**ORAL ARGUMENT NOT YET SCHEDULED**

# No. 20-5320

## In the United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANGE SAMMA, *ET AL.*, ON BEHALF OF THEMSELVES AND OTHER SIMILARLY SITUATED,

*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,
Hon. Ellen Segal Huvelle, No. 20-cv-1104

# BRIEF OF AMICI CURIAE AMERICAN IMMIGRATION COUNCIL, THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND MARGARET STOCK IN SUPPORT OF PLAINTIFFS-APPELLEES AND OF AFFIRMANCE

DOUGLAS W. BARUCH
JENNIFER M. WOLLENBERG
KAYLA STACHNIAK KAPLAN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
douglas.baruch@morganlewis.com
jennifer.wollenberg@morganlewis.com
kayla.kaplan@morganlewis.com

COLLIN R. HOPKINS*
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 890-5000
collin.hopkins@morganlewis.com

**On brief, not admitted in D.C. Circuit*

*Counsel for the American Immigration Council, the American Immigration Lawyers Association, and Margaret Stock*

## CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

The American Immigration Council and the American Immigration Lawyers Association are non-profit organizations with the general nature and purpose of immigration law advocacy. Margaret Stock is an attorney and owner of Cascadia Cross Border Law Group LLC in Anchorage, Alaska, which is a small law firm that focuses on immigration law. These amici curiae are not publicly held corporations, do not issue stock, do not have parent corporations, and, consequently, there exists no publicly held corporation that owns ten percent or more of their stock.[1]

## CERTIFICATE PURSUANT TO CIRCUIT RULE 29(d)

Undersigned counsel certify that a separate amicus brief—apart from that being filed by national organizations devoted to the rights of veterans and servicemembers—is necessary because the two briefs are from different perspectives and focus on different issues, both of which will aid the Court in resolution of this appeal. This brief is from the perspective of immigration law advocates and focuses on the long history—statutory, legislative, and practical—of immediate naturalization for noncitizens serving in wartime and the purely

[1] Amici curiae state no party or party's counsel authored this brief in whole or in part or contributed money to fund preparing or submitting this brief, and no person or entity—other than amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

ministerial role the Department of Defense serves with respect to such naturalization, while the brief of the other amici curiae focuses on the critical contributions of immigrants to the military and the benefits of expedited naturalization to foreign-born service members.

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## STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE OF AMICI CURIAE

The American Immigration Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States.

The American Immigration Lawyers Association—a national, non-partisan, non-profit association with more than 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law—seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice.

Margaret Stock is an immigration attorney and author of the legal treatise IMMIGRATION LAW & THE MILITARY, who has testified before Congress on several occasions as a recognized national expert on immigration matters, and, as a U.S. Army Reserve Lieutenant Colonel, conceived of and initially implemented the Military Accessions Vital to the National Interest ("MAVNI") program, under which thousands of noncitizen soldiers' service immediately made them eligible for naturalization pursuant to 8 U.S.C. § 1440.

Amici submit this brief to emphasize the lengthy and well-established legislative and practical history of immediate naturalization eligibility to those noncitizens who make the sacrifice of serving in the United States military during wartime. This history conflicts with the argument on appeal of Defendants-Appellants (the "Department of Defense" or "DoD") and instead supports affirmance of the District Court's finding that the DoD-imposed "Minimum Service Requirements are contrary to law." *Samma v. U.S. Dep't of Def.*, 486 F. Supp. 3d 240, 280 (D.D.C. 2020).

Pursuant to Fed. R. App. P. 29, all parties have consented to the filing of this brief.

## ARGUMENT

For more than one hundred years, Congress—through its Constitutional mandate—has extended the benefit of immediate naturalization eligibility to soldiers who serve during times of designated hostilities. DoD's current contention that it has authority to impose on the naturalization process its standard for a characterized honorable discharge, including a minimum-period-of-service requirement, is belied by the statute's plain language and applicable legislative history as well as the military's own long-held view of its limited role vis-à-vis naturalization and historical practice of facilitating immediate "wartime" naturalizations. Moreover, given that hundreds of thousands of soldiers have been naturalized without concern

over the military's separate characterized discharge policy, the "uniformity" considerations raised in DoD's brief—if relevant to this inquiry—weigh in favor of the District Court's decision.

## I. Congress Imposed No Time-In-Service Naturalization Requirement on the Wartime Soldier

"[T]he traditional tools of statutory construction ... includ[ing] examination of the statute's text, legislative history, and structure, as well as its purpose," *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 781 (D.C. Cir. 2012) (citation omitted), confirm that 8 U.S.C. § 1440—by express Congressional design—imposes no minimum time-in-service requirement for a wartime soldier's naturalization.

### A. Section 1440 Plainly Provides No Time-in-Service Prerequisite

The "first step" of statutory interpretation is "a plain language analysis of the statutory text." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) (quotation omitted). The text of § 1440 affords noncitizen soldiers serving during designated periods of hostility an expedited path to citizenship with no minimum time-in-service requirement:

> Any person who, while an alien or a noncitizen national of the United States, has served honorably as a member of the Selected Reserve of the Ready Reserve or in an active-duty status in the military, air, or naval forces of the United States ... during any ... 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 ...

