security determination requirements themselves lack "a rational connection with the applicant's fitness or capacity to" serve in the military. *Dittman*, 191 F.3d at 1030 (citation omitted). Nor do Plaintiffs appear to contend that requiring *all* service members to complete these requirements prior to beginning service would be irrational. Rather, Plaintiffs contend that the October 13 Memo is irrational because it "targets LPRs only" to achieve "its purported objective of facilitating efficient background investigations, which is not limited to LPRs." ECF No. 46 at 22. In other words, the policy "singles out one subset of enlistees for disparate treatment– LPRs – and . . . this discrimination bears no rational relationship to the stated purpose of making DoD background investigations more 'efficient.' " *Id.* at 23.

The gravamen of Plaintiffs' substantive due process claim, then, is the same as their equal protection claim: irrationally unequal treatment. The parties concede that the same rational basis review

standard applies and incorporate the same arguments from the equal protection context as to why the October 13 Memo is irrational. *See* ECF No. 42 at 35; ECF No. 46 at 22-23; ECF No. 52 at 17. Accordingly, the Court reaches the same conclusion, and denies DoD's motion to dismiss the substantive due process claim. *See Stormans*, 794 F.3d at 1088 (incorporating rationality analysis to resolve substantive due process claim without further discussion).

4. APA

DoD's motion to dismiss raises numerous arguments concerning various provisions of the APA. The Court thus begins by briefly reviewing the relevant framework.

a. Judicial Review under the APA

The APA provides a right of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

The Act empowers a reviewing court to grant two types of relief. First, a court may "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). Under § 706(1), a claim "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness All. ("SUWA")*, 542 U.S. 55, 64, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004).

Second, a court may "hold unlawful and set aside agency action, findings, and conclusions, found to be," as relevant here, "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (C) in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. Rather, a court must determine whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* To enable this review, the agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Encino Motorcars*, 136 S.Ct. at 2125 (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856). Furthermore, "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. E.P.A.*, —— U.S. ——, 135 S.Ct. 2699, 2706, 192 L.Ed.2d 674 (2015) (citation omitted).

Where a plaintiff alleges that, as a result of an erroneous legal interpretation, the agency's action was "not in accordance with the law," 5 U.S.C. § 706(2)(A), or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), courts apply the framework for review first established in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1014 (9th Cir. 2008).

The APA also exempts from judicial review cases where "(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

b. Committed to Agency Discretion by Law

DoD argues that § 701(a)(2) bars review of Plaintiffs' APA claims because decisions regarding the implementation of 10 U.S.C. § 504(b)(1) are "committed to agency discretion by law." ECF No. 42 at 35-36.

i. Legal Standard

Because "Congress rarely intends to prevent courts from enforcing its directives to federal agencies," courts apply "a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. E.E.O.C.*, —— U.S. ——, 135 S.Ct. 1645, 1651, 191 L.Ed.2d 607 (2015) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986)). Thus, the Supreme Court has long "read the APA as embodying a 'basic presumption of judicial review.' " *Lincoln v. Vigil*, 508 U.S. 182, 190, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

Section 701(a)(2) provides "a very narrow exception" to this principle. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). It governs "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Id.* (citation omitted); *see also Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (Section 701(a)(2) applies where a "statute is drawn so that a

court would have no meaningful standard against which to judge the agency's exercise of discretion."). But "[e]ven where statutory language grants an agency unfettered discretion, its decision may nonetheless be reviewed if regulations or agency practice provide a meaningful standard by which [a] court may review its exercise of discretion." *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th Cir. 2015) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003)).

The Supreme Court has also recognized "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,' " and which may fall within § 701(a)(2)'s ambit. *Lincoln*, 508 U.S. at 191, 113 S.Ct. 2024. For instance, "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831, 105 S.Ct. 1649; *see also Lincoln*, 508 U.S. at 192, 113 S.Ct. 2024 ("The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion."); *I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987) ("[W]e perceive that a similar tradition of nonreviewability exists with regard to [agency] refusals to reconsider for material error.").

Accordingly, a court must examine "the language of the statute and whether the general purposes of the statute would be endangered by judicial review." *ASSE Int'l*, 803 F.3d at 1068 (quoting *Pinnacle Armor*, 648 F.3d at 719). "[T]he mere fact that a statute contains discretionary language" does not mean that Section 706(a)(2) prevents judicial review.

Pinnacle Armor, 648 F.3d at 719 (quoting *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994)).

Even where § 701(a)(2) forecloses judicial review of APA claims, however, it does not necessarily bar constitutional claims. *See Webster v. Doe*, 486 U.S. 592, 601, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988). "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.* at 603, 108 S.Ct. 2047.

ii. Discussion

Here, DoD argues that 10 U.S.C. § 504 contains no meaningful standards for the Court to apply to the October 13 Memo. ECF No. 42 at 36-37. Plaintiffs counter that because the statute does not impose any different restrictions on U.S. citizens and LPRs, Congress did not intend to grant DoD discretion to treat the two groups differently, let alone preclude judicial review. ECF No. 46 at 25. Both parties stress that Congress recently amended § 504 to impose precisely the requirements of the October 13 Memo on a different class of aliens who are not LPRs, and both parties argue that this decision left their respective interpretations of the status quo intact. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018), *codified at* 10 U.S.C. § 504(b)(3)(A) (requiring that the Secretary must "complete[ ] all required background investigations and security and suitability screening" before that person "may report to initial training"). DoD contends that Congress deliberately left in place DoD's discretion to implement the October 13 Memo; Plaintiffs argue that Congress did not amend its prior implied

instruction to treat U.S. citizens and LPRs equally for enlistment purposes.[18]

Section 504, by itself, does not supply a meaningful standard for the Court to apply to this case. The Court cannot infer from the mere fact that § 504(b)(1) permits both groups to enlist, without additional distinction, that the statute prohibits DoD from imposing *different terms* on their enlistment. *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), is on point. There, the statute required the agency to give preference to a class of electric power customers. *Id.* at 667 (citing 43 U.S.C. § 485h(c)). The Ninth Circuit explained that this provision did "not require that all preference customers be treated equally or that all potential preference customers receive an allotment." *Id.* Accordingly, the court concluded, when "one preference entity challenges the Secretary's decision to discriminate against it in favor of other preference entities, the reclamation laws provide no law to apply to the dispute." *Id.*

But the Court need not rely on section 504 alone, because DoD has promulgated regulations and guidance regarding enlistments. *See ASSE Int'l*, 803 F.3d at 1069. Through regulation, DoD has established a policy to "[u]se common entrance qualification standards for enlistment, appointment, and induction into the Military Services." 32 C.F.R. § 66.4(a). Pursuant to this policy, DoD regulations set

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[18] The Court finds unpersuasive DoD's reliance on the fact that Congress unambiguously prohibited the enlistment of the "insane" or "intoxicated." 10 U.S.C. § 504(a). Whether Congress removed discretion to enlist certain groups of people is not responsive to the question whether Congress vested the agency with discretion to impose different standards on groups permitted to enlist.

forth in great detail the requirements by which "[e]ligibility will be determined." *Id.* § 66.6(a)(2). Of particular relevance here, the regulations explain that "[t]he underlying purpose of these enlistment, appointment, and induction standards is to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline." *Id.* § 66.6(b)(8). As part of this evaluation, the regulations disqualify anyone who "[r]eceives an unfavorable final determination by the DoD Consolidated Adjudication Facility on a completed National Agency Check with Law and Credit (NACLC) or higher-level investigation, which is adjudicated to the National Security Standards in accordance with Executive Order 12968, during the accession process." *Id.* § 66.6(b)(8)(vi). Nonetheless, under the regulations, DoD may permit an applicant to "[b]e accessed (including shipping him or her to training or a first duty assignment) provided that a NACLC or higher-level investigation was submitted and accepted by the investigative service provider (Office of Personnel Management (OPM)) and an advanced fingerprint was conducted, and OPM did not identify any disqualifying background information." *Id.* § 66.6(b)(8)(vi)(A).

Here, DoD has made a categorical determination that an entire group of enlisted service members are not eligible to access under the conditions provided for in § 66.6(b)(8)(vi)(A). The Court can assess – with the requisite deference – whether this determination is rationally related to DoD's stated goal "to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline." *Id.*

§ 66.6(b)(8). The Court can further evaluate whether that rationale adequately justifies DoD's deviation from its policy to "[u]se common entrance qualification standards." *Id.* § 66.4(a).

The Court rejects DoD's argument that the regulations must expressly forbid DoD's action or affirmatively require the precise course that Plaintiffs urge. *See* ECF No. 52 at 21 (arguing that "the regulation does not state that it is DoD's policy to ship all enlistees to basic training at the same time"). DoD's position is squarely at odds with well-established Ninth Circuit precedent holding that a general standard against which to measure the agency's action is sufficient. *See, e.g.*, *Pac. Nw. Generating Co-op. v. Bonneville Power Admin.*, 596 F.3d 1065, 1077 (9th Cir. 2010) (collecting Ninth Circuit cases finding law to apply based on "whether a decision was 'in the public's interest' or whether a particular act was 'feasible' or 'just and reasonable,' . . . [or] 'consistent with sound business principles' " (citations omitted)).

DoD also contends that the October 13 Memo falls within one of the "categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion.' " *Lincoln*, 508 U.S. at 191, 113 S.Ct. 2024. As an initial matter, although whether agency decisions "traditionally have been reviewable . . . are relevant considerations in a section 701(a)(2) analysis, it's well settled that the touchstone of reviewability under section 701(a)(2) is whether there's law to apply." *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996) (citation omitted). Further, while courts grant great deference to the military, the Court cannot say that this area is one that has historically been regarded as committed

to the military's absolute discretion. Certainly, the outcome of individual security clearance adjudications, *see Dep't of Navy v. Egan*, 484 U.S. 518, 529, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), or the Director of the Central Intelligence Agency's assessment whether a particular employee presents a security threat, *see Webster*, 486 U.S. at 601, 108 S.Ct. 2047, may traditionally be viewed as beyond the reach of the courts. But, as discussed in detail above, the same is not true for claims that generally applicable requirements or procedures to which military members are subject are arbitrarily discriminatory. *See, e.g.*, *Pruitt*, 963 F.2d 1160 (reviewing on the merits constitutional challenges to the Army's regulations prohibiting homosexuality); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 565, 576-77 (9th Cir. 1990) (same for regulations "subjecting all homosexual applicants for Secret and Top Secret clearances to expanded investigations and mandatory adjudications"), *abrogated on other grounds by United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

Accordingly, the Court concludes that Plaintiffs' APA claims are reviewable.

c. Failure to State a Claim

i. Section 706(1)

The Court next considers whether Plaintiffs have failed to state a claim to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

In their complaint, Plaintiffs allege that DoD has unreasonably delayed their "shipment to basic training, and thus their military service." Compl. ¶ 103. In opposing DoD's motion to dismiss, however,

Plaintiffs argue that the required action is "*a determination* whether Plaintiffs can access into the military and ship to basic training." ECF No. 46 at 33 n.12 (emphasis added). In response, DoD contends that Plaintiffs' "complaint may not be amended by briefs in opposition to a motion to dismiss." ECF No. 52 at 21 (quoting *Tietsworth v. Sears*, 720 F.Supp.2d 1123, 1145 (N.D. Cal. 2010)). DoD's argument misses the mark.

