ORAL ARGUMENT NOT SCHEDULED

No. 20-5320

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANGE SAMMA, *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF DEFENSE, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs in district court, and appellees here, are Ange Samma, Abner Bouomo, Ahmed Isiaka, Michael Perez, Sumin Park, Yu Min Lee, Timotius Gunawan, and Rafael Leal Machado. In addition to being individual plaintiffs, Timotius Gunawan, Rafael Leal Machado, and Ahmed Isiaka were also appointed by the district court as representatives of a class of similarly situated individuals. Defendants in district court, and appellants here, are the United States Department of Defense and Secretary of Defense Lloyd J. Austin III. There were no amici in the district nor, at the time of filing, before this Court.

B. Rulings Under Review

The rulings under review are the opinion and order entered on August 25, 2020 (Dkt. Nos. 46 & 47), *see Samma v. U.S. Dep't of Def.*, No. 1:20-cv-1104 (D.D.C.), 2020 WL 5016893 (Huvelle, J.).

C. Related Cases

The case on review has not previously been before this Court or any other court, save the district court from which it originated. The undersigned counsel is unaware of any related cases currently pending in any court within

the meaning of D.C. Circuit Rule 28(a)(1)(C). One other case raising similar issues was previously pending in this Court and that case and an additional case raising similar issues were previously pending in the United States District Court for the District of Columbia. *See Nio v. Department of Homeland Sec.*, No. 1:17-cv-998 (D.D.C.), *appeal dismissed*, Nos. 20-5317, 20-5326 (D.C. Cir. Nov. 24, 2020); *Kirwa v. U.S. Department of Def.*, No. 1:17-cv-1793 (D.D.C.). Both of those cases involved a challenge to the October 2017 policy memorandum that was previously at issue in this case, but the plaintiff classes in those cases did not overlap with the class certified in this case and those plaintiffs challenged provisions of the memorandum that were not at issue in this case.

/s/ Sean Janda
SEAN JANDA

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GLOSSARY

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Department	Department of Defense
J.A.	Joint Appendix
USCIS	United States Citizenship and Immigration Services

INTRODUCTION

The service of immigrants in the Nation's military is an honored tradition, and noncitizens have served in America's Armed Forces since the earliest days of the Republic. Currently, Congress has made certain categories of noncitizens eligible to join the military. *See* 10 U.S.C. § 504(b). In recognition of the significant value to the Nation of such noncitizens' service, particularly during wartime, Congress has determined that certain noncitizen service members who "served honorably"—as "determine[d]" by the "executive department under which such person served"—should be provided an expedited path to naturalization. 8 U.S.C. § 1440.

Understanding the important contribution of noncitizen service members, in October 2017, the Department of Defense imposed a standard framework for making the required honorable-service determination. As relevant here, the policy, which has since been rescinded to allow the Department to further study the issue, imposed certain time-in-service requirements that service members were required to satisfy before the military would certify that they have "served honorably" for purposes of section 1440. The policy explained that those requirements were broadly similar to requirements that the military has imposed for nearly four decades when

making similar honorable-service characterizations in the context of discharging service members.

The narrow question presented in this case is whether the military has statutory authority to impose a time-in-service requirement for purposes of certifying honorable service under section 1440. In this case, plaintiffs, a class of noncitizen service members, contend that Congress's direction that the military shall "determine" whether a service member has "served honorably" imposes a ministerial duty on the military to certify all noncitizen service members' service as honorable on the very first day of that service. In accepting that argument as a basis for permanently enjoining the Department from enforcing the requirements contained in the October 2017 policy, the district court erred.

Section 1440 confers broad discretion on the Department to promulgate standards for characterizing service. That understanding of the statute comports not only with the text of the relevant provision but also with the long history of the military's exercising discretion in determining how to characterize a service member's service. This Court should accordingly reverse the district court's grant of summary judgment on plaintiffs' statutory authority claim and vacate the permanent injunction entered by the district court.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court entered final judgment on August 25, 2020. J.A. 63. The government timely filed a notice of appeal on October 23, 2020. J.A. 177. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Congress has provided an expedited path to naturalization for certain noncitizen service members who have "served honorably" during wartime. 8 U.S.C. § 1440(a). "The executive department under which such person served shall determine whether persons have served honorably[.]" *Id.* The question presented is whether the Department of Defense has statutory authority to promulgate minimum time-in-service requirements that noncitizen service members must meet before the Department will provide a favorable determination of honorable service under section 1440.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Military Characterizations of Service

