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.*,

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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION AND SUMMARY

Congress and the Department of Defense have long recognized the important contributions that noncitizens may make to the Nation through military service. Congress has thus determined that certain noncitizen service members who have "served honorably"—as "determine[d]" by the military—during time of war should be provided an expedited path to naturalization. 8 U.S.C. § 1440(a).

The military has long implemented a system of characterizing service, with a particular emphasis on the importance of a service member's earning an "honorable" characterization. For more than a century, the military has determined that service members who serve only for a short period of time may not be eligible for that valued honorable characterization. The issue presented in this case is whether Section 1440 provides the Department with authority to define the boundaries of honorable service for purposes of certification under that provision, including by imposing minimum-service requirements.

As the government explained in its opening brief, the statute confers such authority. The plain text of Section 1440 entrusts the Department with the authority to determine whether noncitizens have served honorably. That statute was enacted against the background of the military's developing

substantive standards to define honorable service. And Congress has more recently acquiesced in the Department's view of its statutory authority and confirmed its understanding that a Section 1440 characterization reflects a discretionary exercise of authority.

In response, plaintiffs have no answer for most of these points. Instead, like the district court, plaintiffs primarily rely on a collage of less-relevant interpretive tools—snippets of legislative history, vague divinations of general statutory purpose, and irrelevant past practice—in an attempt to cloud the clear import of the statutory text. In so doing, plaintiffs give short shrift to the text itself and barely engage with the extensive history of the military's substantial control over honorable-service determinations. This Court should reject plaintiffs' arguments and reverse the district court's judgment in part.

ARGUMENT

SECTION 1440 AUTHORIZES THE DEPARTMENT TO DEFINE THE BOUNDARIES OF HONORABLE SERVICE, INCLUDING BY IMPLEMENTING MINIMUM-SERVICE REQUIREMENTS

A. The Text of Section 1440 Makes Clear that the Department Has Authority to Implement Minimum-Service Requirements

Section 1440 provides that a noncitizen who "has served honorably" in the military during a period of wartime may, if other requirements are met, be eligible for naturalization. 8 U.S.C. § 1440(a). Congress has explicitly provided

that the "executive department under which such person served shall determine whether persons have served honorably." *Id.* As explained in the government's opening brief, that provision reflects a clear delegation of authority to the Department of Defense to determine the standards that a servicemember must meet to earn a certification that he has "served honorably." And nothing in the statutory text limits that broad grant of discretion to preclude the Department from issuing standards related to a service member's time in service or completion of basic training requirements. *See* Opening Br. 18-19.

In response, plaintiffs do not identify any text in Section 1440 that—even in their own telling—specifically precludes the Department from issuing such requirements. Instead, plaintiffs initially argue (at 18-24) that Section 1440 confers no authority on the Department to define honorable-service requirements. And they argue (at 25-26, 34) that even if the Department has such discretion, Congress's choice not to adopt an explicit time-in-service requirement in the statute should be read to preclude the Department from adopting such a requirement. Neither of those lines of argument is availing.

1. At the outset, plaintiffs' argument that Section 1440 confers no authority on the Department to define the standards that a service member must meet to receive an honorable-service certification cannot be reconciled

with the statutory text. Section 1440 does not itself provide any requirements that a service member must meet in order to receive an honorable-service certification; instead, the statute provides the Department with the authority to "determine whether persons have served honorably." 8 U.S.C. § 1440(a). And the authority to "determine" whether persons have served honorably necessarily includes the antecedent authority to define the bounds of honorable service such that the Department has a consistent standard to apply when making the required individual "determin[ations]." *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

In response, plaintiffs primarily argue that the text of Section 1440 is "nothing like" the statutes that the Supreme Court has recently identified as providing such discretionary authority because those statutes "explicitly give agencies authority to define standards or issue regulations related to specific terms." Br. 19 (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 & n.5 (2024)). Of course, Section 1440 does not speak in precisely the same terms as the handful of statutes quoted in *Loper Bright*; nonetheless, the import of the statute is the same. The plain text of Section 1440 provides that the Department shall make the required honorable-service "determin[ation]," a

term that itself connotes a measure of discretionary decisionmaking authority. *See Determination*, Black's Law Dictionary (12th ed. 2024) ("[t]he act of deciding something officially"). "[T]he best reading of [that] statute is that it delegates discretionary authority to" the Department. *Loper Bright*, 144 S. Ct. at 2263.