The rule on which DoD relies applies to "*facts* raised for the first time in [a] plaintiff's opposition papers." *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (emphasis added); *see also Tietsworth*, 720 F.Supp.2d at 1145 (explaining that the complaint "still does not contain any factual allegations that would support th[e] claimed violation" advanced for the first time in the opposition). The Court applies a different analysis to new "legal conclusions" as to precisely which agency action was unlawfully withheld, because unlike Plaintiffs' plausible factual allegations, the Court is not required to accept them as true. *Ashcroft*, 556 U.S. at 678, 129 S.Ct. 1937. If the facts alleged support a § 706(1) claim on a different legal theory, Plaintiffs' claim may proceed. *See Johnson v. City of Shelby*, —— U.S. ——, 135 S.Ct. 346, 347, 190 L.Ed.2d 309 (2014) (per curiam) ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief.") (quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (3d ed. 2005)); *Coos Cty. Bd. of Cty. Comm'rs v. Kempthorne*, 531 F.3d 792, 812 n.16 (9th Cir. 2008) ("Notice pleading requires the plaintiff to set forth in his complaint *claims for relief*, not causes of action,

statutes or legal theories." (citation omitted)). "The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Pruitt*, 963 F.2d at 1164. The Court therefore considers whether an adjudication of Plaintiffs' background investigations is a discrete and mandatory duty. *See SUWA*, 542 U.S. at 64, 124 S.Ct. 2373.

DoD argues that this decision does not constitute "agency action," ECF No. 52 at 21, which the APA defines as "*includ[ing]* the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(12) (emphasis added). This definition, however, "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). Indeed, the APA further defines "order" in capacious terms: "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). Accordingly, the Court has "little trouble concluding" that DoD's disposition of Plaintiffs' background investigations constitutes agency action. *Whitman*, 531 U.S. at 478, 121 S.Ct. 903; *see also Mamigonian v. Biggs*, 710 F.3d 936, 945 (9th Cir. 2013) ("[T]here is no question that USCIS's denial of Ms. Mamigonian's adjustment-of-status applications is "final agency action" for purposes of the APA.").

Further, the adjudication of an individual investigation is a "discrete" action, rather than a "broad programmatic" issue. *SUWA*, 542 U.S. at 64, 124 S.Ct. 2373. The remaining question is whether a decision on Plaintiffs' applications is mandatory within a certain timeframe. *See id.*

The APA "instructs agencies to complete their work 'within a reasonable time,' and grants courts of appeal the authority to 'compel agency action unlawfully withheld or unreasonably delayed.' " *In re Pesticide Action Network N. Am., Nat. Res. Def. Council, Inc.*, 798 F.3d 809, 813 (9th Cir. 2015) (first quoting 5 U.S.C. § 555(b); then quoting *id.* § 706(1)); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003) (explaining that the APA "imposes a general but nondiscretionary duty upon an administrative agency to pass upon a matter presented to it 'within a reasonable time,' ") (quoting § 555(b)).[19]

In this circuit, courts determine whether an agency's delay is unreasonable based on six factors:

> (1) the time agencies take to make decisions must be governed by a rule of reason;
>
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

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[19] Section 555(b) provides, in relevant part: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."

> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
>
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
>
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

In re Pesticide Action Network, 798 F.3d at 813 (quoting *Telecomms. Research & Action Ctr. v. F.C.C. ("TRAC")*, 750 F.2d 70, 79-80 (D.C. Cir. 1984)).

This general duty to conclude matters within a reasonable time applies even when there is no requirement that the agency undertake the action in the first instance. *See In re A Cmty. Voice*, 878 F.3d 779, 785 (9th Cir. 2017) ("Once an agency decides to take a particular action, a duty to do so within a reasonable time is created." (citation omitted)). "An agency 'cannot simply refuse to exercise [its] discretion' to conclude a matter." *Id.* (quoting *Indep. Min. Co. v. Babbitt*, 105 F.3d 502, 507 n.6 (9th Cir. 1997)). Because this general duty applies even in the absence of a statutory or regulatory deadline for the specific agency action at issue, DoD's reliance on the lack of such a requirement, ECF No. 52 at 21-22, is unavailing. Rather, the absence of a specific timetable is simply the second of six factors the Court

must consider. *See In re Pesticide Action Network*, 798 F.3d at 813.[20]

The Court notes that cases finding unreasonable delay have generally involved lengthier delays than the ones at issue here. *See In re A Cmty. Voice*, 878 F.3d at 787 (finding an eight-year delay unreasonable and suggesting that "a '14-month time period' without more is not unreasonable") (quoting *United Steelworkers of Am., AFL-CIO-CLC v. Rubber Mfrs. Ass'n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986)). But "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003); *see also Fu v. Gonzales*, No. C 07-0207 EDL, 2007 WL 1742376, at *4 (N.D. Cal. May 22, 2007) ("What constitutes an unreasonable delay in the context of immigration applications depends to a great extent on the facts of the particular case." (citation omitted)). Because "the current record is inadequate at this time to reach any conclusions" on the relevant factors, the Court cannot determine whether the time DoD has taken to process

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[20] DoD mischaracterizes *Nio v. DHS*, 270 F.Supp.3d 49, 66-67 (D.D.C. 2017). *Nio* in fact supports the Court's conclusion. There, the court noted that "no statute or regulation mandates a timetable for completing the investigation and examination" of certain naturalization applications and therefore the second *TRAC* factor tipped in the government's favor. *Id.* at 67. But rather than dismissing plaintiffs' § 706(1) claim – as DoD represents – the *Nio* court explained that the application of the *TRAC* factors "is a fact intensive inquiry." *Id.* at 66. Because "the current record [wa]s inadequate at th[at] time to reach any conclusions" on the remaining *TRAC* factors, the court *declined to issue a preliminary injunction. Id.* at 67.

Plaintiffs' investigations was unreasonable as a matter of law. *Nio v. U.S. Dep't of Homeland Sec.*, 270 F.Supp.3d 49, 62 (D.D.C. 2017).

Accordingly, the Court denies the motion to dismiss Plaintiffs' § 706(1) claim.

ii. Section 706(2)

In their complaint, Plaintiffs raise numerous arguments that the October 13 Memo is invalid under § 706(2), but these arguments can be distilled into essentially two claims. First, Plaintiffs allege that the October 13 Memo is "not in accordance with the law," 5 U.S.C. § 706(2)(A), and "in excess of [DoD's] statutory jurisdiction," *id.* § 706(2)(C), because 10 U.S.C. § 504(b) does not permit DoD to differentiate between U.S. citizens and LPRs on a classwide basis. Compl. ¶¶ 115-116. These are essentially the same claim, because "there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has." *City of Arlington v. F.C.C.*, 569 U.S. 290, 299, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013). In either case, Plaintiffs claim is that the October 13 Memo "violates a federal statute." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012) (citing 5 U.S.C. § 706(2)(A), (C)). If, as Plaintiffs contend, 10 U.S.C. § 504(b) prohibits DoD's policy, then the Court must set the policy aside, regardless of DoD's reasons for adopting it.

Second, Plaintiffs allege that, even if DoD's policy is permitted by statute, its decision to adopt this otherwise permissible policy was "arbitrary and

capricious" or "an abuse of discretion," 5 U.S.C. § 706(2)(A), because DoD "failed to provide any legitimate explanation." Compl. ¶ 111. While Plaintiffs' first claim raises a question of statutory interpretation, their second claim requires the Court to assess whether DOD "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action 'including a rational connection between the facts found and the choice made.' " *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

DoD argues that Plaintiffs have failed to state a claim under either theory. ECF No. 42 at 41-43.

The Court first addresses Plaintiffs' statutory interpretation argument. Plaintiffs' complaint alleges that "[t]he October 13 Memo is not in accordance with the law and . . . exceeds the authority granted to the DoD by the Enlistment Statute, which mandates that LPRs be permitted to enlist and serve in the military." Compl. ¶ 115. The complaint further explains that the memo "has indefinitely barred LPRs, including Plaintiffs, from serving in the military by prohibiting them from doing so until their MSSD and NSD adjudications are complete," thereby "violat[ing] Congress's clear intent and the plain language of the Enlistment Statute." *Id.* ¶ 116. In their opposition, Plaintiffs phrase their argument in different terms, contending that 10 U.S.C. § 504 requires that "LPRs not only may enlist, but once enlisted, may access into the Armed Forces on the same terms as U.S. nationals." ECF No. 46 at 31. Though DoD faults Plaintiffs' opposition for straying from the terms of their complaint, ECF No. 52 at 22, Plaintiffs are permitted to refine their legal

arguments, as opposed to advancing new factual allegations, as explained above.[21]

The Court thus turns to the merits of Plaintiffs' argument. Plaintiffs agree that the *Chevron* framework applies. ECF No. 46 at 31-33.[22] Under *Chevron*, the Court considers "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Campos-Hernandez v. Sessions*, 889 F.3d 564, 568 (9th Cir. 2018) (quoting *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778). In other words, the Court asks

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[21] Moreover, the Court may use Plaintiffs' "brief to clarify allegations in [their] complaint whose meaning is unclear." *Pegram v. Herdrich*, 530 U.S. 211, 230 n.10, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); *see also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1163 (9th Cir. 2017) (explaining that the Ninth Circuit has "relied on the briefs on appeal to clarify the complaint, in compliance with our obligation to construe the complaint favorably to the plaintiff"). Plaintiffs' argument, as formulated in their opposition, clarifies the complaint's allegation that the statutory framework requires DoD "to allow LPRs to enlist along with U.S. citizens," Compl. ¶ 116, rather than advancing an entirely new theory. Plaintiffs' "equal treatment" reading of the statute should come as no surprise to DoD, *see id.* ¶ 56 ("The October 13 Memo fails to articulate any legitimate justification for its departure from this country's long tradition of enlisting LPRs and U.S. citizens on equal terms."); *see also United States v. Idaho*, 210 F.3d 1067, 1080 (9th Cir. 2000) (courts must consider how "[t]he complaint, taken as a whole, is most naturally read").