As the Supreme Court "has long recognized," the "military is, by necessity, a specialized society separate from civilian society" that "has, again

by necessity, developed laws and traditions of its own during its long history." *Parker v. Levy*, 417 U.S. 733, 743 (1974). The special nature of military society "result[s] from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Id.* (quotation omitted). As part of ensuring its ability to perform that important function, the military must "[m]aintain standards of performance and conduct," which it achieves in part "through characterization of service in a system that emphasizes the importance of honorable service." *Enlisted Administrative Separations*, 47 Fed. Reg. 10,162, 10,174 (Mar. 9, 1982); *see also* U.S. Dep't of Def., Instr. No. 1332.14, *Enlisted Administrative Separations* 6-7 (Aug. 1, 2024) (similar), https://perma.cc/FW8V-WBF5 (Instruction No. 1332.14).

In accordance with the recognition that characterizations of service promote an important military readiness and discipline function, the military has long provided for official characterizations of service to "serve[] as a judgment upon the quality of the service rendered by" the service member. *Bland v. Connally*, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961). More than a century ago, the Army provided for "three types of certificates of discharge: honorable, dishonorable, and unclassified." *Patterson v. Lamb*, 329 U.S. 539, 542 (1947). An honorable discharge was reserved for a service member whose "conduct has been such as to warrant his re-enlistment" and whose "service has been

honest and faithful," while a dishonorable discharge was "issued to soldiers discharged by sentence of a court martial or a military commission." *Davis v. Woodring*, 111 F.2d 523, 524 (D.C. Cir. 1940) (quotation omitted). A service member received an unclassified discharge when neither of those conditions obtained. *Id.* at 525.

Although the exact terminology has evolved over time, the same basic taxonomy remains in effect today: separations, other than those imposed as sentences of courts-martial, may be characterized as "honorable," "general (under honorable conditions)," "under other than honorable conditions," or "[u]ncharacterized." *See* Instruction No. 1332.14, at 35-38. One consistent feature of the military's characterization scheme has been that service members who serve only for a short period of time may be precluded from receiving honorable discharges. For example, in *Patterson*, the Supreme Court upheld the military's decision to issue an unclassified discharge to a service member who had served for four days in World War I before being discharged at the end of the war, explaining that the military had validly reserved honorable discharges for service members "who performed military service after having become fully and finally absorbed into that service." 329 U.S. at 542. And in keeping with that history, in 1966, the military promulgated regulations requiring officials to evaluate, among other factors, the length of a service member's service when

making characterization determinations. *See* 31 Fed. Reg. 705, 706 (Jan. 19, 1966) (providing that "length of service" is one factor that officials must consider in determining whether a service member qualifies for an honorable discharge).

In 1982, the military modified its regulations to provide more specific guidance regarding the length of service required to establish a sufficient record of service to receive an honorable characterization. *See* 47 Fed. Reg. 10,162. Under those regulations, which are materially similar to the current guidelines governing characterizations of service, *see* Instruction No. 1332.14, at 37, 60, service members in their "first 180 days of continuous active military service" were characterized as being in an "Entry Level Status." 47 Fed. Reg. at 10,175. And the regulations provided that, generally speaking, "if separation processing is initiated while a member is in entry level status," the separation should be described as an "[u]ncharacterized" "Entry Level Separation." *Id.* at 10,183. By contrast, "[a]fter six months of service, the member will have established a sufficient record to warrant characterization of service." *Id.* at 10,165.

B. Statutory Background

The Constitution provides Congress and the President with the responsibility to establish the armed forces and to employ them to protect the

nation's security. U.S. Const. art. I, § 8, cls. 12-14; *id.* art. II, § 2, cl. 1. Consistent with that authority, Congress has enacted legislation concerning who is eligible to serve in the military. In particular, Congress has specified that, in addition to citizens, some categories of noncitizens are eligible to serve. *See* 10 U.S.C. § 504(b).

Congress has long recognized the substantial contributions that noncitizen service members make to the country by offering them a path to citizenship in exchange for their service. The Nationality Act of 1940 provided that a noncitizen who "has served honorably" in the military "for a period or periods aggregating three years" was eligible for naturalization if certain other conditions were met. Pub. L. No. 76-853, tit. I, ch. III, § 324, 54 Stat. 1137, 1149-50 (1940). After the United States entered World War II, Congress amended the Nationality Act to allow certain noncitizen residents who "ha[ve] served or hereafter serve[] honorably in the military" during the war to obtain citizenship without the three-year waiting period. Second War Powers Act, 1942, Pub. L. No. 77-507, tit. X, § 1001, 56 Stat. 176, 182-83. In 1948, Congress added an additional provision allowing certain noncitizens who had "served honorably" during additional wartime periods to obtain naturalization. Act of June 1, 1948, Pub. L. No. 80-567, § 324A(a), 62 Stat. 281, 282. For such noncitizens, Congress did not specify any minimum time-

in-service requirement but provided that "[t]he executive department under which such person served shall determine whether persons have served honorably in an active-duty status." *Id.*

