ORAL ARGUMENT SCHEDULED FOR JANUARY 30, 2025

No. 20-5320

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANGE SAMMA *et al.*, on behalf of themselves and others similarly situated

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF DEFENSE *et al.*,

Defendants-Appellants.

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

SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES

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GLOSSARY

APA	Administrative Procedure Act
DOD	Department of Defense
FRAP	Federal Rules of Appellate Procedure
INA	Immigration and Nationality Act
JA	Joint Appendix
MOU	Memorandum of Understanding
Op.	Opinion
USCIS	United States Citizenship and Immigration Services

Pursuant to the Court's order of December 6, 2024, Plaintiffs respectfully submit this brief addressing whether this appeal is moot.

INTRODUCTION

This appeal concerns Plaintiff class members—non-citizens serving in the United States Armed Forces during the ongoing armed conflict declared by the President after the September 11, 2001 attacks—who challenge a 2017 Department of Defense ("DOD") policy (the "Policy"). Under the Policy, DOD refused to complete United States Citizenship and Immigration Services ("USCIS") Form N-426—which certifies a service member's honorable service for purposes of naturalization—until service members met certain time-in-service and active duty requirements. As the district court held, the Policy contravened the Immigration and Nationality Act, 8 U.S.C. § 1440, which grants non-citizens serving during armed conflict immediate eligibility to apply for citizenship. Under the Policy, service members could no longer apply for citizenship prior to graduation from basic training, resulting in their assignment to duty stations and potentially to combat overseas as non-citizens.

Plaintiffs contended that the Policy was arbitrary and capricious, contrary to law, and constituted agency action unlawfully withheld under the Administrative Procedure Act. The district court agreed and granted summary judgment to

Plaintiffs, vacated the Policy, and permanently enjoined Defendants from applying the Policy to Plaintiff class members. This appeal followed.

DOD formally rescinded the Policy in June 2021. In the intervening three and a half years, it has not reinstated the Policy, despite regular and repeated representations to this Court that it was considering whether to do so. In their recent merits brief, Defendants represented that they were "reconsidering the issue of whether to impose a time-in-service requirement" and have "reserved the right to reimpose such a requirement." Defs.' Br. 14 n.2. In their opposition brief, Plaintiffs relied on Defendants' reservation of right in agreeing that their appeal was not moot, stating that the Policy could "reasonably be expected to recur." Pls.' Br. 14 n.8 (quoting Defs.' Br. 14 n.2). But prompted by the Court's December 6 order, Plaintiffs have reassessed the mootness issue and have concluded that the case law does not support Defendants' position that merely reserving the right to reimpose the Policy maintains this Court's Article III jurisdiction over their appeal. Respectfully, this Court should dismiss this appeal as moot.

BACKGROUND

1. The Immigration and Nationality Act ("INA") provides that a non-citizen who has "served honorably as a member of the Selected Reserve of the Ready Reserve or in an active duty status" during a designated period of armed conflict "may be naturalized." 8 U.S.C. § 1440. In 2002, President George W. Bush issued

an Executive Order designating the period "beginning on September 11, 2001" as a period of armed conflict for purposes of section 1440. Exec. Order No. 13269, 67 Fed. Reg. 45287 (Jul. 8, 2002). That designation remains in effect.

To implement Section 1440, USCIS has prescribed Form N-426 for the military branches to use for certifying honorable service. *See* 8 C.F.R. § 329.4; USCIS, N-426, Request for Certification of Military or Naval Service, https://www.uscis.gov/n-426. Service members may apply to USCIS for naturalization once the military has certified their honorable service with a completed Form N-426 ("N-426 certification"). *See* 8 C.F.R. § 329.4.

Before Defendants issued the Policy in 2017, there was no time-in-service or active duty requirement for non-citizens serving during armed conflict who sought N-426 certifications to apply for naturalization. *See* JA 36–37, 41, 43 (Op. at 36–37, 41, 43). Moreover, beginning in 2009, DOD, in partnership with USCIS, formalized and streamlined the longstanding military practice of issuing N-426 certifications at the start of service for non-citizens serving during armed conflict through the Naturalization at Basic Training Initiative. JA 10–11 (Op. at 10–11). Pursuant to the Initiative, non-citizens serving in the Army, Navy, Air Force, and Marines received N-426 certifications at the start of basic training and USCIS processed naturalization applications during training, with the goal of naturalizing service members by graduation, typically ten weeks later. *Id*.

2. In October 2017, DOD issued the Policy. JA 70–73. The Policy provided that service members may not receive N-426 certifications until they complete "basic training requirements" and serve a minimum period of time—180 days for active duty service members and one year for service members in the Selected Reserve of the Ready Reserve. JA 71–72. The Policy resulted in the shutdown of the Naturalization at Basic Training Initiative.