[22] A court applies *Chevron*'s framework where (1) "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 908 (9th Cir. 2009) (en banc) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)).

"whether, 'applying the normal tools of statutory construction,' the statute is ambiguous." *Sung Kil Jang v. Lynch*, 812 F.3d 1187, 1190 (9th Cir. 2015) (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 n.4, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)). Second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Campos-Hernandez*, 889 F.3d at 568 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778).

Congress has not "directly spoken to the precise question" whether DoD can require enlisted LPRs, but not U.S. citizens, to complete background investigations prior to accessing. *Id.* (citation omitted). Nor, as explained above, has Congress directly specified that DoD cannot apply different accession rules to LPRs. *Cf. Andrus*, 572 F.2d at 667. On its face, § 504(b)(1) simply provides a prerequisite for the citizenship or residency of enlisted service members. It does not unambiguously express any intent to restrict DoD from adopting different requirements for how those enlisted service members are processed into service.

Plaintiffs also stress that Congress specifically required that non-LPR aliens enlisted under the MAVNI program could not "report to initial training until after" the completion of "all required background investigations and security and suitability screening." 10 U.S.C. § 504(b)(3)(A). Relying on the canon of *expressio unius*,[23] Plaintiffs

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[23] The canon of statutory construction *expressio unius est exclusio alterius* means "expressing one item of [an] associated group or series excludes another left unmentioned." *N.L.R.B. v.*

reason that Congress's failure to expressly impose this same requirement on LPRs enlisted pursuant to § 504(b)(1)(B) means that the DoD may not impose that requirement either. ECF No. 46 at 25-26 (citing *Silvers v. Sony Pictures Entm't Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (en banc)). The difficulty with Plaintiffs' argument is that this canon of statutory construction "does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381, 133 S.Ct. 1166, 185 L.Ed.2d 242 (2013) (internal quotation marks and citation omitted). Given that Congress added § 504(b)(3)(A) after the October 13 Memo was already in effect, *see* 132 Stat. at 1636, the Court cannot infer that Congress meant by its silence to foreclose the policy change enacted through the October 13 Memo.

Accordingly, Plaintiffs' allegations, even if true, do not state a claim that the October 13 Memo exceeded DoD's jurisdiction or was otherwise prohibited by statute.

The Court next addresses Plaintiffs' arbitrary-and-capricious argument. DoD asserts that Plaintiffs have failed to state a claim by taking issue with two points in Plaintiffs' complaint: (1) that the memo "contains vague and unworkable requirements," Compl. ¶ 112; and (2) that DoD is "impermissibly

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SW Gen., Inc., —— U.S. ——, 137 S.Ct. 929, 940, 197 L.Ed.2d 263 (2017) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80, 122 S.Ct. 2045, 153 L.Ed.2d 82 (2002)). The Supreme Court gives the example of a sign at the entrance to a zoo that says "come see the elephant, lion, hippo, and giraffe" next to a temporary sign saying "the giraffe is sick." Under those circumstances, one "would reasonably assume that the other [animals] are in good health." *Id.*

applying the October 13 Memo retroactively," *id.* ¶ 114. DoD contends that these specific arguments are meritless, but it does not attempt to rebut Plaintiffs' larger claim that the October 13 Memo is fatally arbitrary because the agency "failed to provide any legitimate explanation." Compl. ¶ 111; *cf. United States v. Williams*, 846 F.3d 303, 311 (9th Cir. 2016) (distinguishing between claims and arguments for purposes of waiver). In other words, even if the Court agreed with DoD on these particular points, it would not mean that Plaintiffs "fail[ed] to state a [5 U.S.C. § 706(2)] claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). DoD's motion to dismiss Plaintiffs' Section 706(2) claim on this theory is therefore denied.[24]

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[24] DoD also argues that Plaintiffs have failed to state a claim for failure to comply with the APA's notice-and-comment rulemaking requirements, which are set forth in 5 U.S.C. § 553. ECF No. 42 at 42; *see also* Compl. ¶ 113 ("Nor did Defendants circulate the October 13 Memo for public review and comment prior to issuing the Memo."). DoD points out that 5 U.S.C. § 553(a)(1) exempts from those requirements actions involving "a military or foreign affairs function of the United States." It does not appear that Plaintiffs have raised or are pursuing an independent 5 U.S.C. § 553 claim, as they do not designate one in their complaint, *cf.* Compl. ¶ 113, nor do they respond to DoD's argument on this point. The Court therefore concludes that, to the extent Plaintiffs' intended to raise such a claim, they have conceded it. *See So Young Kang v. Wells Fargo Bank, N.A.*, No. 16-CV-04309-DMR, 2018 WL 1586237, at *6 (N.D. Cal. Apr. 2, 2018) ("Plaintiff fails to respond to this argument and therefore concedes it through silence.") (quoting *Ardente, Inc. v. Shanley*, No. C 07-4479 MHP, 2010 WL 546485, at *6 (N.D. Cal. Feb. 10, 2010)).

IV. MOTION FOR PRELIMINARY INJUNCTION

Having concluded that Plaintiffs' claims survive a motion to dismiss, the Court turns to Plaintiffs' motion for a preliminary injunction. Plaintiffs seek a preliminary injunction solely on the basis of their § 706(2) claim, ECF No. 21 at 9 n.9, requesting that the Court order relief "(1) prohibiting Defendants' continued implementation of the October 13 Memo; (2) ordering Defendants to return to the pre-October 13, 2017 practices for the accession of LPRs into the military; and (3) ordering Defendants to permit Plaintiffs to ship basic training while their background investigations are pending, as U.S. nationals are able to do," *id.* at 10.

A. Legal Standard

Preliminary relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22, 129 S.Ct. 365. To obtain preliminary injunctive relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm to the moving party in the absence of preliminary relief; (3) that the balance of equities tips in favor of the moving party; and (4) that an injunction is in the public interest. *Id.* at 20, 129 S.Ct. 365. "[S]erious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted).

B. The Record

The Court first addresses threshold questions regarding the scope of the record for this motion.

The APA instructs that, in reviewing § 706 challenges, "the court shall review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Therefore, to the extent practicable, a court should determine a plaintiff's likelihood of success on the merits of such a challenge based on the administrative record. *See Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (holding that the district court abused its discretion in denying a preliminary injunction by using "the parties' written or oral representations to discern the basis on which the [agency] acted" instead of "calling for the administrative record"). Because " '[t]he whole record' includes everything that was before the agency pertaining to the merits of its decision," the Ninth Circuit has explained that "[a]n incomplete record must be viewed as a 'fictional account of the actual decisionmaking process.' " *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (first quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989); then quoting *Home Box Office, Inc. v. Fed. Commc'ns Comm'n*, 567 F.2d 9, 54 (D.C. Cir. 1977)). "The 'whole' administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555.

The Ninth Circuit permits consideration of "material outside of the administrative record in four narrow circumstances:"

1) where the extra-record evidence is "necessary to determine whether the agency has considered all relevant factors and has explained its decision";

2) where "the agency has relied on documents not in the record";

3) where "supplementing the record is necessary to explain technical terms or complex subject matter"; or

4) where "plaintiffs make a showing of agency bad faith."

Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke, 889 F.3d 584, 600 (9th Cir. 2018) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1451 (9th Cir. 1996)). Even where the Court allows such supplementary evidence, "[c]onsideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record." *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980).

Here, DoD produced a 162-page administrative record, pursuant to the Court's order. ECF No. 57. It is not unduly burdensome to summarize the record's contents. It contains the 2-page October 13 Memo, *id.* at 5-6, 137 pages of DoD regulations and guidance documents concerning its general procedures for enlistment, accession, and security determinations, *id.* at 7-143, an additional 14 pages of memos that pertain solely to the MAVNI program, *id.* at 146-48, 153-54, 158-66, and a 4-page memo increasing the requirements for LPR and MAVNI service members to obtain the "honorable service" certifications

necessary to begin the naturalization process, *id.* at 149-52.

The only portions of the record that appear to relate to security screening for LPRs are (1) a 2-page "background" document summarizing findings of a 2017 study on "Gaps in Vetting of Legal Permanent Residents (LPRs) who Obtain Citizenship via Joining the U.S. Military" ("2017 Study"), *id.* at 144-45; and (2) and a single statement in another memo regarding MAVNI accessions that states: "[B]ecause we believe [LPRs] share[ ] many of the same risk factors with the MAVNI population, we believe current policy is insufficient to mitigate risk," *id.* at 157. Notably, DoD's supplemental brief also cites only those latter two documents as the basis for its decision that change the timing of LPR background investigations was warranted. ECF No. 65 at 2-3.

1. Classified Information

DoD admits that the record is not complete. In its certification of the administrative record, DoD explained that the record contained only "all unclassified information" that Under Secretary Kurta considered. ECF No. 57 at 2. DoD urged the Court to resolve this case on "the basis of the unclassified record," but "reserve[d] the right to seek relief from the Court in order to protect this classified record." *Id.* at 2 n.1. DoD cites no authority for its ability to unilaterally withhold classified information from the administrative record.