8 U.S.C. § 1440(a); *see Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 27 (D.D.C. 2017) ("[N]o minimum period of military service is required.").[2] Indeed, if the plain language of a statute does not impose a precondition, this Court should not invent one. *See DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co.*, 388 F.3d 886, 891 (D.C. Cir. 2004) ("The text sets no preconditions to its protections[.]"); *see also United States v. Luskin*, 926 F.2d 372, 376 (4th Cir. 1991) (refusing to "legislate from the bench").

The intentional omission of a time-in-service requirement in § 1440 is made even clearer by comparison to its sister provision for peacetime soldiers, which contains a time-in-service requirement:

> 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 ....

8 U.S.C. § 1439(a) (emphasis added). If DoD were allowed to graft a time-in-service requirement onto § 1440, Congress's carefully crafted distinction between peacetime

[2] However, Congress backstopped this by allowing for citizenship revocation in certain circumstances specifically tied to length of service. 8 U.S.C. § 1440(c) ("Citizenship granted pursuant to this section may be revoked … 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").

and wartime service would collapse and the additional benefit accorded wartime soldiers would be erased. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law." (quotations omitted)).[3]

And DoD's position that an honorable service certification inherently includes DoD's minimum-service requirement (from its discharge policy) impermissibly renders superfluous the express time-in-service requirement of § 1439, which also includes an honorable service certification requirement. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quotation omitted)).

Moreover, language added or changed in 2003 amendments to these statutes further undermines DoD's position. First, Congress reduced the minimum-service

[3] *See* MARGARET D. STOCK, IMMIGRATION LAW & THE MILITARY 47 (3d ed. 2022) ("Two special military-related naturalization statutes provide that qualified members of the U.S. Armed Forces are permitted to apply for U.S. citizenship after one year of service (when no presidential order regarding ongoing hostilities is in effect) or immediately (when a presidential executive order regarding wartime hostilities is in effect)."

requirement in § 1439 from three years to one year,[4] meaning DoD's current discharge policy—if accepted as the honorable service certification standard for naturalization purposes—would negate that express reduction by requiring some soldiers to serve more than one year before being able to apply for naturalization.[5] Second, Congress added an eligibility category to § 1440, applying it not only to active duty soldiers but also to members of the Selected Reserve of the Ready Reserve.[6] Allowing DoD to impose its discharge standard as a naturalization requirement would negate this additional category of Selected Reservists because

[4] National Defense Authorization Act for FY2004, Pub. L. No. 108-136, § 1701(a), 117 Stat. 1392, 1691 (2003).

[5] *See* U.S. DEP'T OF DEF., DOD INSTRUCTION 1332.14 ENLISTED ADMINISTRATIVE SEPARATIONS § 4.3(c)(1)(a) (Aug. 1, 2024) (hereinafter "DoDI 1332.14") (providing that soldiers in "entry-level status" typically receive uncharacterized discharges, with "entry-level status" defined as "the first 365 days of continuous active military service," "the first 365 days of continuous active service after a service break of more than 92 days of active service," "365 days after beginning training" if "ordered to active duty for training for one continuous period of 180 days or more," or "180 days after the beginning of the second period of active-duty training" if "ordered to active duty for training under a program that splits the training").

[6] As a supporting senator contemporaneously explained, "it is only fair to extend this benefit to reserve as well as active duty personnel serving our country in a time of war." Joint Appendix ("JA") 176 (149 Cong. Rec. S7283 (daily ed. June 4, 2003)) (statement of Sen. Saxby Chambliss). This amendment to add Selected Reservists was "intended to correct inequities that resulted when, for example, National Guard members were placed on extended 'state' duty after the 9/11 terrorist attacks because of the ongoing national emergency, yet could not qualify for military naturalization because they had not been on federally recognized active duty." Stock, *supra* note 3, at 57.

DoD's characterized discharge standard requires "active duty" service of every soldier.[7]

### B. The Legislative History Confirms Congress's Intent to Provide Wartime Soldiers Immediate Naturalization Eligibility

The plain language of § 1440 is supported by the long legislative history of Congress's provision for immediate naturalization eligibility for wartime soldiers. While expedited naturalization of noncitizens during wartime extends back as far as the War of 1812,[8] expedited naturalization specifically being provided in exchange for military service during designated hostilities has a legislative history nearly as long, dating back to the Civil War. Importantly, this history also reflects a deliberate effort by Congress to differentiate between peacetime and wartime soldiers and to grant to wartime soldiers—who have the added sacrifice of serving during even greater times of peril—an immediate opportunity to naturalize (*i.e.*, without a time-in-service requirement).

While the Civil War-era statute was the first enactment of a statute directly recognizing expedited naturalization in exchange for military service, Congress

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[7] *See supra* note 5. Prior versions of this policy also mandated active duty service prior to discharge characterization. *See, e.g.*, DoDI 1332.14 (Dec. 21, 1993) (requiring "180 days of continuous active military service"); *Samma*, 486 F. Supp. 3d at 270 (describing same 180-day active duty policy, in effect in 2020).