In 1952, Congress revised and restructured the existing immigration laws through the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). As part of that revision, Congress generally maintained the previously enacted scheme by providing that a noncitizen who had served honorably at any time was eligible for naturalization after three years of service, while a noncitizen who had served honorably during World War I or World War II was eligible for naturalization without any specific waiting period—but subject to the limitation that the relevant executive department "shall determine" whether the noncitizen had served honorably. *See id.* §§ 328, 329, 66 Stat. at 249-51.

Today, after various additional revisions (generally to expand the second provision's coverage to additional wartime periods), those provisions are codified at 8 U.S.C. §§ 1439 and 1440. Under section 1439, a noncitizen who meets other qualifications and who has "served honorably at any time in the armed forces of the United States for a period or periods aggregating one year" is eligible to apply for naturalization. 8 U.S.C. § 1439(a). To establish his honorable service, an applicant under this provision is required to provide "a

certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable." *Id.* § 1439(b)(3).

Under section 1440, a noncitizen who meets other qualifications and who "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 various specified wartime periods or during any period which the President designates as one in which the military is engaged in armed conflict[1] is eligible to apply for naturalization. 8 U.S.C. § 1440(a). As with previous versions of that provision, the "executive department under which such person served shall determine whether persons have served honorably." *Id.*

A noncitizen is ineligible to apply for citizenship under section 1439 or section 1440 if he has already been separated from service under other-than-honorable conditions, *see* 8 U.S.C. §§ 1439(a), 1440(a), and a noncitizen who obtains citizenship under either provision may be denaturalized if he is separated under other-than-honorable conditions before he has served honorably for five years, *id.* §§ 1439(f), 1440(c).

[1] The Armed Forces have been in such a state of armed conflict since September 11, 2001. *See* Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 8, 2002).

C. Factual Background and Prior Proceedings

1. A noncitizen who wishes to apply for expedited naturalization under section 1439 or section 1440 is required to submit a Form N-426 to United States Citizenship and Immigration Services (USCIS) as part of her naturalization application. *See* J.A. 139-43. As part of completing that form, which provides information about the noncitizen's service history, USCIS requires an applicant to obtain a military official's certification that the noncitizen has served honorably, thereby fulfilling the statutory requirement of an honorable-service determination. *See id.*

2. In 2016 and 2017, the Department of Defense and the Department of the Army engaged in a "comprehensive review" of a program (not directly at issue in this case) that allowed the military to enlist certain noncitizens. Decl. of Stephanie Miller, Director, Accession Policy Directorate, Office of the Under Secretary of Defense for Personnel and Readiness ¶ 4 (Miller Decl.), J.A. 163. As part of that process, Department officials "reviewed more than 700 certified [Form] N-426s that were issued in 2016 and 2017," and that review caused the officials "to note the relatively low level of the certifying official and the apparent lack of any consistent standard governing what grade that should be." Miller Decl. ¶ 5, J.A. 163-64. That inconsistent treatment of noncitizen service members—whose determination of honorable service could

vary across units and military departments—contrasted with the Department's decades-long practice, described above, of requiring a service member to fulfill minimum time-in-service requirements before it would characterize her service as "honorable" for purposes of separation. *See* 47 Fed. Reg. at 10,175, 10,183. Given that lack of consistency, as well as the fact that many of the certifying officials were generally not "sufficiently senior to sign performance appraisals," the officials determined that it would be helpful to develop a standard policy for the issue. Miller Decl. ¶ 5, J.A. 163-64.

In October 2017, after further internal deliberations, the Department of Defense issued a formal policy governing Form N-426 certifications. *See* Memorandum from A.M. Kurta, Performing the Duties of the Under Sec'y of Def. for Personnel & Readiness, to Sec'ys of the Military Dep'ts & Commandant of the Coast Guard (Oct. 13, 2017) (October 2017 policy), J.A. 70-73. As relevant to this case, the policy provided that service members were generally required to complete basic training and either 180 consecutive days of active-duty service or one year of Selected-Reserve service before receiving an honorable-service certification. October 2017 Policy § I(3), J.A. 71-72.

3. In this lawsuit, a group of noncitizen service members challenged the October 2017 policy's time-in-service requirements as contrary to law and arbitrary and capricious in violation of the Administrative Procedure Act

(APA). The district court certified a plaintiff class consisting of all individuals who: (1) "are non-citizens serving in the U.S. military"; (2) "are subject to Section I of the" October 2017 policy; (3) "have not received a certified N-426"; and (4) are not members of a class certified in a different suit not at issue here. J.A. 66-67.