The Court is sensitive to the need to protect the confidentiality of information that bears on national security, including classified information. But there are established routes for addressing those concerns. Most obviously, DoD "may provide the Court with

classified information." *Washington v. Trump*, 847 F.3d 1151, 1168 n.8 (9th Cir.), *reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), *and reconsideration en banc denied*, 858 F.3d 1168 (9th Cir. 2017), *and cert. denied sub nom. Golden v. Washington*, —— U.S. ——, 138 S.Ct. 448, 199 L.Ed.2d 331 (2017) ("Courts regularly receive classified information under seal and maintain its confidentiality. Regulations and rules have long been in place for that.") (citing 28 C.F.R. § 17.17(c) (describing Department of Justice procedures to protect classified materials in civil cases); 28 C.F.R. § 17.46(c) ("Members of Congress, Justices of the United States Supreme Court, and Judges of the United States Courts of Appeal and District Courts do not require a determination of their eligibility for access to classified information . . . .")); *De Sousa v. Dep't of State*, 840 F.Supp.2d 92, 104 (D.D.C. 2012) (concluding that a court "has the discretion to order disclosure of classified information to the Court in a civil case where the information is material to the resolution of disputed legal issues and where alternatives to reliance upon classified information are inadequate to satisfy the interests of justice"); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F.Supp.2d 34, 45 (D.D.C. 2005) (upholding agency action under § 706(2) based on "both the classified and unclassified administrative record" provided to the court), *aff'd in part and remanded sub nom. Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007). At today's hearing, DoD acknowledged that it could have used these avenues to provide further data to the Court, but chose not to do so.

Alternatively, DoD can assert "the state secrets doctrine," which "encompasses a 'privilege against

revealing military [or state] secrets.' " *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (alteration in original) (quoting *United States v. Reynolds*, 345 U.S. 1, 6-7, 73 S.Ct. 528, 97 L.Ed. 727 (1953)). Because this privilege "is not to be lightly invoked," it requires "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 1081 (quoting *Reynolds*, 345 U.S. at 7-8, 73 S.Ct. 528). The Court must then must independently determine that "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Id.* (alteration in original) (quoting *Reynolds*, 345 U.S. at 10, 73 S.Ct. 528). If the government satisfies these first two steps, then "the evidence is completely removed from the case." *Id.* at 1082 (citation omitted).

DoD has done none of those things here. The Court will therefore proceed to assess Plaintiffs' likelihood of success on the merits based on the record before the Court.

2. Smith Declaration

First, the Court must determine whether the record properly includes the declaration of Roger Smith, which DoD submitted in support of its opposition to this motion. *See* ECF No. 42-1. Plaintiffs initially sought to strike Smith's declaration, and the Court deferred ruling on the request until production of the administrative record, ECF No. 54, so that the Court could evaluate whether the declaration was "necessary to explain technical

terms or complex subject matter," *Cachil Dehe Band of Wintun Indians*, 889 F.3d at 600.

Having reviewed the administrative record and the Smith declaration, the Court finds that it cannot consider the Smith declaration as support for DoD's decision. As an initial matter, the Smith declaration is not "necessary to explain technical terms or complex subject matter." *Id.* DoD argues that the declaration offers further explanation of the classified information that it has withheld from the record. ECF No. 65 at 6. As explained above, DoD has not sufficiently supported its withholding of that information or shown that the proper course is to provide a post-hoc summary rather than providing the underlying information itself, in its entirety, with tailored redactions[25] or for *in camera* review. Moreover, purportedly explanatory extra-record evidence cannot supply the basis for the Court "to determine the correctness or wisdom of the agency's decision." *Asarco*, 616 F.2d at 1160.

Even were the Court to accept the post-hoc Smith declaration as a substitute for a complete administrative record, the current record does not contain, even in summary form, any corresponding

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[25] If additional evidence exists that might support the October 13 Memo, the Court is not convinced that none of it is unclassified. For example, one asserted justification for the October 13 memo is contained in Under Secretary Kurta's September 22, 2017 memorandum where he states that LPRs "share[ ] many of the same risk factors with the MAVNI population." ECF No. 57 at 157. But DoD disclosed the percentage of MAVNI investigations that resulted in negative suitability determinations. *See* ECF No. 57 at 156-57. So it is difficult to understand why the production of similar data regarding LPRs, if it exists, would implicate national security.

information with which to anchor the Smith declaration's "additional" explanation. The "Most Significant Findings" of the 2017 Study, as presented in the record, relate to information-sharing between different agency components and whether certain procedures are used. ECF No. 57 at 144-45. Regarding the key question in this motion – whether there is a rational connection between the evidence before DOD and its conclusion that LPRs as a class must complete all investigations and screening prior to accessing – the record contains only DoD's unadorned conclusion that "current policy is insufficient to mitigate risk" posed by LPRs. *Id.* at 157. That single sentence does not permit DoD to bootstrap by vague assertion, in effectively unrebuttable form, that LPRs provide a greater classwide risk and that "particular LPR enlistees have posed a grave threat to national security." ECF No. 42-1 at 7-8. Either there is no evidence to support the assertion or DoD has intentionally chosen not to provide it. Either way, the existing record gives the Court no assurance that the Smith declaration is "explanatory in nature, rather than a new rationalization of the agency's decision." *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1984). So, even if the Court accepted DoD's invitation to create a fifth exception for extra-record evidence that explains classified information, *cf. Cachil Dehe Band of Wintun Indians*, 889 F.3d at 600, it would not aid DoD here, because the record gives no contemporaneous indication that this type of evidence was considered by the decisionmaker, *see Kunaknana*, 742 F.2d at 1149 (claim that extra-record evidence is explanatory "must be sustained by the record"). The Court cannot simply take the assertion on faith.

Nonetheless, though not addressed by the parties, the Court must also consider whether the Smith declaration has any legitimate purpose in deciding this motion. While the Court's consideration of extra-record evidence is carefully circumscribed in evaluating the merits of Plaintiffs' APA claim, "the Court is not limited to the administrative record" when "assessing how the issuance of an injunction may harm the public interest." *Nat. Res. Def. Council, Inc. v. Evans*, No. C-02-3805-EDL, 2003 WL 22025005, at *1 (N.D. Cal. Aug. 26, 2003) (citation omitted); *see also Winter*, 555 U.S. at 24, 129 S.Ct. 365 (relying on "declarations from some of the Navy's most senior officers" as to how a preliminary injunction would impact the Navy's training exercises for the public interest prong). Accordingly, the Court declines to strike the Smith declaration at this time but will not consider its assertions as support for the merits of DoD's policy.

C. Nature of Injunctive Relief

DoD argues that Plaintiffs are subject to a heightened standard because they seek a mandatory rather than a prohibitory injunction. ECF No. 42 at 43-44. The argument is not persuasive.

"A mandatory injunction orders a responsible party to take action," while "[a] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *Ariz. Dream Act Coal.*, 757 F.3d at 1060 (citation omitted). The relevant status quo consists of "the last, uncontested status which preceded the pending controversy." *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 n.13 (9th Cir. 1999) (citation omitted).

Here, Plaintiffs seek a prohibitory injunction to "prohibit enforcement of a new law or policy." *Ariz. Dream Act Coal.*, 757 F.3d at 1061. That DoD will have to perform other, affirmative acts based on the old policy does not transform this "classic form of prohibitory injunction" into a mandatory one. *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017).

D. Likelihood of Success on the Merits

As described above, the Court reviews with great deference whether DoD has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Encino Motorcars*, 136 S.Ct. at 2125 (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856).

DoD cannot articulate such a connection, and its explanation therefore fails at the outset, because it has simply withheld all of the relevant facts. *See State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (requiring a court to consider whether the agency has "offered an explanation for its decision that runs counter to the evidence before the agency"); *Santillan v. Gonzales*, 388 F.Supp.2d 1065, 1078 (N.D. Cal. 2005) ("Without the ability to examine the studies cited by defendants in order to determine whether they support the [challenged] policy change, this court is unable to conclude that the policy change had any rational basis.").

The only quasi-factual elements of the record related to LPRs are set forth in the background summary of the 2017 Study. As relevant here, the 2017 Study concluded that the government was not doing certain things that rendered its background investigations of LPRs ineffective. First, because

LPRs are never eligible to receive classified information, *see* ECF No. 57 at 89 § 6.1, the DOD Consolidated Adjudication Facility did "not review or adjudicate Tier 3 investigations," instead issuing "a No Determination Made." *Id.* at 144. Accordingly, this created a risk that "derogatory information discovered in the investigation" would not be "acted upon accordingly." *Id.* Second, DOD's "central biometric repository for terrorist data from a range of combatant commands and military services" was "not being systematically queried as part of the fingerprint check being conducted for military accessions." *Id.* "[R]elying only on name-based [counterterrorism] checks," impaired "DoD's ability to positively identify terrorists and other national security threats." *Id.* at 144-45. Finally, DoD did not have access to LPRs' green card or visa applications. *Id.* at 145. Likewise, DHS was not provided access to derogatory information identified by DoD. *Id.*[26]

Even considering the Study's bare conclusions, none of these findings rationally support the October 13 Memo's policy change. Because nothing in the administrative record suggests that these information-sharing defects were *caused* by permitting LPRs to ship to basic training prior to the completion of background checks, there is no rational basis to believe that preventing LPRs from shipping to basic training will *fix* these problems. *Cf. Santillan*, 388 F.Supp.2d at 1079. Nor does the

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[26] The 2017 Study additionally conclude that LPRs comprised roughly 79 percent of the Tier 3 and NACLC investigations conducted for non-U.S. citizens during fiscal year 2016, and that further research was needed to determine whether a National Intelligence Agency Check should be adopted across all military components. ECF No. 57 at 144.

record indicate that DoD could not fix those problems without requiring completed investigations prior to LPRs shipping to basic training. For instance, the record does not state, and DoD does not now argue, that the timing change enacted by the October 13 Memo in any way impacted its ability to systematically query its biometric database or share information with DHS. *See* ECF No. 57 at 144-45.

DoD argues that its decision is supported by the finding that it was not adjudicating Tier 3 investigations for LPRs or acting on derogatory information that could have been revealed. ECF No. 65 at 2. That suggests, logically enough, that DoD should in fact adjudicate those investigations for LPRs and act on derogatory information. Though the October 13 Memo requires DoD to do so, ECF No. 57 at 5-6, Plaintiffs do not challenge that aspect of the policy, *see* Compl. ¶¶ 109-116. But the record does not suggest that DoD was unable to adjudicate those investigations because LPRs shipped to basic training. Rather, all military personnel must undergo those investigations, *see* ECF No. 57 at 74 § 4.2, and U.S. citizens continue to ship to basic training prior to the completion of those investigations.

In interpreting the 2017 Study, the Court does not purport to "to substitute its judgment for that of the agency." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) (citation omitted). Rather, DoD has simply provided no explanation for how the 2017 Study's findings support its policy choice, and "where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious." *See Encino Motorcars*, 136 S.Ct. at 2125.