3. Plaintiffs brought suit in April 2021 on behalf of a class of service members subject to the Policy. The district court granted class certification. *Samma v. DOD*, No. 20-cv-1104, 2020 WL 4501000 (D.D.C. Aug. 4, 2020). The district court also granted summary judgment in Plaintiffs' favor, holding that the Policy was arbitrary and capricious, JA 34–51, contrary to law, and constituted agency action unlawfully withheld, JA 51–61. The district court vacated the Policy, permanently enjoined Defendants from applying the Policy to Plaintiff class members, and ordered Defendants to "endeavor to certify or deny a submitted Form N-426 expeditiously, but in no case shall it take longer than . . . 30 days." JA 63–65.

4. On October 29, 2020, Defendants filed a notice of appeal. Between January 2021 and May 2021, Defendants sought, and received, five extensions of time to file their opening brief.

5. On June 23, 2021, Defendants reported to the Court in a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure ("FRAP 28(j) Letter") that

DOD had rescinded the Policy. Six days later, Defendants moved the Court to hold this appeal in abeyance, with unilateral status reports to be due at 60-day intervals. This Court granted Defendants' motion, and between August 2021 and June 2024, Defendants filed eighteen status reports. Every status report since February 2022 has recited identical text—stating that DOD "has continued to carefully review the time-in-service requirements that are at issue in this appeal" and "continues to focus its efforts on . . . completing the proposed policy"—a practice that ended only when Plaintiffs moved to end the abeyance and establish a briefing schedule. *See, e.g.*, Report of February 28, 2022; Report of April 28, 2023; Report of June 21, 2024.

6. On July 5, 2023, DOD and USCIS concluded a five-year Memorandum of Understanding (the "MOU") to restore naturalization at basic training. Memorandum of Understanding Between the United States Department of Defense and U.S. Citizenship and Immigration Services (July 5, 2023), at 2.[1] DOD has restored naturalization at basic training camps across the Army, Navy, Air Force, and Marines. In the Army, naturalization is occurring at all four of its basic training camps.[2] The Army identifies service members seeking naturalization upon arrival at basic training, signs N-426 certifications "usually . . . within 10 days but no later

[1] *Available at* https://bit.ly/49Tlhnu.

[2] *See* Information Paper, Naturalization Process for Non-U.S. Citizen Trainees, *available at* https://perma.cc/2MQH-8DUW ("Army Information Paper").

than 30 days," sends naturalization applications to USCIS, and provides USCIS with the graduation dates of all service members seeking naturalization. Army Information Paper at 1. The Army's stated "goal" is to return to the pre-Policy posture of having "trainees become citizens prior to graduating from ten weeks of [basic training]." *Id*.[3]

Naturalization is also occurring at the Navy's sole basic training camp.[4] The Navy piloted this program as far back as November 2021, "officially enacted" it in January 2022, and it "is currently the established method for naturalization going forward." Navy Information Paper at 1. Under the program, the Navy identifies service members seeking naturalization within the first five days of arrival at basic training, signs N-426 certifications, sends applications to USCIS, and "[w]ith assistance from USCIS and the U.S. District Court of Northern Illinois . . . holds a bi-weekly ceremony to ensure all eligible Recruits take the Oath prior to graduating." *Id*. at 2.

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[3] A front page story in the December 28, 2024 Washington Post illustrates the success of the Army's program, reporting on the naturalization of 10% of one recent graduating Army basic training class. *See* Missy Ryan & Greg Jaffe, *He's Becoming an American Soldier. First He Must Become a Citizen*, Wash. Post, (Dec. 28, 2024), https://www.washingtonpost.com/politics/2024/12/27/american-soldier-new-american-citizen/.

[4] *See* Department of Defense Information Paper, Recruit Training Command (RTC) Naturalization Process Brief, 2 Nov. 2023, *available at* https://perma.cc/D5M6-PMRK ("Navy Information Paper").

Naturalization is also occurring at the Air Force's sole basic training camp.[5] The Air Force program identifies service members seeking naturalization in the first week of basic training, signs N-426 certifications, and sends applications to USCIS, with the goal of swearing in service members before graduation. *See* Air Force Background Paper at 1–2. The Air Force has emphasized that "[d]edicated resources are available for naturalization to be completed prior to graduation" from basic training. *Id*. at 2.

Finally, naturalization is occurring at at least one of the Marines' two basic training camps.[6] Under that program, "[u]pon arrival . . . the . . . Recruit Liaison Section will assist the recruit in obtaining a signed USCIS Form N-426, . . . and submitting their application." White, *Expedited Naturalization*, *supra* 7 n.6. During the final week of basic training, the Marines organize "a ceremony . . . to present the new U.S. citizens with their naturalization certificates." *Id*.