[8] *See* Act Supplementary to the Acts Heretofore Passed on the Subject of a Uniform Rule of Naturalization, U.S. Statutes at Large 3, at 53 (1813).

apparently—through the requirement that "proof of such person having been honorably discharged" be provided—limited the naturalization benefit to veterans.[9] In contrast, during World War I, Congress revised legislation requiring mandatory conscription to allow for the ***immediate*** naturalization of noncitizen soldiers, without a minimum-period-of-service or discharge requirement.[10] This began a recognition by Congress that those who "entered [military] service to make the 'supreme sacrifice' for democracy" should become "an American in all the senses" before "they embarked" for theaters of war.[11] As one Senator explained:

> It is impossible, or at least it is unfair, to send these soldiers to the battle line in Europe until they have been naturalized and made citizens of this country, so that they will not be subjected to charges of treason against the governments and princes of whom they were formerly subjects. The War Department is not willing to subject these men to that sort of danger. It is not fair to them and it is not just to the country.[12]

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[9] An Act to Define the Pay and Emoluments of Certain Officers of the Army, and for Other Purposes, U.S. Statutes at Large 12, § 21, 12 Stat. 597, 597 (1862).

[10] An Act to Amend the Naturalization Laws and to Repeal Certain Sections of the Revised Statutes of the United States and Other Laws Relating to Naturalization, Pub. Law No. 65-144, 40 Stat. 542 (1918).

[11] Lucy E. Slayer, *Baptism by Fire: Race, Military Service, and U.S. Citizenship Policy, 1918–1935*, J. AM. HIST. 847, 852–53 (Dec. 2004) (quoting 65 Cong. Rec. 6018 (1918)).

[12] 56 Cong. Rec. S5009 (daily ed. April 12, 1918) (statement of Sen. Thomas Hardwick).

Between the World Wars, Congress passed the Nationality Act, which was the first "comprehensive nationality code" that would "permit more prompt, expeditious, economic enforcement and satisfactory administration" of naturalizations.[13] The Act's section addressing military naturalizations provided that "[a] person … who has served honorably at any time in the [armed forces] for a period or periods aggregating three years" could become a citizen.[14] Just two years later—in the wake of the attack on Pearl Harbor—Congress provided a method by which servicemembers "may be naturalized immediately."[15] The House Committee underscored that the purpose of this amendment was to

> enable certain noncitizens serving honorably ... to be naturalized immediately … in furtherance of the principle that noncitizens who are gladly serving in the armed forces of this country, and who are willing to sacrifice their lives in its service if necessary, should receive this consideration by the Government if they are shown to be worthy of naturalization.[16]

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[13] H.R. Rep. No. 87-2396, at 1 (1940).

[14] Nationality Act of 1940, Pub. L. No. 76-853, § 324(a), 54 Stat. 1137, 1149 (1940).

[15] Second War Powers Act, 1942, Pub. L. No. 77-507, § 1001, 56 Stat. 176, 182 (1942). A later statute kept this immediate naturalization in place and also eliminated the requirement for proof of lawful entry into the United States. *See* Act Relating to the Naturalization of Persons Not Citizens Who Serve Honorably in the Military or Naval Forces during the Present War, Pub. L. No. 78-531, 58 Stat. 885, 886–87 (1944).

[16] H.R. Rep. No. 77-2584, at 2–3 (1941); *see also Petition of Delgado*, 57 F. Supp. 460, 462 (N.D. Cal. 1944) ("The House Committee … said: 'It is a matter of historic record that the Government of the United States, as an encouragement to loyal aliens engaged in the defense of this country through service in the armed forces, has in

The colloquy on this point during committee hearings was explicit:

> [Representative] Mr. Allen: Does this bill simply make it mandatory that any one who joins the army immediately gets citizenship[?]
>
> [Asst. to the INS Commissioner] Mr. Hazard: Not at all, sir. His service must be honorable.
>
> Mr. Allen: How long must he render service?
>
> Mr. Hazard: No particular period of time.[17]

DoD distorts this history by citing solely to the "service must be honorable" portion of this colloquy and omitting the very next Q&A, which makes clear that no time-in-service requirement was intended. Moreover, also not mentioned by DoD, the ranking member of the committee confirmed in that same hearing that a wartime soldier "immediately ... becomes eligible to make [a naturalization] application."[18]

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past years, relieved them from some of the burdensome requirements of the general naturalization laws.' And again in the same report, it is stated: 'This proposed legislation proceeds upon the principle that non-citizens who are ready and willing to sacrifice their lives in the maintenance of this democratic government are deserving of the high gift of United States citizenship when vouched for by responsible witnesses as loyal and of good character and shown by government records as serving honorably.'" (quoting House Misc. Rep. 10661, at 3)); Darlene Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 420 (2000) (explaining the "statutory framework to almost immediately naturalize aliens serving in WWII").