Moreover, plaintiffs' position is further undermined by their refusal to embrace the scope of its logical conclusions. As plaintiffs note (at 11-12), in addition to the requirements plaintiffs challenge, the Department has also issued additional requirements that a service member must meet to receive an honorable-service certification. For example, the service member must not be "the subject of pending disciplinary action or pending adverse administrative action or proceeding" or "the subject of a law enforcement or command investigation." J.A. 71. Plaintiffs do not challenge these requirements; indeed, it is hard to understand how Congress could have intended to preclude the Department from—for example—determining that a service member facing court-martial for serious misconduct has not "served honorably" for Section 1440 purposes. But that is exactly the outcome that plaintiffs' argument suggests: if Section 1440 truly provides the Department with no authority to define the bounds of honorable service, the Department could no more permissibly exclude the service member facing court-martial than it could

exclude a service member who has not met the requirements that plaintiffs do challenge.

Nor is plaintiffs' argument supported by Section 1440's use of purportedly mandatory language. *See* Resp. Br. 22. Although the statute provides that the Department "shall determine whether" a service member has served honorably, 8 U.S.C. § 1440(a), nothing about the statutory use of "shall" restricts the Department's authority to define the bounds of honorable service. Instead, at most, the statute may require the Department to actually make the determination "whether" (or not) a service member has served honorably. But nothing about the statute can be read to require the Department to provide a positive, rather than a negative, determination to any particular service member.

Similarly, the Department's previous description—in a single district court brief filed years ago—of its role in the certification process as "ministerial" does not advance plaintiffs' case. *See* Resp. Br. 22 (quotation omitted). As explained, the statute may in fact confer a nondiscretionary duty on the Department to actually reach a determination. Thus, at least that aspect of the Department's role might reasonably be described as "ministerial." And nothing in the oblique reference cited by plaintiffs suggests any understanding that the Department may not permissibly define the bounds of honorable

service. To the contrary, in the very paragraph plaintiffs cite, the Department made clear its position that naturalization officials "should defer to [the Department] to determine when an individual is serving honorably." *See* Response to Preliminary Injunction Motion at 36, *Nio v. U.S. Dep't of Homeland Sec.*, No. 1:17-cv-998 (D.D.C. July 7, 2017), Dkt. No. 19.

Finally, plaintiffs are wrong to argue (at 24) that any statutory authority to define the bounds of honorable service rests with U.S. Citizenship and Immigration Services (USCIS) and not the Department of Defense. To the contrary, although an honorable-service certification is a prerequisite for naturalization under Section 1440, Congress has explicitly provided the Department, not USCIS, with authority to make the honorable-service determination. Congress has thus plainly decided—consistent with common sense and with decades of practice, *see infra* pp. 12-14—that the military is in the best position to determine whether a particular service member has served honorably.

2. The Department's authority to determine the requirements that a service member must meet to receive an honorable-service certification includes the authority to promulgate requirements like those contained in the October 2017 policy, which required service members to have served for a defined period of time and to have completed basic training requirements. *See*

J.A. 71-72. Although plaintiffs generally contend that the Department lacks statutory authority to impose any requirements on honorable-service certifications, plaintiffs do not identify any specific provision of Section 1440(a) or any other statute as precluding the Department from imposing these specific requirements. Instead, plaintiffs primarily suggest (at 23-24) that the Department may not impose such requirements because there is no statutory text providing authority for those requirements specifically.