DoD's remaining argument hinges on its conclusion that the class of LPRs "shares many of the same risk factors with the MAVNI population." ECF No. 57 at 157. DoD's post-hoc explanation of these factors is that, like MAVNI recruits, LPRs have more extensive relationships with foreign countries than do U.S. citizens. ECF No. 65 at 2-3. But DoD has given no reason to think that this was not the case during the prior policy. And where an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *Fox*, 556 U.S. at 515-16, 129 S.Ct. 1800).

Moreover, the record provides no indication of the risk that LPRs pose compared to U.S. citizens. Curiously, DoD contends that it need not have made such a comparison. ECF No. 65 at 4. But the precise policy change at issue is that DoD began to treat LPRs as presumptive security risks, while presuming that U.S citizens did not pose such a risk. If there was no evidence that LPRs posed a greater security risk, this policy change is by definition arbitrary and capricious. *See Organized Vill. of Kake*, 795 F.3d at 969.

In sum, DoD has simply provided no evidence to support a rational connection between the facts and its choice, nor any indication that "the process by which it reache[d] that result [was] logical and rational." *Michigan*, 135 S.Ct. at 2706 (citation omitted). Therefore, the Court concludes that Plaintiffs are likely to succeed on the merits of their § 706(2) claim.

E. Irreparable Harm

The Court next considers whether Plaintiffs have adequately demonstrated that they are likely to suffer irreparable harm in the absence of a preliminary injunction.

Plaintiffs cite three forms of harm: (1) damage to their career prospects, ECF No. 21 at 24-28; (2) economic harm in the form of lost service pay and other benefits, *id.* at 29-30; and (3) a delay in obtaining U.S. citizenship through the expedited naturalization process available to military members, *id.* at 30.

The Court first addresses Plaintiffs' career prospects. The Ninth Circuit has held that "diminished . . . opportunity to pursue [plaintiffs'] chosen professions" constitutes an irreparable injury, one which is particularly acute "early in their careers." *Ariz. Dream Act Coal.*, 757 F.3d at 1068 (citing *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165-66 (9th Cir. 2011)). More particularly, courts have recognized irreparable harm stemming from delayed accession into active military service. *See Tiwari v. Mattis*, No. C17-242 TSZ, 2018 WL 1737783, at *7 (W.D. Wash. Apr. 11, 2018) ("Among other setbacks, this limitation has precluded MAVNI soldiers from performing in the roles they were recruited for, prevented them from advancing in their careers, spoiled the currency of their qualifications and training, and reduced the amount of pay they are eligible to receive."); *Doe 1 v. Trump*, 275 F.Supp.3d 167, 216 (D.D.C. 2017) (ban on accession of transgender recruits "stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities"), *stay denied*, 2017 WL 6553389, at *3

(D.C. Cir. Dec. 22, 2017) (finding that "the enjoined accession ban would directly impair and injure the ongoing educational and professional plans of transgender individuals").

It is undisputed that DoD projected that LPRs' time in delayed entry programs would "likely exceed one year while awaiting completion of the screening requirements," ECF No. 57 at 157, and Kuang's and Cooke's own experiences further support that projection. Whether Kuang may ship out soon, ECF No. 42 at 45, is immaterial to whether Plaintiffs as a class will continue to experience year-long delays. Similarly, whether Plaintiffs' enlistment contracts provided that they could be ordered to active duty at any time, *id.*, is irrelevant to whether the October 13 Memo causes such delays. Plaintiffs have provided evidence that these delays impact the long-term trajectories of military and post-military careers. ECF No. 26 ¶¶ 17-25. DoD argues that cases like *Doe 1* and *Tiwari* involved additional harms, ECF No. 42 at 47-49, but do not rebut the evidence that a one-year delay does cause harm to career prospects. In light of Ninth Circuit precedent recognizing irreparable injury flowing from general delay of the ability to pursue a career, *see, e.g.*, *Enyart*, 630 F.3d at 1165, Plaintiffs need not show that *Doe 1* and *Tiwari* are indistinguishable.

Moreover, there is a second form of irreparable injury present here that was not implicated in *Doe 1*, because the October 13 Memo delays Plaintiffs' ability to obtain citizenship through their military service. *See Kirwa*, 285 F.Supp.3d at 42 ("[D]elaying naturalization applications after applicants have been promised an expedited path to citizenship constitutes irreparable harm.") (citing *Nio*, 270

F.Supp.3d at 62). It is true, as DoD points out, that its newly adopted policy requires LPRs to have completed background investigations prior to naturalization under 8 U.S.C. § 1440. ECF No. 57 at 149-50. But it is equally true that, under this same policy, LPRs must also have a total of 180 days of active service, including basic training, before they can be certified for honorable service, another prerequisite to the expedited naturalization process. *Id.* at 150. Plaintiffs' inability to begin basic training until after their complete investigations plainly delays this process. The Court further rejects DoD's suggestion that Plaintiffs suffer no injury from the loss of this opportunity. ECF No. 42 at 50. Statutory eligibility for naturalization is an important benefit of military service, and Kuang's and Cooke's declarations make clear that the military was in the practice of using that benefit as a recruiting tool. ECF No. 24 ¶ 8; ECF No. 25 ¶ 10. While Plaintiffs have no "right to naturalization," they can still suffer irreparable harm from unjustified delays in the process.

Finally, while DoD repeatedly asserts that various injuries were not "caused" by the October 13 Memo, the test is whether "irreparable injury is *likely* in the absence of an injunction." *M.R. v. Dreyfus*, 697 F.3d 706, 728 (9th Cir. 2012). A plaintiff "need not further show that the action sought to be enjoined is the exclusive cause of the injury." *Id.*

Accordingly, the Court concludes that Plaintiffs have demonstrated irreparable harm.[27]

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[27] The Court therefore does not reach Plaintiffs' asserted stigmatic and economic injuries.

F. Balance of Equities and Public Interest

The Court turns to the final two *Winter* factors. "When the government is a party, these last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

DoD argues that it has valid national security concerns regarding the accession of LPRs prior to the completion of background investigations. ECF No. 42 at 54. The country's national security is obviously of the utmost importance, and the Court will give due deference to that consideration, when present, as it analyzes the balance of harms. Before it can do so, however, there must be evidence that the concern actually *is* present. Defendants have not given the Court anything from which it could reach that threshold conclusion. Simply put, "[a] bare invocation of 'national defense' simply cannot defeat every motion for preliminary injunction that touches on the military." *Doe 1*, 275 F.Supp.3d at 217.

By contrast, there is substantial, uncontradicted evidence before the Court – including evidence from the military itself – that the policy set forth in the October 13 Memo actually impairs the military's recruitment goals and undermines military readiness. *See* ECF No. 57 at 157 (Under Secretary Kurta's statement that the policy "will impact the ability of some Military Service components to make recruiting mission in FY 2018"); *see also* ECF No. 23 ¶¶ 19-24 (former Secretary of Army's declaration that policy impacts military objectives). Former Secretary of the Army Eric K. Fanning opines without rebuttal that "the recently announced policy change is causing significant harm to both LPRs serving in the military and the efficacy of the military itself," ECF No. 23 ¶ 17, and "will likely dissuade many qualified LPRs

from enlisting in the military due to the lengthy delays in accession and uncertainty surrounding shipment dates," making it difficult for the military to meet its recruiting goals, *id.* ¶ 22. Thus, a policy with the stated goal of improving the country's national security is likely to actually undermine that goal by impairing military readiness. That does not serve the public interest.

There are additional equities on Plaintiffs' side. Kuang and Cooke, and likely many other LPR class members as well, enlisted prior to the October 13 Memo, only to face an entirely different policy after enlistment. Their ability to apply for citizenship after a fixed period of military service has been frustrated by a delay of unknown length in beginning that service. Finally, "in the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them." *See Doe 1 v. Trump*, 2017 WL 6553389, at *3.

For these reasons, the Court concludes that the balance of equities and the public interest favor granting an injunction and Plaintiffs' motion for a preliminary injunction is granted.

CONCLUSION

For the foregoing reasons, the Court (1) GRANTS Plaintiffs' motion for class certification; (2) DENIES DoD's motion to dismiss; and (3) GRANTS Plaintiffs' motion for preliminary injunction. The Court hereby

ENJOINS Defendants and their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants from taking any action continuing to implement the October 13 Memo and ORDERS Defendants to return to the pre-October 13, 2017 practices for the accession of Lawful Permanent Residents into the military.[28]

This Preliminary Injunction shall take effect immediately and shall remain in effect pending resolution of this action on the merits or further order of this Court.

IT IS SO ORDERED.

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[28] In their moving papers, Plaintiffs request the Court also order "Defendants [to] permit Plaintiffs to ship out to basic training while their background investigations are pending, as U.S. nationals are able to do." ECF No. 21-1 at 2. Because Plaintiffs request the same relief as that granted to the class as a whole, the Court has not added a provision specific only to them.

FILED

FEB 1 2019

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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIAHAO KUANG and DERON COOKE, on behalf of themselves and those similarly situated, Plaintiffs–Appellees, v. UNITED STATES DEPARTMENT OF DEFENSE and 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 Northern District of California, San Francisco ORDER

Before: THOMAS, Chief Judge, GOULD and PAEZ, Circuit Judges,

To the extent that appellees' motion to strike (Docket Entry No. 13) seeks to strike the declaration of Stephanie P. Miller for the purposes of resolving the pending motion to stay the district court's November 16, 2018 order, the request is denied. The motion to strike is otherwise referred to the panel assigned to decide the merits of this appeal.

Appellants' motion (Docket Entry No. 9) to stay the district court's November 16, 2018 order pending appeal is denied. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The previously established briefing schedule remains in effect.