The district court then granted summary judgment in the class's favor. J.A. 63-65. The court first concluded that the time-in-service requirements were contrary to law and that the refusal to certify Form N-426s for service members who do not meet those requirements constituted agency action unlawfully withheld. *See* J.A. 51-61. Both of those conclusions rested on the district court's determination that the Department of Defense's role in certifying Form N-426s is purely ministerial and, therefore, that the statute does not authorize the Department to promulgate time-in-service requirements for certification. The district court further concluded that the promulgation of the time-in-service requirements in the October 2017 policy was arbitrary and capricious, in violation of the APA. *See* J.A. 34-51.

Based on those conclusions, the district court granted plaintiffs' motion for summary judgment; vacated "the Minimum Service Requirements in the N-426 Policy," J.A. 64; and enjoined the Department of Defense "from withholding certified Form N-426s from any class member based on a failure

to complete the Minimum Service Requirements," *id.* (footnote omitted). This appeal followed.

4. In June 2021, the Department of Defense rescinded the portions of the October 2017 memorandum imposing the time-in-service requirements challenged by plaintiffs. *See* Memorandum from Virginia S. Penrod, Acting Under Sec'y of Def. for Personnel & Readiness, to Sec'ys of the Military Dep'ts & Commandant of the Coast Guard (June 17, 2021). The Department explained that it "is currently reconsidering its policy on required service in order to certify honorable service for the purpose of applying for naturalization, and in the interim is rescinding its prior policy on minimum periods of service." *Id.* at 1.

In addition, the Department moved to hold this case in abeyance to permit the Department time to engage in that reconsideration and determine appropriate steps moving forward. The Court granted that motion, *see* Order (June 30, 2021), and the Department continued engaging in the policy process while this appeal remained in abeyance. In June 2024, plaintiffs moved to lift the abeyance because the Department had not yet issued a new policy to replace the rescinded time-in-service requirements. *See* Mot. to Set Briefing Schedule (June 10, 2024). This Court granted that motion and ordered that the case be returned to the active docket. *See* Order (June 26, 2024).

Because the Department has rescinded the specific time-in-service requirements challenged by plaintiffs, the government no longer contests the district court's determination that the issuance of the October 2017 policy was arbitrary and capricious nor its vacatur of the time-in-service requirements in that policy. Nevertheless, the government maintains that the district court erred in concluding that the promulgation of time-in-service requirements exceeded the Department's statutory authority and that, to the extent its injunction prevents the Department from enforcing such requirements in the future, that injunction is in error.[2]

SUMMARY OF ARGUMENT

A. This country has long valued the honorable military service of noncitizens, as reflected in 8 U.S.C. § 1440, which provides an expedited path

[2] Although the Department of Defense has rescinded the specific policy that plaintiffs challenge here, this appeal is not moot. Generally speaking, an agency's voluntary withdrawal of a challenged policy moots a case only where the agency demonstrates that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.*, 528 U.S. 167, 190 (2000), such as where the government represents to the court that it does not intend to return to the withdrawn policy, *cf. America Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179-80 (9th Cir. 2010). Here, however, the Department has explained that it is reconsidering the issue of whether to impose a time-in-service requirement and, if so, what that requirement should be. As such, the Department has reserved the right to reimpose such a requirement, even though plaintiffs have argued (and the district court agreed) that any such requirement exceeds the Department's statutory authority.

to naturalization for noncitizens who have served honorably. In the past, section 1440, which does not define what it means to serve honorably, had been applied in an ad hoc and inconsistent manner. Respectful and appreciative of the service of noncitizen service members, but understanding the importance of uniformity, the Department of Defense promulgated a policy laying out the requirements for an honorable-service determination—including a time-in-service requirement—to standardize those determinations and to make them broadly consistent with the honorable-service determination that the Department makes with respect to discharges.

Relevant tools of statutory interpretation demonstrate that 8 U.S.C. § 1440 confers broad discretion on the Department of Defense to promulgate substantive standards for characterizing honorable service, including the discretion to adopt time-in-service requirements. As an initial matter, the text of section 1440 expressly vests authority in the Department to "determine" whether a noncitizen service member "has served honorably" for purposes of that section. 8 U.S.C. § 1440(a).