But plaintiffs misunderstand the structure of Section 1440(a)'s delegation of authority. As explained, that provision provides the Department with broad latitude to define the bounds of honorable service. Armed with that broad delegation of authority, the Department is not required to identify additional statutory text providing authority to impose any specific requirement. Instead, the relevant question for this Court is simply whether the class of requirements at issue falls within the bounds of that broad delegated authority—or whether, instead, Congress has taken action to preclude the Department from imposing a particular set of requirements. *See Loper Bright*, 144 S. Ct. at 2263 (explaining that "the reviewing court" fulfills its role simply by "fixing the boundaries of the delegated authority and ensuring the agency has engaged in reasoned decisionmaking within those boundaries" (alterations, citation, and quotations omitted)).

Plaintiffs are no more correct in arguing (at 25-26, 34) that Congress's choice to include a time-in-service requirement in various other statutes—including in 8 U.S.C. § 1439 and in a 1953 statute relating to naturalization of those who served during the Korean War—reflects a desire to preclude the Department from imposing similar requirements in the context of Section 1440. The government already explained the multiple errors in this argument: The time-in-service requirements in other statutes are not incorporated into the definition of honorable service; instead, they are additional, independent requirements that a noncitizen must satisfy to naturalize under those statutes. Nothing about the inclusion of those separate requirements in other provisions is probative of whether Congress intended to preclude the Department from defining the boundaries of honorable service to include completion of specified amounts of service. And regardless, Congress's determination not to include any specific time-in-service requirement in Section 1440(a) would be most naturally understood as "nothing more than a refusal to tie the agency's hands" regarding whether to include such a requirement. *See* Opening Br. 28-29 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009)).

Moreover, plaintiffs are wrong to argue (at 26-27) that Section 1439's one-year time-in-service requirement must mean that the Department may not implement minimum-service requirements under Section 1440 for fear of

letting the Department "effac[e] any distinction" between the two provisions. At most, plaintiffs' argument might support an as-applied challenge to any particularly lengthy time-in-service requirements implemented under Section 1440; it cannot support plaintiffs' broader attack on the Department's authority to impose any—even substantially shorter—time-in-service requirements. In any event, there will of course be substantial overlap between the two provisions' implementation because both require that the service member have served honorably. Plaintiffs provide no compelling justification to read extratextual limits into Section 1440 simply to create additional differences between the two neighboring provisions.

Nor is it relevant whether, as plaintiffs suggest, USCIS understands Section 1440(a) "to confer eligibility for naturalization" with "no minimum period of service." Resp. Br. 24 (citing 75 Fed. Reg. 2785, 2785 (Jan. 19, 2010)). As explained, *see supra* p. 7, the Department—and not USCIS—has explicit textual authority to interpret and implement Section 1440's honorable-service determination. Regardless, plaintiffs' reliance on USCIS's statement about the statute is unfounded. Of course, the statement plaintiffs quote is descriptively true: Section 1440(a) does not itself impose any particular minimum-service requirement. Nor, for that matter, does Section 1440(a) impose any other requirements relating to the boundaries of honorable service.

But that description of the statute does not suggest that Congress intended to preclude the Department from imposing such requirements—whether in the form of a time-in-service requirement or other requirements, such as the requirement that a service member not be facing pending disciplinary proceedings. And plaintiffs identify nothing to suggest that USCIS has previously interpreted the statute to preclude such authority.

Finally, plaintiffs are wrong to contend (at 17-18) that the government has forfeited any defense of the Department's statutory authority to require Selected Reserve members to complete basic training. As described in the government's opening brief (at 11), the requirements "relevant to this case" include the requirements that service members both "complete basic training" and also "either 180 consecutive days of active-duty service or one year of Selected-Reserve service." But plaintiffs' and the government's arguments regarding the Department's statutory authority generally apply equally to both sets of requirements. Perhaps for that reason, the district court collectively referred to the challenged requirements as "Minimum Service Requirements," *see* J.A. 64, and the government's opening brief often similarly referred to the challenged requirements collectively as time-in-service requirements. Nothing about those collective references reflected any intent to disclaim the statutory

authority to impose basic-training requirements as well as days-in-service requirements.