GOULD, Circuit Judge, dissenting:

I would grant the stay pending appeal because I conclude that the factors set forth in *Wenger v. Monroe*, 282 F.3d 1068, 1072 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Apr. 17, 2002), analyzing the test initially formulated by the Fifth Circuit in *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), do not support justiciability of the class's claims here. The strength of the named Plaintiffs' claims are not very strong, because at most the new Department of Defense policy requires a delay in class members' entry into basic training until after their background checks have been completed. At most, the injury is a delay in reporting to basic training for an individual if that person's background check proves one that is safe for the military, and if the person is thought not safe for the military based on the background check, then there's no recognizable harm at all. By contrast, the extent of interference with military functions is at its zenith where the military is concerned that those without completed checks may pose national security concerns. And similarly, the judgments to be made on this subject are of the type that should be within military discretion because the expertise of the military on national security matters is paramount. And even if the class's claims are justiciable, the factors governing stay pending appeal, under *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), favor a

stay. Because I conclude that the claims of the class are weak, if not non-justiciable, I also conclude that the Department of Defense, which has the key expertise to assess national security concerns, is most likely to prevail. If a person enters military basic training at a military base, and harbors interests hostile to the United States government, then there is a likelihood of irreparable harm to the government. I also think that the public interest favors completion of background checks before a person enters the military. Respectfully, the stay pending appeal requested by the Department of Defense should be granted.

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

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

Banc. Fed. R. App. P. 35. Appellee's Petition for Rehearing En Banc is DENIED.

5 U.S.C. § 701(b)(1)(G)

§ 701. Application; definitions

* * *

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

* * *

(G) military authority exercised in the field in time of war or in occupied territory; . . . .

* * *

5 U.S.C. § 706(2)(A)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

* * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8 U.S.C. § 1439(a)

§ 1439. Naturalization through service in the armed forces

(a) Requirements

A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating one year, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's application, in the United States for at least five years, and in the State or district of the Service in the United States in which the application for naturalization is filed for at least three months, and without having been physically present in the United States for any specified period, if such application is filed while the applicant is still in the service or within six months after the termination of such service.

* * *

8 U.S.C. § 1440(a)

§ 1440. Naturalization through active-duty service in the Armed Forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities

(a) Requirements

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 either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or during a period beginning June 25, 1950, and ending July 1, 1955, or during a period beginning February 28, 1961, and ending on a date designated by the President by Executive order as of the date of termination of the Vietnam hostilities, or thereafter 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, the Canal Zone, American Samoa, or Swains Island, or on board a public vessel owned or operated by the United States for noncommercial service, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment

or induction such person shall have 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: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of an application for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

* * *

8 U.S.C. § 1446

§ 1446. Investigation of applicants; examination of applications

(a) Waiver

Before a person may be naturalized, an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person applying for naturalization in the vicinity or vicinities in which such person has maintained his actual place of abode and in the vicinity or vicinities in which such person has been employed or has engaged in business or work for at least five years immediately preceding the filing of his application for naturalization. The Attorney General may, in his discretion, waive a personal investigation in an individual case or in such cases or classes of cases as may be designated by him.

(b) Conduct of examinations; authority of designees; record

The Attorney General shall designate employees of the Service to conduct examinations upon applications for naturalization. For such purposes any such employee so designated is authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any applicant for naturalization, to administer oaths, including the oath of the applicant for naturalization, and to require by subpena the attendance and testimony of witnesses, including applicant, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any district court of the United States; and any such court may, in the event of neglect or refusal

to respond to a subpena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the examination authorized by this subsection shall be admissible as evidence in any hearing conducted by an immigration officer under section 1447(a) of this title. Any such employee shall, at the examination, inform the applicant of the remedies available to the applicant under section 1447 of this title.

(c) Transmittal of record of examination

The record of the examination upon any application for naturalization may, in the discretion of the Attorney General be transmitted to the Attorney General and the determination with respect thereto of the employee designated to conduct such examination shall when made also be transmitted to the Attorney General.

(d) Determination to grant or deny application

The employee designated to conduct any such examination shall make a determination as to whether the application should be granted or denied, with reasons therefor.

(e) Withdrawal of application

After an application for naturalization has been filed with the Attorney General, the applicant shall not be permitted to withdraw his application, except with the consent of the Attorney General. In cases where the Attorney General does not consent to the

withdrawal of the application, the application shall be determined on its merits and a final order determination made accordingly. In cases where the applicant fails to prosecute his application, the application shall be decided on the merits unless the Attorney General dismisses it for lack of prosecution.

(f) Transfer of application

An applicant for naturalization who moves from the district of the Service in the United States in which the application is pending may, at any time thereafter, request the Service to transfer the application to any district of the Service in the United States which may act on the application. The transfer shall not be made without the consent of the Attorney General. In the case of such a transfer, the proceedings on the application shall continue as though the application had originally been filed in the district of the Service to which the application is transferred.

10 U.S.C. § 504(b)

§ 504. Persons not qualified

* * *

(b) CITIZENSHIP OR RESIDENCY.—(1) A person may be enlisted in any armed force only if the person is one of the following:

(A) A national of the United States, as defined in section 101(a)(22) of the Immigrationand Nationality Act (8 U.S.C. 1101(a)(22)).

(B) An alien who is lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).

(C) A person described in section 341 of one of the following compacts:

(i) The Compact of Free Association between the Federated States of Micronesia and the United States (section 201(a) of Public Law 108-188 (117 Stat. 2784; 48 U.S.C. 1921 note)).

(ii) The Compact of Free Association between the Republic of the Marshall Islands and the United States (section 201(b) of Public Law 108-188 (117 Stat. 2823; 48 U.S.C. 1921 note)).

(iii) The Compact of Free Association between Palau and the United States (section 201 of Public Law 99-658 (100 Stat. 3678; 48 U.S.C. 1931 note)).

(2) Notwithstanding paragraph (1), and subject to paragraph (3), the Secretary concerned may authorize the enlistment of a person not described in paragraph

(1) if the Secretary determines that such person possesses a critical skill or expertise—

(A) that is vital to the national interest; and

(B) that the person will use in the primary daily duties of that person as a member of the armed forces.

(3)(A) No person who enlists under paragraph (2) may report to initial training until after the Secretary concerned has completed all required background investigations and security and suitability screening as determined by the Secretary of Defense regarding that person.

(B) A Secretary concerned may not authorize more than 1,000 enlistments under paragraph (2) per military department in a calendar year until after—

(i) the Secretary of Defense submits to Congress written notice of the intent of that Secretary concerned to authorize more than 1,000 such enlistments in a calendar year; and

(ii) a period of 30 days has elapsed after the date on which Congress receives the notice.

32 C.F.R. § 66.6(b)(8)(vi)

§ 66.6 Enlistment, appointment, and induction criteria.

* * *

(b) *Basic eligibility criteria.*—

* * *

(8) *Character/conduct.* The underlying purpose of these enlistment, appointment, and induction standards is to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline. The Military Services are responsible for the defense of the Nation and should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society at-large. As a minimum, an applicant will be considered ineligible if he or she:

* * *

(vi) Receives an unfavorable final determination by the DoD Consolidated Adjudication Facility on a completed National Agency Check with Law and Credit (NACLC) or higher-level investigation, which is adjudicated to the National Security Standards in accordance with Executive Order 12968, during the accession process.

* * *

[Seal omitted]

OFFICE OF THE UNDER SECRETARY
OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

OCT 13 2017

MEMORANDUM FOR SECRETARIES OF THE
MILITARY DEPARTMENTS
COMMANDANT OF THE COAST GUARD
DIRECTOR, DEPARTMENT OF DEFENSE
CONSOLIDATED ADJUDICATIONS
FACILITY

SUBJECT: Military Service Suitability Determinations for Foreign Nationals Who Are Lawful Permanent Residents

Reference: (a) 10 U.S. Code §504(b)(l)(B)

(b) Department of Defense Instruction (DoDI) 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," March 23, 2015

(c) Security Executive Agent Directive 4, National Security Adjudicative Guidelines, June 8, 2017

(d) Department of Defense Manual 5200.02, "Procedures for the DoD Personnel Security Program (PSP)," April 3, 2017

In order to facilitate process efficiency and the appropriate sharing of information for security risk based suitability and security decisions for the accession of foreign nationals described in reference (a), effectively immediately a Military Service

Suitability Determination (MSSD) and National Security Determination (NSD), will be made prior to such foreign national's entry into Active, Reserve or Guard Service. Following completion of the appropriate background investigation, the DoD Consolidated Adjudications Facility (DoD CAF) will attempt to render favorable MSSD and NSD recommendations on the foreign national applicant, applying the National Security Adjudicative Guidelines at reference (c).

- If during the NSD or MSSD adjudication at the DoD CAF, derogatory information is discovered that cannot be mitigated in accordance with reference (c), or derogatory information is discovered that was not previously known to the Military Service of which the foreign national applicant will be a member, the DoD CAF will refer that information to the designated office of responsibility within the applicant's Military Service. The designated official will take appropriate action to mitigate the security risk or discontinue applicant processing for the individual concerned within 90 days from the date of the DoD CAF referral, on the basis of military service suitability disqualification.
- If the Military Service mitigates the derogatory information and/or grants a waiver to MSSD standards, the case and any mitigating information will be returned to the DoD CAF to complete the NSD review process. If, after review, an adverse NSD is rendered, the DoD CAF will notify the Military Service, which will discontinue applicant processing for the individual concerned.

- In cases in which the foreign national applicant is not yet a citizen but is otherwise eligible for a favorable NSD and MSSD, in accordance with reference (d), a waiver, deviation, and/or condition, as necessary and appropriate, will be annotated in the Joint Personnel Adjudication System, including the annotation of a statement that the individual is not eligible for access to classified information until U.S. citizenship is granted, and then only if the individual's position and/or duties require access to classified information.

s/ A.M. Kurta

A.M. Kurta
Performing the Duties of Under Secretary of Defense for Personnel and Readiness

Cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Intelligence
Under Secretary of Defense for Personnel and Readiness
Chief of the National Guard Bureau
Assistant Secretary of the Army for Manpower and Reserve Affairs
Assistant Secretary of the Navy for Manpower and Reserve Affairs
Assistant Secretary of the Air Force for Manpower and Reserve Affairs
Director, Washington Headquarters Services

[Seal omitted]

OFFICE OF THE SECRETARY
OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

July 30 2019

MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM) 19-008, "Expedited Screening Protocol (ESP)"

References: See Attachment 1

Purpose. This DTM:

- Implements policy, assigns responsibilities, and prescribes procedures by which the Department of Defense implements the Expedited Screening Protocol (ESP)—uniform and consistent standards for a centralized process for the screening and vetting of individuals requiring access to DoD systems, facilities, personnel, information, or operations for allegiance, foreign preference, or foreign influence concerns.
- Implements the policies prescribed in DoD Instruction (DoDI) 1304.26 and in Section 5.2(a) of Executive Order (E.O.) 12968 for an applicant where a conditional offer of enlistment, induction, or appointment is withdrawn for failure to obtain favorable ESP results.
- Establishes the implementation of ESP consistent with relevant governing documents enumerated in Attachment 1.
- Is effective July 30, 2019 and supersedes any contradictory guidance in DoD Instruction 1304.26, DoD Instruction 1332.14, and DoD Manual (DoDM) 5200.02. These DoD issuances will be updated to comply with this DTM. The Military Departments and the Coast Guard will implement within 30 days of the effective date.