That conclusion is reinforced by the historical and statutory context. Long before Congress enacted section 1440's predecessor, the military had already developed a system of service characterization that placed a premium on a service member's ability to earn an honorable characterization. Moreover,

this Court and the Supreme Court have repeatedly reaffirmed the military's substantial discretion to develop substantive standards to guide those characterization decisions, including the discretion to develop time-in-service requirements. Given that background, it is clear that Congress intended to provide similar broad authority to the military to develop standards for characterizing service for purposes of section 1440. That conclusion is also demonstrated by the statutory and legislative history, which reflect a Congressional understanding spanning decades that the military's characterization of service under section 1440 involves the exercise of substantial military judgment and that the Department should therefore have broad latitude in promulgating standards to guide that judgment.

B. In resisting that conclusion, the district court relied on inferences from other provisions of the statute and legislative history to conclude that section 1440(a) precludes the imposition of time-in-service requirements. But the statutory text, history, and precedent all demonstrate that the best understanding of the statute is as authorizing the military to promulgate time-in-service requirements.

Contrary to the district court's holding, moreover, the explicit and broad delegation of authority to the Department of Defense in section 1440(a) indicates a clear Congressional intent to provide the Department with

discretion with respect to the narrow question of defining the meaning of honorable service. Moreover, none of the district court's various structural inferences is persuasive, as each provision relied on by the district court either supports the Department's interpretation or has no bearing on the reasonableness of time-in-service requirements. Finally, the legislative history relied on by the district court does not, even on its own terms, suggest any intent to limit the Department's authority to promulgate time-in-service requirements—and is, in any event, contradicted by more directly relevant legislative history suggesting that the Department does have such authority.

STANDARD OF REVIEW

On appeal from a district court's grant of summary judgment in an APA action, this Court reviews "*de novo*, applying the Administrative Procedure Act standard that requires [courts] to set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Grunewald v. Jarvis*, 776 F.3d 893, 898 (D.C. Cir. 2015) (quotation omitted).

ARGUMENT

THE DEPARTMENT OF DEFENSE HAS STATUTORY AUTHORITY TO PROMULGATE TIME-IN-SERVICE REQUIREMENTS FOR PURPOSES OF SECTION 1440 HONORABLE-SERVICE DETERMINATIONS

All parties to this case agree that noncitizens make enormously valuable contributions to this country through their military service. The Department of

Defense, and the Executive Branch more broadly, recognizes that the noncitizens who have served in the military have provided great contributions to their country. The dispute in this case involves only the narrow question whether the Department has statutory authority to promulgate uniform substantive requirements for honorable service, including requirements based on a service member's time in service, in the context of section 1440—or whether, instead, the statute imposes a ministerial requirement on the Department to certify honorable service the day that a service member enlists. All available tools of statutory interpretation confirm that the Department does have such discretion, and the district court's conclusion to the contrary was erroneous.

A. Text, Context, Precedent, and History All Demonstrate that the Department of Defense Has Broad Authority to Determine the Requirements for Honorable Service, Including Requirements Based on Time in Service

1. The text of section 1440 provides a grant of broad discretion to the Department of Defense to determine the requirements for honorable service. Through that provision, Congress has allowed a noncitizen service member to apply for naturalization under section 1440 only if, among other requirements, she "has served honorably" in the military during a designated period of hostilities. 8 U.S.C. § 1440(a). Congress did not, however, provide additional guidance anywhere in section 1440—or anywhere else in the Immigration and

Nationality Act—regarding the conditions under which a noncitizen's service should be considered "honorable." Instead, the statute vests responsibility for determining the requirements of honorable service with the military: "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." *Id.*

By providing that the Department shall "determine whether" a noncitizen has "served honorably," 8 U.S.C. § 1440(a), Congress "expressly delegated" to the Department "the authority to give meaning to" the statutory concept of honorable service, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) (alteration and quotation omitted). And nothing in the text of section 1440 purports to limit that otherwise broad grant of discretion to exclude specifically the discretion to promulgate requirements related to a service member's time in service. Therefore, by its plain terms, section 1440 authorizes the Department of Defense to promulgate a time-in-service requirement for the purposes of determining whether a noncitizen has served honorably.

2. That clear import of the terms of section 1440 is additionally confirmed by history and precedent. As is discussed above, *see supra* pp. 4-6, the military has long promulgated rules that distinguish among different types

of service, with a particular emphasis placed on a service member's ability to earn an honorable characterization. That system of characterizing service helps to preserve military readiness "by maintaining high standards of performance, conduct, and discipline." Instruction No. 1332.14, at 6. And the military has historically exercised substantial discretion in determining how particular conduct may undermine "the overall effectiveness of the military" and, concomitantly, how that conduct should be evaluated for purposes of characterizing service. *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 597-98 (D.C. Cir. 1980) (upholding Air Force regulation providing that service members who are separated based on particular civilian criminal convictions generally will not receive an honorable discharge).