[17] Naturalization of Aliens Serving in the Armed Forces of the U.S.: Hearing on H.R. 6073, H.R. 6416, and H.R. 6439 Before the H. Comm. on Immigration and Naturalization, 77th Cong. 12 (1942) (statements of Rep. A. Leonard Allen and Dr. Henry B. Hazard, Assistant to Comm'r, Immigration & Naturalization Serv.).

[18] *Id.* at 14 (statement of Rep. Noah M. Mason).

In 1948, Congress distinguished—in one place—between wartime and peacetime soldiers with respect to a time-in-service requirement for naturalization purposes. Upon recognizing a "definite need for the enactment of permanent legislation dealing with the naturalization of wartime veterans,"[19] Congress amended the Nationality Act to permanently extend the procedures for immediate naturalizations to "[a]ny person not a citizen who is serving or has served honorably in an active-duty status ... during either World War I or World War II[.]"[20] At the same time, Congress understood "the existing law [Section 324 of the Nationality Act] which grant[ed] certain privileges in the naturalization process to persons who have served for a period or periods aggregating 3 years ... in time of peace" was "adequate to cover cases in which service ... occur[ed] subsequent to the war period."[21] In the Immigration and Nationality Act of 1952 ("INA"), which replaced the Nationality Act, Congress continued drawing this distinction, with INA § 328 for peacetime soldiers (codified at 8 U.S.C. § 1439) requiring service "aggregating

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[19] H.R. Rep. No. 80-1408, at 2 (1948); *see* Act to Amend the Nationality Act of 1940, Pub. L. No. 80-567, 62 Stat. 282 (1948).

[20] *Id*; *see also* U.S. Senate, Manual Explanatory of Privileges, Rights, and Benefits Provided for Veterans and Their Dependents 138 (U.S. Gov't Printing Office 1948) (explaining that 1948 amendment "made special provision for the expeditious naturalization of any person not a citizen who served honorably in the military or armed forces of the United States" during World War I or World War II).

[21] Report from the Committee on the Judiciary to Accompany H.R. 5193, S. Rep. No. 80-1207, at 2 (1948).

three years" and INA § 329 for wartime soldiers (codified at 8 U.S.C. § 1440) providing no minimum-period-of-service requirement.[22]

In 1953, Congress passed legislation "patterned generally after legislation enacted on March 27, 1942" but allowing naturalization for those serving during the Korean Conflict only if the soldier "has actively served or actively serves ... for a period or periods totaling not less than 90 days."[23] While this legislation was a departure from the immediate naturalization eligibility accorded wartime soldiers since World War I, it demonstrates that Congress knows how to legislate a period-of-service requirement. In addition, Congress later passed legislation for the express purpose of "accord[ing] veterans of the Korean hostilities the same naturalization privileges as the existing law accords veterans of World War I and World War II,"[24] including the privilege of no minimum-period-of-service requirement.[25]

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[22] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 250 (1952); H.R. Rep. No. 82-1365, at 79 (1952) ("Section 329 of the bill also carries forward the provisions of the Nationality Act of 1940 relating to naturalization of those who served honorably in an active-duty status during World War I or World War II.").

[23] Act to provide for the naturalization of persons serving in the Armed Forces of the United States after June 24, 1950, Pub. L. No. 83-86, § 329(a), 67 Stat. 108, 108–09 (1953) (temporarily codified at 8 U.S.C. § 1440a).

[24] H.R. Rep. No. 87-1086, at 34 (1961).

[25] Act to amend the Immigration and Nationality Act and for other purposes, Pub. L. No. 87-301, 75 Stat. 650, 654 (1961) ("Any person who, while an alien or a noncitizen national of the United States, has served honorably 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,

The Vietnam War saw Congress once again passing legislation to provide wartime soldiers immediate naturalization eligibility. But this time, Congress added a provision to carry the benefit through to future conflicts—"during any other period which the President by Executive Order shall designate."[26] Importantly, recounting the history of this provision, the Senate Judiciary Committee Report stated: "Exemptions granted wartime servicemen and veterans have been more liberal than those given for services rendered during peacetime," and "[a] basic difference[]" between § 1439 (INA § 328) and § 1440 (INA § 329) is that "[t]he peacetime serviceman must have a minimum of 3 years' service, the wartime serviceman ***has no minimum required***."[27]

Finally, in 2003, Congress amended § 1440 to add Selected Reservists as soldiers qualifying for naturalization. As a supporting senator contemporaneously

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1946, or during a period beginning June 25, 1950, an ending July 1, 1955 and who, if separated from such service, was separated under honorable conditions, may be naturalized[.]").

[26] Act to amend the Immigration and Nationality Act to provide for the naturalization of persons who have served in combat areas in active-duty service in the Armed Forces of the United States, and for other purposes, Pub. L. No. 90-633, 82 Stat. 1343 (1968).