- Will be reevaluated within 6 months of the effective date and expire effective July 30, 2020. Subject to any judicial orders, the October 13, 2017 Office of the Under Secretary of Defense for Personnel and Readiness memorandum shall be held in abeyance upon the issuance of this DTM. Based on the results of subsequent ESP reevaluation, the October 13, 2017 Office of the Under Secretary of Defense for Personnel and Readiness memorandum will be terminated, held in abeyance for an additional period, or reinstated, as appropriate.

Applicability. This DTM applies to:

- OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security, by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

- Applicants for military service who enter into a contract for enlistment, induction, or appointment, and Service members with an open initial national security background investigation.

Definitions See Glossary.

Policy. It is DoD policy that:

- Military Departments and the Coast Guard will account for all Service members and those individuals who have contracted into the Delayed Entry Program (DEP) and the Delayed Training Program (DTP), through their respective security managers, who have a military owning or servicing relationship in the DoD system of record, the Joint Personnel Adjudication System, or its successor system. This relationship is maintained for all Service members, including Coast Guard personnel, from the time they are submitted for their first investigations until they separate from their respective Armed Forces.

- All applicants for military service who enter into a contract for service and all Service members with an open initial national security background investigation will be referred for ESP if review of their Standard Form 86 (SF-86) indicates a need to screen for potential risk concerning allegiance to the United States, foreign preference, or foreign influence concerns. ESP will augment and enhance vetting mechanisms used to inform military service eligibility determinations pertaining to enlistment, induction, or appointment within the Military Departments and the Coast Guard.

- Consistent with the authorities and guidance set forth in E.O. 13764, Section 1564b of Title 10, U.S.C., the Federal

Investigative Standards, and Section 925 of Public Law 115-91, this process will be:

- Applied to military accession populations with open initial national security background investigations. These individuals will be referred for ESP if a need to screen for potential risks associated with allegiance to the United States, foreign preference, or foreign influence concerns is identified through a review of their Standard Form (SF) 86.
- Applied to identify the above potential risk indicators and meet requirements and guidelines outlined in the Federal Investigative Standards for Tier 3 / Tier 5 investigations and Guidelines A, B, and C of the National Adjudicative Guidelines found in Security Executive Agent Directive 4.

- Nothing in this DTM:
  - Change policies governing National Security Determinations.
  - Precludes DoD from using ESP for other purposes, including, but not limited to, support of vetting processes that inform decisions for national security purposes (e.g., eligibility for or access to classified information or to hold a sensitive position), for suitability and fitness, and for purposes of issuing a federal identity credential in accordance with applicable law and policy.

Responsibilities. See Attachment 2.

Procedures. See Attachment 3.

Information Collection Requirements. The requirement for data collection in this DTM does not require licensing with a report control symbol in accordance with Paragraph 1.b.(13) in Enclosure 3 of Volume 1 of DoDM 8910.01.

Releasability. Cleared for public release. Available on the Directives Division Website at https://www.esd.whs.mil/DD/.

s/ Joseph D. Kernan	*s/ James N. Stewart*
Joseph D. Kernan	James N. Stewart
Under Secretary of Defense for Intelligence	Assistant Secretary of Defense for Manpower and Reserve Affairs, Performing the Duties of the Under Secretary of Defense for Personnel and Readiness

Attachments
As stated

cc:
Secretary of Homeland Security
Commandant of the United States Coast Guard
Director, Defense Counterintelligence and Security Agency

ATTACHMENT 1
REFERENCES

DoD Instruction 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," March 23, 2015, as amended

DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended

DoD Instruction 1332.30, "Commissioned Officer Administrative Separations," May 11, 2018, as amended

DoD Manual 5200.02, "Procedures for the DoD Personnel Security Program (PSP)," April 3, 2017

DoD Manual 8910.01, Volume 1, "DoD Information Collections Manual: Procedures for DoD Internal Information Collections," June 30, 2014, as amended

Executive Order 12968, "Access to Classified Information," August 2, 1995

Executive Order 13764, "Amending the Civil Service Rules," January 17, 2017

Executive Order 13869, "Transferring Responsibility for Background Investigations to the Department of Defense," April 24, 2019

Federal Investigative Standards, December 2012

Office of the Under Secretary of Defense for Personnel and Readiness Memorandum, "Military Service Suitability Determinations for Foreign Nationals Who Are Lawful Permanent Residents," October 13, 2017

Public Law 115-91, Section 925, "National Defense Authorization Act for Fiscal Year 2018," April 2, 2018

Security Executive Agent Directive 4, "National Security Adjudicative Guidelines," June 8, 2017

United States Code, Title 10, Section 1564b

ATTACHMENT 2
RESPONSIBILITIES

1. ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS. Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Manpower and Reserve Affairs, through the Director, DoD Accessions Policy will, in coordination with Military Department and Coast Guard counterparts, oversee and assess the ESP performance as it relates to military accessions screening for eligibility for enlistment, induction, or appointment.

2. DIRECTOR FOR DEFENSE INTELLIGENCE (COUNTERINTELLIGENCE, LAW ENFORCEMENT, AND SECURITY). Under the authority, direction, and control of the Under Secretary of Defense for Intelligence, the Director for Defense Intelligence (Counterintelligence, Law Enforcement, and Security) will provide guidance and oversight for the ESP under the DoD Personnel Security Program. Additionally, in coordination with Director, DoD Accessions Policy and with Military Department and Coast Guard counterparts, will oversee and assess ESP performance with respect to military accessions screening.

3. DIRECTOR, DEFENSE COUNTERINTELLIGENCE AND SECURITY AGENCY. Under the authority, direction, and control of the Under Secretary of Defense for Intelligence, the Director, Defense Counterintelligence and Security Agency, will:

a. Establish training and other policies, procedures, and personnel requirements for the Expedited Screening Center (ESC), and other

organizational entities to execute and achieve the requirements of this DTM.

b. In coordination with the Director for Defense Intelligence (Counterintelligence, Law Enforcement, and Security), establish a centralized capability for using ESP to identify and mitigate potential high risk indicators associated with allegiance, foreign preference, and foreign influence concerns within military accessions populations.

c. Provide metrics and other data to the Director for Defense Intelligence (Counterintelligence, Law Enforcement, and Security) and to the Director, DoD Accessions Policy, to be shared with the Military Departments and Military Services, regarding ESP timelines and trends for accessions as defined by this DTM.

4. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

a. Will, for their respective departments, establish training and other policies, procedures and, for Fiscal Year 2019, personnel requirements to execute and achieve the requirements of this DTM.

b. May waive certain requirements as described in Attachment 3.

5. COMMANDANT OF THE UNITED STATES COAST GUARD. The Commandant of the United States Coast Guard:

a. Will, as necessary and appropriate, integrate the results of ESP into its adjudication of personnel vetting in accordance with this DTM, DoDI 1304.26, and DoDM 5200.02.

b. May waive certain requirements as described in Attachment 3.

ATTACHMENT 3
ESP PROCESS AND TIMELINESS GOALS

1. GENERAL

a. The requirements in this attachment shall be fully achieved by 12 months from the date of issuance of this DTM.

b. All applicants for military service who enter into a contract for service and all Service members with an open initial national security background investigation will be referred for ESP when information the individual provides on the SF-86 signals a need to screen for concerns regarding allegiance to the United States, foreign preference, or foreign influence, as follows:

(1) Responses to Questions 9, 10, 11, 12, 15.3, 17, 18, 19, 20a, 20b, 25, or 29 of the SF-86 signal need to screen for potential risk indicators associated with allegiance to the United States, foreign preference, or foreign influence concerns.

(2) Responses to Question 20c of the SF-86 will be used as a secondary indicator until this question is incorporated into the protocol as a primary indicator no later than October 1, 2020.

2. ESP PROCEDURES. In accordance with the following procedures, the ESP will be implemented in two phases to minimize disruption to military accessions and to allow for evaluation of the protocol.

a. ESP Initiation (Phase 1), Through Fiscal Year 2019.

(1) Individuals will be held from shipping to initial entry training (IET), held at current duty station, or held at a Service-designated staging location when initial ESP results reveal potential

high risk indicators regarding allegiance to the United States, foreign preference, or foreign influence concerns.

(2) Hold statuses, unless waived by the Secretary concerned, or the Commandant of the Coast Guard, as the case may be, per Section 3 of this DTM, will be in effect until a favorable ESP result is rendered. Actions taken in response to Final ESP results are addressed in Sections 2.d and 2.c of this attachment.

b. ESP Initiation (Phase 2), Effective During Fiscal Year 2020.

(1) Phase 2 initiation will be subject to analysis and review by the Offices of the Under Secretary of Defense for Personnel and Readiness and of the Under Secretary of Defense for Intelligence.

(2) Individuals referred to ESP will not proceed to IET (either basic or advanced training) until any identified potential high risk indicators have been mitigated and a favorable ESP result is rendered, or until the Military Department concerned or the Coast Guard, as the case may be, makes a determination to retain the individual from military service.

(3) Current service members who are referred to ESP will remain at their present duty station or service-designated staging location until any identified potential risk indicators have been mitigated and a favorable ESP result is rendered, or until the Military Department concerned or the Coast Guard, as the case may be, makes a determination to retain or separate the individual from military service.

c. Final ESP Results. Final ESP results, regardless of outcome, will be forwarded to the National Background Investigation Bureau or the appropriate investigative service provider, and the Department of Defense Consolidated Adjudications Facility (DoD CAF) or the appropriate adjudicative entity to inform Tier 3 or Tier 5 background investigations.

(1) No Potential High Risk Indicators. If final ESP results do not identify any potential high risk indicators, ESC personnel will annotate the system of record accordingly.

(2) Potential High Risk Indicators Are Mitigated. If final ESP results identify potential high risk indicators and ESC personnel identify mitigating information, the individual will not need to be further processed in ESP. ESC personnel will annotate the system of record accordingly with the favorable result.