These programs, which require dedicated resources from Defendants (*e.g.* proactively identifying all service members seeking naturalization and promptly signing their N-426 certifications) and extensive coordination with USCIS and, in

[5] Bullet Background Paper on Notifying Trainees of the "Naturalization at BMT" Initiative, *available at* https://perma.cc/R2EG-WP8Y ("Air Force Background Paper").

[6] *See* Staff Sgt. Courtney White, *Expedited Naturalization Returns to MCRD San Diego*, U.S. Marine Corps. (Apr. 12, 2024), https://perma.cc/7KBE-ETHK.

the case of the Navy, also a U.S. district court, illustrate Defendants' commitment to returning to the pre-Policy status quo.

7. On June 10, 2024, Plaintiffs moved the Court to lift the abeyance and issue a briefing schedule, on the grounds that "[g]iven the years-long wait, Plaintiffs-Appellees believe that no new policy will be forthcoming in the foreseeable future." On June 26, 2024, the Court granted Plaintiffs' motion.

8. On August 19, 2024, Defendants filed their merits brief. On October 2, 2024, Plaintiffs filed their opposition brief. On October 23, 2024, Defendants filed their reply brief.

9. On December 6, 2024, the Court ordered "the parties [to] file supplemental briefs addressing whether this case is moot in light of the withdrawal of the policy at issue."

10. To date, Defendants have neither reinstated the Policy nor issued a new policy regarding time-in-service or active duty requirements for service members seeking N-426 certifications.

ARGUMENT: THIS APPEAL IS MOOT.

Article III conditions the exercise of judicial power on the existence of "an actual controversy . . . at all stages of review, not merely at the time the complaint is filed." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). Thus, "[e]ven where litigation poses a live

controversy when filed," a court must "refrain from deciding [the dispute] if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Pub. Citizen, Inc. v. Fed. Energy Regul. Comm'n*, 92 F.4th 1124, 1127–28 (D.C. Cir. 2024) (quoting *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc)). "This rule ensures that federal courts respect the bounds of their constitutionally assigned role," including by "protect[ing] courts from rendering impermissible advisory opinions." *Id*. at 1128.

Generally, the government's rescission of a challenged policy renders ongoing litigation over the legality of the policy moot. *See Row 1 Inc. v. Becerra*, 92 F.4th 1138, 1144 (D.C. Cir. 2024) ("As this court has recognized, 'the government's abandonment of a challenged [policy] is just the sort of development that can moot an issue." (quoting *Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1203 (D.C. Cir. 2020)); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 106 (D.C. Cir. 2016) ("Because that [challenged] regulation no longer exists, we can do nothing to affect [Plaintiffs'] rights relative to it, thus making this case classically moot for lack of a live controversy."); *Larsen v. U.S. Navy*, 525 F.3d 1, 2 (D.C. Cir. 2008) ("[B]ecause the Navy has long since eliminated the challenged policy, plaintiffs' challenge is moot."). For example, in *Akiachak*, the Department of Interior rescinded a regulation following a district court decision holding it unlawful. Despite

the rescission, the State of Alaska, which had intervened as a defendant, pursued an appeal of the decision. The court instructed that "the scope of a federal court's jurisdiction to resolve a case or controversy is defined by the affirmative claims to relief sought in the complaint." 827 F.3d at 106. It concluded that because "the subject" of those claims—the challenged regulation—"no longer exists," it "cannot continue to generate a live controversy." *Id*. at 108.

This appeal has become moot for the same reason. The subject of Plaintiffs' claims for relief was the Policy. *See* JA 116 (Am. Compl. at 43) ("c) Declare the . . . Policy violates the INA and APA; d) Order Defendants to set aside the . . . Policy; e) Enjoin Defendants from withholding certified Form N-426s . . . pursuant to the . . . Policy"). Defendants have formally rescinded the Policy. FRAP 28(j) Letter at 2. Because the Policy no longer exists, this Court can "do nothing to affect" Plaintiff class members' "rights relative to it, thus making this case classically moot for lack of a live controversy." *Akiachak*, 827 F.3d at 106. Nor does the rescinded Policy have "any residual effect" on Plaintiff class members' rights. *Clarke*, 915 F.2d at 701. And as noted above, DOD has taken extensive, Department-wide measures to institutionalize the pre-Policy status quo. *See supra* 5–7. New service members have now been receiving N-426 certifications with no time-in-service or active duty requirements for more than four years.