[27] JA121, 123 (S. Rep. No. 90-1292, at 3, 5 (1968)) (emphasis added); *see also* Report from the Committee on the Judiciary to Accompany H.R. 15147, H.R. Rep. No. 90-1129, at 3 (1968) (same); *Nolan v. Holmes*, 334 F.3d 189, 201 (2d Cir. 2003) (relying on the 1968 Senate Judiciary Committee Report and the differences between §§ 1439 and 1440 to determine Congressional intent).

explained, the amendment "provides a process of ***immediate*** naturalization for our selected reserve Armed Forces serving during a time of hostility."[28]

This legislative history supports finding § 1440 provides a naturalization benefit to wartime soldiers of immediate (*i.e.*, no time-in-service requirement) citizenship eligibility.[29]

## II. Congress Did Not Outsource to DoD the Authority to Determine the Requirements for Naturalization

### A. The Constitution Vests Congress Alone with the Power to Establish Naturalization Criteria

Through the "Naturalization Clause," the Constitution assigns to Congress the sole authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. And the Supreme Court has made clear that "over no conceivable subject is the legislative power of Congress more complete than it is over" immigration and naturalization. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339

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[28] 149 Cong. Rec. S7283 (daily ed. June 4, 2003) (statement of Sen. Saxby Chambliss) (emphasis added).

[29] Without accounting for this on-point legislative history, DoD instead cites the Senate Armed Services Committee Report for a FY 2019 appropriations bill. But this bill was not amending § 1440, and the committee report appears only to be referencing without comment the then-current and since withdrawn DoD policy. *See* S. Rep. No. 116-48, at 187–88 (2019). DoD also relies on the FY 2020 National Defense Authorization Act, but that legislation merely requires the military to designate the officials authorized to sign honorable service certifications; it does not expressly or implicitly authorize the military to create naturalization requirements. *See* National Defense Authorization Act for FY2020, Pub. L. No. 116-92, § 526, 133 Stat. 1198, 1356 (2019).

(1909); *see also Galvan v. Press*, 347 U.S. 522, 531 (1954) (The rule that formulating "[p]olicies pertaining to the entry of aliens and their right to remain here ... is entrusted exclusively to Congress" is "as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."); *Davis v. Dist. Dir., INS*, 481 F. Supp. 1178, 1183 n.8 (D.D.C. 1979) ("This Constitutional mandate empowers Congress to define the processes through which citizenship is acquired or lost, to determine the criteria by which citizenship is judged, and to fix the consequences citizenship or noncitizenship entail." (quotations & citation omitted)).[30]

### B. Courts, Including the Supreme Court, Have Refused to Allow Anyone Other than Congress to Create Naturalization Requirements

Courts consistently have guarded against usurpation of Congress's unique role over naturalization. The Supreme Court itself has rejected an argument similar to the one being made by DoD—that the imposition of extra-statutory criteria was relevant to determining legislated criteria. *See Schneiderman v. United States*, 320

[30] In the legislative history around Civil War era conscription and naturalization laws, at least one member of Congress recognized this Constitutional mandate and cautioned against outside encroachment on its authority: "Congress is by the Constitution expressly declared to have the power to establish a uniform rule of naturalization, we have full power over that subject." Senate Remarks on the Conscription Bill, 37th Cong., 3d sess., Congressional Globe 991 (1863) (statement of Sen. James Doolittle).

U.S. 118, 131–59 (1943) (refusing to allow citizenship revocation because of communist affiliation).

Another court applied the Supreme Court's reasoning to an even more analogous case in which the requirement being imposed for naturalization was not just extra-statutory, it would in fact nullify a Congressional provision. In *Schwab v. Coleman*, the Fourth Circuit noted that to impose additional requirements for the investigation of good moral character (beyond the investigation INS already had conducted pursuant to statute) and an additional waiting period to demonstrate attachment to the Constitution (so that further records could be developed) "is not only to add to the requirements which the applicant must meet a condition which Congress has not imposed, but is also, in so far as the condition is insisted on, to nullify the provision of the statute." 145 F.2d 672, 675–77 (4th Cir. 1944) (citing *Tutun v. United States*, 12 F.2d 763, 764 (1st Cir. 1926)); *see also INS v. Pangilinan*, 486 U.S. 875, 884–85 (1988) (determining that the Judiciary could not exercise equitable powers to disregard Congressional naturalization provisions); *United States v. Ginsberg*, 243 U.S. 472, 473–74 (1917) (describing how Congress, pursuant to the Naturalization Clause, legislatively "specifies with circumstantiality the manner ('and not otherwise') in which an alien may be admitted to become a citizen of the United States," and finding "[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in

respect of a matter so vital to the public welfare."); *Wiedersperg v. INS*, No. 98-15410, 1999 WL 519174, at *3–4 (9th Cir. July 20, 1999) (explaining that the separation of powers doctrine prevents other branches from granting or denying citizenship in ways Congress has not provided and citing as support that "[w]hen a statute designates certain ... manners of operation, all omissions should be understood as exclusions" (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991)).