(3) High Risk Indicators Are Not Mitigated. If final ESP results identify potential high risk indicators and ESC personnel cannot identify mitigating information, ESC personnel will annotate the system of record with the unfavorable result and notify the Military Department concerned or the Coast Guard, as the case may be, accordingly.

d. Notifications and Separation Procedures.

(1) Unfavorable ESP Results Notification. If the ESP produces unfavorable results, the ESC will notify the Military Department concerned or the Coast Guard, as the case may be. The notification will read: "[Named Individual] has high risk indicators with no available mitigating information."

(2) Military Department and Coast Guard Actions.

(a) After receiving an unfavorable ESP result, the Military Department concerned or the Coast Guard, as the case may be, will determine whether the individual continues to meet eligibility requirements for enlistment, induction, or separation in accordance with DoDI 1304.26, and whether the individual should be separated from military service in accordance with DoDI 1332.14 or DoDI 1332.30. The enlistment, induction, or appointment criteria in Paragraph 2.h.(6) in Enclosure 3 of DoDI 1304.26 is amended to include the following criteria:

1. Receives an unfavorable result from a review of information that revealed the individual presents an unacceptable risk to good order and discipline within the Armed Forces.

2. Receives an unfavorable determination by an adjudicative entity on a completed Tier 3 or higher-level investigation adjudicated according to the National Security Standards set forth in E.O. 12968, while in the Delayed Entry Program, the Delayed Training Program, or otherwise in entry-level status.

(b) If a Tier 3 or Tier 5 background investigation results an unfavorable national security determination from an adjudicative entity, the Military Departments and the Coast Guard, after receiving the notification, will initiate separation proceedings in accordance with DoDIs 1332.14 and DoDI 1332.30, as amended by this DTM.

(3) Administrative Separation Procedures. The procedures in Section 5.2(a) of E.O. 12968 will not apply to Service members who are being considered

for administrative separation under DoDI 1332.14 or DoDI 1332.30, or for any other reason other than denial of eligibility for access to classified information or to hold a national security position. The policy in Paragraph 5 in Enclosure 3 of DoDI 1332.14 will be followed and is amended with the following policy for unfavorable results or determinations:

(a) Separation from the DEP.

1. An individual who is in the DEP may be separated because of ineligibility for enlistment in accordance with DoDI 1304.26, or the additional standards prescribed by the Secretary of the Military Department concerned or by the Commandant of the Coast Guard, or upon his or her request when authorized by the Secretary of the Military Department concerned or by the Commandant of the Coast Guard, as the case may be. This includes individuals in DEP who have been determined to no longer meet eligibility requirements for enlistment or induction based upon unfavorable ESP results.

2. Paragraph 4.e. in Enclosure 3 of DoDI 1332.14 shall be amended to require that the individual be notified of the proposed separation and the reasons for it. If the reasons include classified information, unclassified summaries may be used; however, any summaries derived from classified information will be consistent with the national security interests of the United States and other applicable law.

(b) Entry-Level Performance and Conduct Separations. This paragraph applies to individuals in the Delayed Training Program (DTP) or otherwise in entry-level status.

1. An enlisted Service member may be separated while in entry-level status when it is determined that the enlisted Service member: no longer meets the requirements for eligibility for enlistment or induction as specified in DoDI 1304.26; or is unqualified for further military service by reason of unsatisfactory performance, conduct, or both. Evidence of an enlisted Service member being unqualified may include lack of capability, lack of reasonable effort, failure to adapt to the military environment, or minor disciplinary infractions.

2. When separation of an enlisted Service member in entry-level status is warranted by failure to meet the requirements for eligibility for enlistment or induction; or unsatisfactory performance, conduct, or both, the enlisted Service member should be processed for entry-level separation. However, entry-level status does not preclude separation for any other reason authorized by this issuance when such separation is warranted by the circumstances of the case.

3. Counseling and rehabilitation requirements are normally important aspects of the reason for separation. Except in separations based on failure to meet the requirements for eligibility for enlistment or induction, separation processing may not be initiated until the enlisted Service member has been formally counseled concerning those deficiencies as reflected in appropriate counseling or personnel records. An enlisted Service member in entry-level status should not be separated for unsatisfactory performance, minor disciplinary infractions, or both, when this is the sole reason, unless appropriate efforts at rehabilitation have been made under standards prescribed by the Secretary of the Military

Department concerned or by the Commandant of the Coast Guard.

(c) Administrative Separation Procedures for Service Members No Longer in an Entry Level Status. An Armed Force will use Secretarial Plenary Authority for enlisted Service members who are not in the DEP or DTP or are otherwise not in entry-level status, who have been determined to no longer meet eligibility requirements for enlistment or induction based on the unfavorable ESP results.

(4) Notice of Separation. Enlisted Service members who are facing separation, based on unfavorable ESP results in accordance with DoDI 1332.14 will be provided notice of intended separation consistent with Paragraph 2 in Enclosure 5 of DoDI 1332.14.

(a) The individual will be notified in writing of:

1. The basis of the proposed separation, including the circumstances upon which the separation is based and a reference to this DoDI and any applicable provisions of the appropriate Military Department's or the Coast Guard's implementing regulation, as the case may be. If the basis includes classified information, unclassified summaries may be used. However, any summaries derived from classified information will be consistent with the national security interests of the United States and other applicable law.

2. Whether the proposed separation could result in discharge, release from active duty to a Reserve Component, transfer from the Selected Reserve to the Individual Ready Reserve, release

from custody or control of the Military Services, or other form of separation.

3. The least favorable characterization of service or description of separation authorized for the proposed separation.

4. The right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation. Classified information in such documents may be provided to the individual in unclassified summarized format. However, any summaries derived from classified information provided to the individual shall be consistent with the national security interests of the United States and other applicable law.

(b) Consistent with DoDI 1332.14 (as amended by this DTM), individuals facing administrative separation from military service based on unfavorable ESP results will receive the notice in the Figure.

Figure. Unfavorable ESP Notice

"A review of information indicates that you present an unacceptable risk to good order and discipline within the Armed Forces and that it is not in the best interests of the [Military Department or the Coast Guard] for you to continue to serve. Accordingly, you are being notified that 30 days from your receipt of this memorandum, we intend to take action to administratively separate you from the Armed Forces."

(5) Separation Procedures for Commissioned Officers.

(a) A commissioned officer who receives an unfavorable final ESP result will be separated from the Military Department concerned or the Coast Guard, as the case may be, in accordance with regulations outlined in Section 3 of DoDI 1332.30.

(b) The Military Department or the Coast Guard will reject an application for an officer commission by an applicant who receives unfavorable ESP results. The applicant for a commission will only receive notice that his or her application has been rejected for failure to meet initial security screening requirements. The separation procedures specified in Paragraph 2.d.(3) in this attachment do not apply in these circumstances.

3. WAIVERS

a. The Secretaries of the Military Departments and the Commandant of the Coast Guard have authority to waive the requirements to separate or disqualify individuals with unfavorable ESP results on a case by case basis. A waiver may only apply to a single individual and cannot be applied to groups. Waivers must explain why the individual is deemed mission essential while acknowledging the associated risks identified through the ESP.

b. The Secretaries of the Military Departments and the Commandant of the Coast Guard may delegate, in writing, to an Assistant Secretary or to a Deputy Chief of Staff, respectively, the authority to grant waivers to retain an individual with high risk indicators and to accept the risk on behalf of the Secretary of the Military Department concerned, or

the Commandant of the Coast Guard, as the case may be.

c. Any waiver decision by the Secretaries of the Military Departments and the Commandant of the Coast Guard will be informed by an executive summary of ESP results to be provided by the ESC upon request.

d. The Secretaries of the Military Departments and the Commandant of the Coast Guard, or their designees, will provide copies of all approved ESP waivers to the Under Secretary of Defense for Intelligence and the Under Secretary of Defense for Personnel and Readiness explaining why the accession or retention of the individual is in the national security interest of the respective Military Service.

4. OVERALL ESP PROCESS TIMELINESS GOALS

a. If there are no potential high risk indicators identified through the ESP, the goal for completion is within 14 days of the date on which the ESC received SF-86 information (approximately 7 to 10 days after the SF-86 is completed, submitted, and any information inconsistencies are resolved). However, if the ESP identifies potential high risk indicators, the goal for completion of analysis and potential mitigation is within 90 days of receipt of SF-86 data by the ESC.

b. This protocol should not unduly affect individuals proceeding to IET in a timely manner. All efforts will be made to minimize the impact to the Military Department and Coast Guard training pipelines, while identifying and mitigating risks through the ESP.

c. Metrics, data, and trends regarding ESP will be provided by the Director, Defense Counterintelligence and Security Agency, to the Director for Defense Intelligence (Counterintelligence, Law Enforcement, and Security), and the Director, DoD Accessions Policy, to be shared with Military Departments and the Coast Guard.

5. PROCESS REVIEW. The Offices of the Under Secretaries of Defense for Intelligence and of Personnel and Readiness will conduct a process review regarding the ESP implementation to determine effectiveness and resourcing in Fiscal Year 2020.

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DEP	Delayed Entry Program
DoD CAF	Department of Defense Consolidated Adjudications Facility
DoDI	DoD instruction
DoDM	DoD manual
DTM	directive-type memorandum
DTP	Delayed Training Program
E.O.	Executive order
ESC	Expedited Screening Center
ESP	Expedited Screening Protocol
IET	Initial Entry Training
SF	Standard Form

PART II. DEFINITIONS

These terms and definitions are for the purpose of this issuance.

ESP. A set of procedures used to vet an individual who provides responses to certain SF-86 questions that raise potential allegiance, foreign influence, or foreign preference concerns, specifically sections 9, 10, 11, 12, 15.3, 17, 18, 19, 20a, 20b, 25, or 29, and section 20c as a secondary factor initially.

open initial national security background investigation. A national security background investigation that is initiated when a Service member first accesses into the Armed Forces, and the

investigative service provider has not forwarded it to the adjudicative entity for adjudication.

eligibility. Eligibility for enlistment, appointment, and induction into the Military Services as outlined in DoDI 1304.26 and suitability as described in E.O. 12968.

potential high risk indicator. Data that meets or exceeds predetermined expandable focused investigation thresholds, outlined in the Federal Investigative Standards (as amended) pertaining to adjudicative guideline regarding allegiance to the United States, foreign influence, and foreign preference concern.