Even more specifically, the military has long enforced regulations that require service members to build a substantive record of service before the military will characterize their service as "honorable." *See supra* pp. 5-6. The military acts "within its power" by promulgating such time-in-service regulations because those regulations draw a reasonable distinction between service members who were not "finally accepted for military service" such that "they could or would be assigned to full-fledged duty as soldiers" and those who "performed military service after having become fully and finally absorbed into that service." *Patterson v. Lamb*, 329 U.S. 539, 542-44 (1947).

Moreover, such time-in-service requirements reasonably ensure that the military's service characterizations are based on an appropriately robust service record to allow for an informed judgment. The selection of an appropriate characterization of service centers on "the quality of the enlisted Service member's service" and involves a degree of balancing the positive and negative aspects of that service. *See* Instruction No. 1332.14, at 34-37. Through time-in-service requirements, the military has long ensured that a service member's service is not characterized before she has compiled a sufficient service record to allow for the requisite informed evaluation of her "quality of service" and balancing of any competing aspects of that service.

Congress's initial decision in 1940 to require that a noncitizen serve "honorably" to be eligible for expedited naturalization—and its subsequent decisions in reenacting versions of sections 1439 and 1440 since that time—was made against the backdrop of that system of service characterization. Given that history, it is clear that Congress, in selecting honorable service as the relevant criterion, intended to incorporate the military's traditional discretion in determining performance standards—including time-in-service requirements—related to an honorable characterization of service. *See FAA v. Cooper*, 566 U.S. 284, 292 (2012) ("[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows

and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." (quotation omitted)).

3. Congress's intent to authorize the Department to exercise discretion in defining the meaning of "honorable service" is additionally confirmed by the legislative and statutory history. In 1942, when Congress first provided for a naturalization process without statutorily prescribed time-in-service requirements for noncitizens serving during World War II, the legislative history emphasized that the statute did not confer immediate eligibility for citizenship upon any noncitizen service member—but instead that any citizenship eligibility was contingent upon honorable service. For example, when a Representative inquired during a committee hearing whether the proposed legislation "simply make[s] it mandatory that any one who joins the army immediately gets citizenship," an official with the Immigration and Naturalization Service explained that the bill did not contain such a requirement because the noncitizen's "service must be honorable." *Naturalization of Aliens in the Armed Forces of the United States: Hearing on H.R. 6073, H.R. 6416, and H.R. 6439 Before the H. Comm. on Immigration and Naturalization*, 77th Cong. 12 (statements of Rep. A. Leonard Allen and Dr. Henry B. Hazard, Assistant to Comm'r, Immigration & Naturalization Serv.). Similarly, during the same hearing, a different Representative clarified that the

legislation was not intended to provide a noncitizen with "citizenship papers the next day after he joins the army." *See id.* at 14 (statement of Rep. Noah M. Mason).

In discounting the import of that legislative history, the district court concluded that those statements were consistent with a Congressional intent to require honorable-service certification on a service member's first day in service because the processing of a naturalization application takes some amount of time. *See* J.A. 57-58. But that attempt to parse the relevant statements as drawing a distinction between when a noncitizen service member may apply for naturalization and when he will in fact receive citizenship is unavailing. Nothing about the context or content of the discussion in question indicates that the members of Congress were in fact attempting to draw such a fine-grained distinction. And, in any event, every other indication of Congressional intent points in the opposite direction, as explained. *See supra* pp. 21-22.

Moreover, in a 2019 Senate Armed Services Committee report, the committee explicitly observed that the Department "provides non-citizen servicemembers an expedited path to naturalization upon," among other things, "[c]ompletion of 180 consecutive days of Active-Duty service." S. Rep. No. 116-48, at 187-88 (2019). Far from expressing disapproval of that

requirement, the committee encouraged the Department to establish procedures to identify and notify service members "who will be eligible for expedited naturalization upon fulfillment of th[ose] requirements." *Id.*

And, following that report, Congress enacted a provision directing the Secretary of Defense to promulgate regulations relating to the processing of Form N-426 requests and, in particular, to "designate the appropriate level for the certifying officer" for such requests. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, div. A, tit. V, subtitle C, § 526, 133 Stat. 1198, 1356 (2019). That provision, which suggests that only officers above a certain level may "appropriate[ly]" certify honorable service for Form N-426 purposes, further confirms Congress's understanding that an honorable-service determination is not ministerial but instead requires the exercise of a degree of military judgment.