And courts have rejected the imposition of military-related extra-statutory criteria. *See, e.g.*, *In re Reyes*, 910 F.2d 611, 613–14 (9th Cir. 1990) (affirming district court decision to strike executive order purporting to establish a period of armed conflict for purposes of 8 U.S.C. § 1440, but only for noncitizens serving in a specific geographic location, because no such limitation was authorized by the statute).

Thus, pursuant to its constitutional mandate, Congress has specified naturalization eligibility criteria in the INA, including in § 1440. And neither the Judiciary nor the Executive (nor any executive agency such as DoD) is "at liberty to imply a condition which is opposed to the explicit terms of the statute. ... To [so] hold ... is not to construe the Act but to amend it." *Fedorenko v. United States*, 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38 (1934)).

### C. A Court Analyzing This Exact Question Found the Military's Honorable Service Certification Function to be "Ministerial"

The district court in a related judicial proceeding—*Kirwa v U.S. Dep't of Defense*—analyzed the same since-rescinded DoD policy at issue in this case (but for a class of Military Accessions Vital to the National Interest ("MAVNI") soldiers[31]) and this exact question of whether a time-in-service requirement could be imposed through DoD's role in certifying N-426s. That court determined the military's role to be extremely limited. "Every characterization of honorable service or separation under honorable conditions in 8 U.S.C. § 1440 is defined in terms of past service," which requires only a ministerial review of existing records. 285 F. Supp. 3d 257, 267 (D.D.C. 2018). "[T]he granting or denying of an N-426 constituted a ministerial task." *Id.* at 266.

In fact, DoD admitted—in federal court, in a case in which it was a party—that an honorable service determination is ministerial. *Kirwa v. U.S. Dep't of Def.*, 285 F. Supp. 3d 21, 38 (D.D.C. 2017) ("Counsel for DOD in *Nio* represented to the Court that 'DOD serves a ministerial role in determining if an individual is serving honorably.'"). As the *Kirwa* court concluded, "despite its [current] assertions to the contrary, DOD does not control the naturalization process." *Id.* at 39.

[31] DoD stopped enlisting soldiers under the MAVNI program in late 2016.

The *Kirwa* court's conclusions are correct: DoD's role is ministerial and the military cannot dictate the requirements for naturalization.[32] Only Congress has that authority.

## III. Uniformity Considerations Weigh Against a Time-in-Service Requirement for the Wartime Soldier's Naturalization

DoD seeks to justify its request for judicial permission to impose an extra-statutory time-in-service requirement based on "uniformity." However, in the decade before DoD implemented its challenged policy in 2017, DoD and USCIS—by words and action—fully recognized that wartime soldiers were immediately eligible to receive an N-426. Moreover, current military and USCIS representations and re-initiation of the Naturalization at Basic Training Initiative demonstrate the agencies' jointly held belief in wartime soldiers' immediate naturalization eligibility. And naturalization at basic training is not just a recent practice. Stemming back to the World Wars, Congress wanted—and military and immigration officials facilitated—naturalization before a soldier was sent overseas or otherwise assigned his "full-fledged duty," and thus before a soldier would qualify for a certain discharge characterization. Under this shared understanding, hundreds of thousands of soldiers already have been naturalized. Thus, to the extent relevant, uniformity considerations weigh heavily against DoD's litigation position.

[32] The *Kirwa* court's findings remain in place as DoD did not pursue an appeal.

USCIS fact sheets and policy manual excerpts immediately pre-dating DoD's challenged policy explained that "[u]nder special provisions in Section 329 of the INA, the President signed an executive order on July 3, 2002, authorizing all noncitizens who have served honorably in the U.S. armed forces on or after Sept. 11, 2001, to ***immediately*** file for citizenship" and "[o]ne day of qualifying service is sufficient in establishing eligibility."[33] Likewise, past Army instructions directed reservists to apply for citizenship after one or two weekend drills.[34] In fact, the Army ordered certain noncitizen reservists to apply for naturalization long before they would have qualified for a characterized honorable discharge: "As part of your contract with the Army, you are required to apply for US citizenship after your

[33] No. 20-cv-1104 (D.D.C.), Dkt. 4-7, at 1 (USCIS, POLICY MANUAL, Vol. 12, Part I, Ch. 3, § A (Aug. 23, 2017)); *see also* USCIS, NATURALIZATION THROUGH MILITARY SERVICE (Nov. 18, 2014); USCIS, F AND M NONIMMIGRANTS AND MAVNI: A GUIDE FOR DESIGNATED SCHOOL OFFICIALS 2 (May 23, 2016) ("A person who has enlisted under MAVNI is eligible to apply for naturalization under the wartime enlistment of *8 U.S.C. 1440, INA 329 and Executive Order 13269* of July 3, 2002; ***without any minimum period of active-duty military service***." (emphasis added)).