There are, of course, some narrow exceptions to mootness, and Defendants relied on one of those—the voluntary cessation exception—in asserting in their opening brief that this appeal was not moot. Defs.' Br. 14 n.2 (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). In *Laidlaw*, the Supreme Court explained that "a defendant's voluntary cessation of a challenged practice" does not automatically "deprive a federal court of its power to determine the legality of the practice." *Id.* at 189 (quotation marks omitted). It explained that "if it did, the courts would be compelled to leave the defendant free to return to his old ways." *Id*. (quotation marks and alterations omitted). The Court accordingly instructed that where the voluntary cessation exception applies, "the standard . . . for determining whether a case has been mooted" is that "the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*

Under the *Laidlaw* standard for determining mootness, Defendants' representation that they "reserved the right to reimpose" the Policy, Defs.' Br. 14 n.2, has some facial appeal, because it makes it sound somewhat reasonable that the Policy might return. But *Laidlaw* does not apply here. In *Laidlaw*, the Court was worried about a defendant who strategically ceased challenged conduct in order to *evade* judicial review so that he would be "free to return to his old ways." 528 U.S. at 189 (cleaned up). The Court therefore placed the "formidable burden of showing" that the challenged conduct could not reasonably be expected to recur on "a

defendant claiming that its voluntary compliance moots a case." *Id.* at 190 (cleaned up) (emphasis added). This Court has echoed that concern when addressing the voluntary cessation exception: "The heightened voluntary-cessation standard is grounded in concerns that a party may be manipulating 'the judicial process through the false pretense of singlehandedly ending a dispute.'" *Pub. Citizen*, 92 F.4th at 1128 (quoting *Guendes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 15 (D.C. Cir. 2019) (per curiam)).

Here, Defendants "did not act in order to avoid litigation," meaning that under "[t]he established law of this circuit . . . the voluntary cessation exception to mootness has no play." *Alaska v. United States Dep't of Agric.*, 17 F.4th 1224, 1229 (D.C. Cir. 2021); *see Pub. Citizen*, 92 F.4th at 1128 ("[C]ourts have declined to apply the [voluntary cessation] doctrine when the facts do not suggest any 'arguable manipulation of our jurisdiction.'" (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 (2001)). If anything, as discussed above, Defendants have taken steps to render rescission of the challenged policy permanent, rather than using rescission as a strategic move to avoid continued litigation. *See supra* 5–7. Indeed, "unlike in the typical voluntary-cessation scenario," Defendants have "opposed a declaration of mootness," making it even more unlikely that they are "engaged in any 'arguable manipulation of the Court's jurisdiction.'" *Pub. Citizen*, 92 F.4th at 1129.

What Defendants appear to be doing, by insisting that their appeal is not moot, is asking for a quintessential advisory opinion that might open for them a hypothetical future policy door. But as the Supreme Court explained more than a half century ago, "it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, *Federal Courts* 34 (1963)). Grounded in Article III's requirement that a court's jurisdiction is limited to live cases and controversies, the rule against advisory opinions "was established as early as 1793," and "has been adhered to without deviation." *Id.* at 96 n.14; *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

This Court has recognized it "is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants before it." *District of Columbia v. Barry*, 387 F.2d 860, 861–62 (D.C. Cir. 1967). Instead, a court's judgment must be capable of "resolv[ing] 'a real and substantial controversy admitting of specific relief through a degree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical

state of facts." *Preiser*, 422 U.S. at 401 (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). At bottom, "[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect." *Mills*, 159 U.S. at 653. Litigation in Article III courts is not for the reservation of rights, but for the adjudication of them.

An "opinion advising what the law would be upon a hypothetical state of facts," *Preiser*, 422 U.S. at 401, is precisely what Defendants are now seeking from this Court. Defendants admit DOD "has rescinded the specific policy that plaintiffs challenge here." Appellants' Br. 14 n.2. They have not only failed to reinstate or replace the Policy, but they have failed to even commit to taking any action at all. By pressing this appeal, Defendants simply want to know what this Court would think about some conjectural, indeterminate time-in-service requirement they might (or might not) adopt at some unspecified time "in the future." Defs.' Br. 14. As a result, Defendants' appeal now presents a "dispute" of a purely "hypothetical or abstract character." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937). They seek "an advisory opinion addressing" DOD's "underlying interpretation of its" authority "so that [the court's] opinion might be applied to other currently hypothetical projects." *Pub. Citizen*, 92 F.4th at 1130. This Court "may not oblige." *Id*.

CONCLUSION

For the foregoing reasons, the Court should dismiss this appeal for lack of jurisdiction.

Dated: January 3, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's order dated December 6, 2024, because it contains 3,338 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Scarlet Kim
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