Therefore, the text of section 1440(a), the military's longstanding practice against which that statute was enacted, and the statutory and legislative history all demonstrate that section 1440(a) delegates substantial discretion to the Department of Defense to determine the requirements that a noncitizen service member must satisfy to have his service certified as "honorable." And they further confirm that the broad delegated discretion includes the specific discretion to promulgate time-in-service requirements.

B. The District Court's Conclusion that Section 1440 Precludes the Promulgation of Time-in-Service Requirements Is Unavailing

In concluding that section 1440 categorically precludes the Department of Defense from promulgating time-in-service requirements for purposes of honorable-service determinations, the district court largely failed to grapple with the provision's text, or with the precedent and history that confirm the Department's substantial discretion in promulgating such requirements. Instead, the district court primarily relied on unsupported inferences from the statute's structure and legislative history. Those inferences could not, in any event, overcome the clear implication of the statutory text, nor could they outweigh the decades of precedent and practice that confirm the Department's authority to require a sufficient service record before deeming that service to be honorable. But even on their own terms, the district court's conclusions are unpersuasive.[3]

[3] At the outset, the district court concluded that the Department's understanding of the scope of its statutory authority is not entitled to deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See* J.A. 53-54. The Supreme Court has since overruled *Chevron* and rejected the presumption "that statutory ambiguities are implicit delegations to agencies." *Loper Bright*, 144 S. Ct. at 2265. Nonetheless, because section 1440 expressly delegates authority to the Department to determine the requirements that must be met for service to be certified as honorable, *see supra* pp. 18-19, the Department's determinations about the specific requirements constitute the sort of "discretionary policymaking left to the political branches" by statute that the Judiciary should not second-guess. *Loper Bright*, 144 S. Ct. at 2268.

The district court relied on inferences drawn from three features of the statutory scheme to conclude that section 1440 precludes the imposition of time-in-service requirements. Those features are: the fact that the certification inquiry refers to service in the past tense; the inclusion of section 1440(c), which allows for denaturalization if a solider naturalized under section 1440 is discharged under other-than-honorable conditions before serving honorably for five years; and the inclusion of an explicit time-in-service requirement in section 1439. *See* J.A. 54-56. Not only can such scattered inferences fail to overcome the clear meaning of section 1440, but none of the structural features identified by the district court meaningfully supports the conclusion that the statute precludes the Department from promulgating time-in-service requirements.

First, the past-tense nature of the certification inquiry in fact reinforces the Department's authority to impose a time-in-service requirement. The relevant statutory language tasks the military with determining whether "persons have served honorably." 8 U.S.C. § 1440(a). The backward-facing nature of that inquiry only confirms the military's authority to promulgate time-in-service requirements. Because the required determination is retrospective, it is sensible for the Department to conclude that it requires a meaningful, previous record of service on which to base any determination of

honorable service; Congress could not reasonably have intended to preclude the Department from instituting requirements necessary to ensure such a record.

Second, the inclusion of the denaturalization provision in section 1440(c) does not suggest any intent to limit the military's ability to promulgate time-in-service requirements under that section. Congress included a similar denaturalization provision alongside an express time-in-service requirement in section 1439(a), which demonstrates that Congress did not perceive those provisions to be incompatible or even substitutes for one another. Nor does the fact that an individual who is later other-than-honorably discharged may be denaturalized have any logical connection to the underlying problem identified by the military in issuing the October 2017 policy—the inability to make an informed certification of honorable service immediately upon a service member's accession.

Moreover, even as a practical matter, the denaturalization provision does not substitute for an informed up-front determination. For one, initiating the denaturalization process requires that the Department know that a particular former service member has already been naturalized, even though final naturalization decisions are not made by the Department. And even if the Department acquires the necessary knowledge, the denaturalization process

requires adversarial proceedings in federal court, *see* 8 U.S.C. § 1451, which places additional burdens on the Executive, the courts, and the service member.

Third, Congress's inclusion of an explicit time-in-service requirement in section 1439 does not suggest that Congress intended its silence on the issue in section 1440 to implicitly prohibit the promulgation of any time-in-service requirement related to that section. Instead, "[i]t is eminently reasonable to conclude that" section 1440's silence on the matter "is meant to convey nothing more than a refusal to tie the agency's hands as to whether" a time-in-service requirement "should be used, and if so to what degree." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009); *see also id.* (It "surely proves too much" to argue that "the mere fact that [a statute] does not expressly authorize cost-benefit analysis for" one agency-administered test while authorizing it for two other tests "displays an intent to forbid its use."). And that conclusion is particularly reasonable in this circumstance, where section 1440 contains no substantive guidance regarding the meaning of "honorable" service but instead explicitly delegates authority to the Department of Defense (consistent with the Department's historical discretion in this important area of military organization) to "determine" whether service members have served honorably. 8 U.S.C. § 1440(a).