[34] *See, e.g.*, No. 20-cv-1104 (D.D.C.), Dkt. 4-17, at 5 (James Hwang, MD, U.S. ARMY, MAVNI INFORMATION SESSION 2013 5 (instructing "***After 1 drill is completed***, prepare the citizenship application (USCIS form N-400) and have your USCIS form N-426 signed by your chain of command; mail your completed citizenship packet to USCIS.") (emphasis added)).

second Army Reserve drill weekend."[35] And the Army ordered commanders to recognize honorable service for naturalization purposes on that same timeline.[36]

These mandates were particularly important for noncitizen soldiers who enlisted through the DoD-created MAVNI Program. In fact, the MAVNI program itself, which allowed for the enlistment of non-LPRs, is a testament to DoD's long-held belief that § 1440 offered wartime soldiers the ability to immediately seek naturalization.[37]

For years, DoD and USCIS jointly facilitated no time-in-service naturalizations for noncitizen soldiers, including LPRs and those who enlisted through the MAVNI program. From 2009 through January 2018, a joint Naturalization at Basic Training Initiative not only immediately provided certified

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[35] CITIZENSHIP FILING INSTRUCTIONS FOR MAVNI (MILITARY ACCESSIONS VITAL TO THE NATIONAL INTEREST) ARMY HEALTH CARE PROFESSIONALS Appx. D.

[36] *See, e.g.*, DEP'T OF THE ARMY, ARMY RESERVE (AR) MILITARY ACCESSIONS VITAL TO THE NATIONAL INTEREST (MAVNI) PILOT PROGRAM IMPLEMENTATION GUIDANCE 4 (Mar. 24, 2009) ("Upon successful completion of two battle assemblies, unit Commanders must prepare and submit ... a memorandum to the program manager indicating the Soldier has honorable serv[ed]. The Soldier will provide a copy of the memorandum to his/her personal attorney to apply for citizenship....").

[37] Many MAVNI soldiers—primarily student and work visa holders—basically become undocumented immigrants ***as a result of their military enlistment***. Their ability to immediately apply for naturalization protected them from deportation. *See* 8 U.S.C. § 1440(b)(1) (creating exception for wartime soldier naturalization applicants who "may be naturalized ... notwithstanding the provisions of section 1429 of this title as they relate to deportability[.]").

N-426s to thousands of soldiers, but also arranged for their naturalization ceremonies at their basic training sites, well before they would have been eligible to receive characterized discharges.[38]

As reflected by several military policies and regulations, recognizing honorable service without a characterized honorable discharge was standard fare in a variety of contexts and readily managed.[39] With respect to the naturalization context, the military simply checked the soldier's existing record. *See Kirwa*, 285 F. Supp. 3d at 36 ("From the unrebutted evidence the Court can conclude that DOD officials were making the certification determination based on an enlistee's service record as it existed on the day he submitted the N-426.").

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[38] *See* U.S. GOV'T ACCOUNTABILITY OFFICE., GAO-22-105021, MILITARY NATURALIZATIONS 40–43 (2022); *see also Kirwa*, 285 F. Supp. 3d at 29 (describing initiative as characterized in USCIS and DoD declarations).

[39] *See, e.g.*, DoDI 1332.14, Enlisted Administrative Separations, Encl. 4, § 3c(1)(c) (Jan. 27, 2014, rescinded/amended as of Aug. 1, 2024) ("[For] administrative matters ... that require a characterization as honorable or general, an entry-level separation will be treated as the required characterization."); 38 C.F.R. § 3.12(l)(1) (entry-level uncharacterized separations "shall be considered under conditions other than dishonorable"); 32 C.F.R. § 724.109(a)(4)(ii) ("With respect to administrative matters outside the administrative separation system that require a characterization of service as Honorable or General, an Entry Level Separation shall be treated as the required characterization. An Entry Level Separation for a member of a Reserve component separated from the Delayed Entry Program is under honorable conditions.").

Bottom line: in the decade leading up to its 2017 policy, the military's practice was to certify honorable service for naturalization purposes on the basis of a soldier's existing service and without the minimum period of service required for a characterized honorable discharge. And throughout this same period—during which the military was certifying N-426s within days and facilitating naturalization within weeks—the military's policy for a characterized honorable discharge required six months of active duty service.[40]

Today, both USCIS and the military employ the same approach of having honorable service certified on the basis of a soldier's existing record.[41] For its part, notwithstanding DoD's contentions here, the military not only employs that approach (as it must given past litigation outcomes in this and related cases) but has gone well beyond what is legally required by voluntarily renewing the Naturalization at Basic Training Initiative and publicly touting its ability to rapidly certify naturalization eligibility.[42]

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[40] *See supra* note 7.

[41] In 2022, USCIS updated its policy manual and included this language: "Members of the U.S. armed forces who serve honorably ***for any period*** during specifically designated periods of hostilities may be eligible to naturalize under INA 329." USCIS, POLICY ALERT NO. PA-2022-24 (Oct. 7, 2022), *available at* https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20221007-CalixtoMAVNI.pdf (emphasis added).

[42] *See, e.g.*, Emily Hileman, U.S. ARMY, BECOMING AN AMERICAN; THE ARMY WAY (June 22, 2023), *available at* www.army.mil/article/267798/becoming

And it is not just within the last two decades that immigration and military officials facilitated naturalization of soldiers during basic training or "boot camp." As USCIS describes on its website:

> During [World] War [II] the Immigration and Naturalization Service (INS) oversaw the campaign to naturalize members of U.S. Armed Forces. Stateside, the INS worked with the military to identify noncitizen soldiers who wished to naturalize, helped soldiers complete the required petition, and organized swearing ceremonies. In many cases INS officials traveled to military camps to process large groups of soldier petitions. Because petitioners needed to swear the Oath of Allegiance in open court, a naturalization judge would then open a session of court at the camp and swear in the soldiers onsite.[43]

This practice is confirmed by first-hand accounts of soldiers previously serving during WWII. For instance, Charles MacGillivary testified before a Senate subcommittee that he joined the U.S. Army after the attack on Pearl Harbor and was

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_an_american_the_army_way ("A few days after trainees arrive to Fort Jackson, all legal immigrants receive a naturalization brief from their Battalion legal team. ... Roughly, 11-12% of each training battalion are legal immigrants…. Not all immediately apply for citizenship, but they're able to apply at any time due to their honorable service in the military."); Vanessa R. Adame, AIR EDUCATION & TRAINING COMMAND, NATURALIZATION PROGRAM AT BMT REACHES ONE-YEAR MILESTONE (May 1, 2024), *available at* https://www.aetc.af.mil/News/Article-Display/Article/3762386/ ("In 2023, the 37th Training Wing partnered with the U.S. Citizenship and Immigration Services to streamline the naturalization process which allows trainees to become U.S. citizens upon completion of BMT…. Today, an average of 26 Airmen are recognized at the weekly ceremonies.").

[43] USCIS, OVERVIEW OF AGENCY HISTORY: MILITARY NATURALIZATION DURING WWII, *available at* www.uscis.gov/about-us/our-history/overview-of-agency-history/military-naturalization-during-wwii.

sent to Ft. Devons for two weeks of training, during which he was taken to a federal courthouse and sworn in as a citizen.[44]

For over one hundred years, Congress has provided wartime soldiers the benefit of immediate naturalization eligibility. Nearly half a million WWI and WWII soldiers were naturalized on this basis.[45] And between 2002 and 2023, USCIS "naturalized more than 170,000 members of the U.S. military."[46] Moreover, regardless of the outcome of this appeal, MAVNI soldiers and veterans will continue to receive honorable service certifications from the military and be naturalized on the basis of no minimum period of service as a result of the outcomes of three class actions: *Kirwa* (discussed above), *Nio v. United States Dep't of Homeland Sec.*, No. CV 17-0998, 2020 WL 6266304, at *1 (D.D.C. Aug. 20, 2020), and *Calixto v. United*

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[44] Hearing Before the S. Subcomm. on Immigration, 106th Cong. 548 (1999) (statement of Mr. Charles MacGillivary).

[45] USCIS, CITIZENSHIP AND IMMIGRATION DURING THE FIRST WORLD WAR, DEP'T OF HOMELAND SECURITY WORLD WAR I CENTENNIAL POSTER SERIES (vol. 1 2017), *available at* www.uscis.gov/sites/default/files/ document/newsletters/WWI_18x24_ USCIS.pdf ("[M]ore than 300,000 soldiers and veterans of WWI became U.S. citizens under these laws."); Nat'l WWII Museum, NEW CITIZEN SOLDIERS: NATURALIZATION DURING WORLD WAR II (July 2, 2020), *available at* www.nationalww2museum.org/war/articles/new-citizen-soldiers-naturalization ("Between July 1, 1942 and June 30, 1945, 109,382 foreign-born members of the US Armed Forces became naturalized citizens.").

[46] USCIS, MILITARY NATURALIZATION STATISTICS (Nov. 8, 2023), *available at* www.uscis.gov/military/military-naturalization-statistics.

*States Dep't of the Army*, No. CV 18-1551, 2022 WL 17976437 (D.D.C. Sept. 22, 2022).

Uniformity (and fairness) would have all noncitizen wartime soldiers treated to the same Congressionally-mandated benefit, interpreted and applied in the same way it has been for over one hundred years for hundreds of thousands of soldiers. In other words, achieving uniformity with long-standing practice—by both the military and relevant immigration agency—would require continued facilitation of wartime soldiers' naturalization applications without imposition of a time-in-service requirement.

## CONCLUSION

For these reasons, the Court should affirm the District Court's finding that imposition by DoD of a minimum period-of-service requirement for wartime soldiers seeking naturalization would be contrary to law.

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Respectfully submitted,

*/s/ Jennifer M. Wollenberg*

COLLIN R. HOPKINS
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 890-5000
collin.hopkins@morganlewis.com

DOUGLAS W. BARUCH
JENNIFER M. WOLLENBERG
KAYLA STACHNIAK KAPLAN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
douglas.baruch@morganlewis.com
jennifer.wollenberg@morganlewis.com
kayla.kaplan@morganlewis.com

*Counsel for the American Immigration Council, the American Immigration Lawyers Association, and Margaret Stock*

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*/s/ Jennifer M. Wollenberg*
JENNIFER M. WOLLENBERG