The conclusion that section 1439's inclusion of a time-in-service requirement does not preclude the military from promulgating such a requirement under section 1440 is buttressed by the differing nature of the two requirements. Even in section 1439, Congress did not tie the requirement to the notion of honorable service; instead, the requirement—which was initially set at three years, *see supra* p. 7—is best understood as defining the quantity of peacetime service that Congress believes is appropriately required in exchange for an expedited path to naturalization. By contrast, the military's authority to adopt a time-in-service requirement does not derive from any authority to define the terms of that exchange. Instead, that authority is related to allowing the military to ensure that honorable-service characterizations are based on an appropriately robust record of service to allow for an "informed determination." *See* October 2017 Policy § I(3), J.A. 71. Therefore, even if an inference about Congressional intent could be drawn from Congress's omission of a time-in-service requirement in section 1440, that inference would not speak to the military's authority to promulgate a time-in-service requirement.

Lastly, the district court attempted to bolster its conclusion by citing pieces of legislative history that describe section 1440 as not imposing any particular waiting period before a service member may be naturalized. *See* J.A.

58-59. But that legislative history is no more than a descriptively true account of section 1440, which does not, as a statutory matter, impose any particular time-in-service requirement. None of the legislative history cited by the district court indicates any further understanding that the provision precludes the adoption of such a requirement by the Department of Defense to ensure its ability to make an informed judgment about a service member's honorable service. In any event, snippets of legislative history could not cloud the otherwise clear meaning of section 1440's text (particularly when read in light of the relevant context, history, and precedent) as authorizing the military to promulgate time-in-service requirements, *cf. Bostock v. Clayton Cty.*, 590 U.S. 644, 674 (2020) ("Legislative history . . . is meant to clear up ambiguity, not create it." (quotation omitted)).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed in part.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6346 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Sean Janda
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ADDENDUM

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8 U.S.C. § 1439

§ 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.

(b) Exceptions

A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) no residence within a State or district of the Service in the United States shall be required;

(2) notwithstanding section 1429 of this title insofar as it relates to deportability, such applicant may be naturalized immediately if the applicant be then actually in the Armed Forces of the United States, and if prior to the filing of the application, the applicant shall have appeared before and been examined by a representative of the Service;

(3) the applicant shall furnish to the Secretary of Homeland Security, prior to any hearing upon his application, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable (the certificate or certificates herein provided for shall be conclusive evidence of such service and discharge); and

(4) notwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing the application, or for the issuance of a certificate of naturalization upon being granted citizenship, and no clerk of any State court shall charge or collect any fee for such services unless the laws of

the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

(c) Periods when not in service

In the case such applicant's service was not continuous, the applicant's residence in the United States and State or district of the Service in the United States, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such application between the periods of applicant's service in the Armed Forces, shall be alleged in the application filed under the provisions of subsection (a) of this section, and proved at any hearing thereon. Such allegation and proof shall also be made as to any period between the termination of applicant's service and the filing of the application for naturalization.

(d) Residence requirements

The applicant shall comply with the requirements of section 1427(a) of this title, if the termination of such service has been more than six months preceding the date of filing the application for naturalization, except that such service within five years immediately preceding the date of filing such application shall be considered as residence and physical presence within the United States.

(e) Moral character

Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of section 1427(a) of this title.

(f) Revocation

Citizenship granted pursuant to this section may be revoked in accordance with section 1451 of this title if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years. Such ground for revocation shall be in addition to any other provided by law, including the grounds described in

section 1451 of this title. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation. Any period or periods of service shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service.

8 U.S.C. § 1440

§ 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.

(b) Exceptions

A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 1429 of this title as they relate to deportability and the provisions of section 1442 of this title;

(2) no period of residence or specified period of physical presence within the United States or any State or district of the Service in the United States shall be required;

(3) service in the military, air or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the applicant served or is serving, which shall state whether the applicant served honorably in an active-duty status 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 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 was separated from such service under honorable conditions; and

(4) notwithstanding any other provision of law, no fee shall be charged or collected from the applicant for filing a petition for naturalization or for the issuance of a certificate of naturalization upon citizenship being granted to the applicant, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected.

(c) Revocation

Citizenship granted pursuant to this section may be revoked in accordance with section 1451 of this title if the person is separated from the Armed Forces under other than honorable conditions before the person has served honorably for a period or periods aggregating five years. Such ground for revocation shall be in addition to any other provided by law, including the grounds described in section 1451 of this title. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation. Any period or periods of service shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service.