B. The Background Against Which Congress Legislated and Congress's Recent Actions Confirm This Authority

To the extent that the statutory text leaves any doubt, the Department's authority to define the boundaries of honorable service—including by implementing time-in-service requirements—is confirmed by the background against which Congress legislated, as well as Congress's recent treatment of the certification process.

1. As explained in the government's opening brief (at 3-6, 19-22), Congress enacted the honorable-service requirement against a long history of the military characterizing service and developing standards to determine whether any particular service member's service warrants an honorable characterization. And for more than a century, the military has determined that service members who serve for a short period of time may not be permitted to receive an honorable discharge. *See, e.g.*, *Patterson v. Lamb*, 329 U.S. 539, 542 (1947) (upholding military's decision not to issue an honorable discharge to a service member who served for four days during World War I). Against that backdrop, Congress's decision to incorporate an honorable-service requirement into Section 1440 and to expressly delegate authority to the military to determine whether a service member has met that requirement is

properly understood as conferring discretion on the military to implement standards of service similar to those the military has long imposed in the context of characterizing discharges.

In response, plaintiffs do not contest that the military has long imposed substantive requirements—including time-in-service requirements—that a service member must meet to receive an honorable characterization of service in the discharge context. Nor do they contest that Congress enacted Section 1440 against the background of this decades-old practice. Instead, plaintiffs primarily contend (at 47-48) that this consistent practice is irrelevant because the practice did not relate to honorable-service characterizations for purposes of naturalization. Of course, when Congress first enacted an expedited path to naturalization for those serving honorably, there was no previous practice of characterizing service for purposes of naturalization. But the military had long characterized service as honorable or not for discharge purposes. Congress's decision to incorporate the old concept of honorable service into this new context reflects an intent to "bring[] the old soil with" the concept, adopting the "long regulatory history" that "developed under prior agency practice." *George v. McDonough*, 596 U.S. 740, 746 (2022) (quotations omitted). And Congress's intent to incorporate the longstanding concepts of honorable-service that had developed in the discharge context is further confirmed by the

statutory text, which—both today and in 1948, when the language was originally enacted—delegates to the military the same authority in the same sentence to "determine whether persons have served honorably" and to determine whether any "separation from" service "was under honorable conditions." 8 U.S.C. § 1440(a); *see also* Act of June 1, 1948, Pub. L. No. 80-567, sec. 1, § 324A(a), 62 Stat. 281, 282 (same).

Nor do plaintiffs advance their case by observing (at 49-50) that the military's regulations governing characterization of separations do not apply by their terms to certifications under Section 1440 or by arguing (at 27, 51-52) that any attempt to apply the military's current discharge regulations to this context would contravene the statute. Of course, the discharge and Section 1440 contexts are different in some ways, and the military has not previously applied—and may not wish to apply—precisely the same standards in the two contexts. Nonetheless, Congress enacted Section 1440 against the backdrop of the military's long developing standards, including time-in-service standards, to characterize service as honorable or not for discharge purposes. Congress's decision to condition naturalization under Section 1440 on a similar honorable-service determination—combined, of course, with Section 1440's explicit textual delegation of authority to the Department—is most naturally

read to provide the military with the same substantive authority to develop standards governing that determination.

Plaintiffs fare no better in arguing (at 20-22) that the current language, enacted in 1948, was not intended to confer any more discretion on the Department than had been conferred by a previous version of the provision allowing honorable service to be demonstrated through affidavits or authenticated service records. For one, even the previous statute seemingly conferred some degree of discretion on the Department, because the authenticated service records themselves would presumably have reflected the Department's view of a service member's service. And regardless, Congress altered the provision in 1948 to explicitly confer authority on the Department to determine whether a service member had served honorably for purposes of Section 1440; plaintiffs' view that the statute nevertheless confers no authority on the Department to make that determination is simply incompatible with the amended text adopted by Congress.

Finally, plaintiffs are wrong to argue that Congress has ratified their interpretation of the statute because it is reflected in various court decisions. *See* Br. 35-36, 39-41 (citing *United States v. Rosner*, 249 F.2d 49, 51-52 (1st Cir. 1957); *United States v. You Lo Chen*, 170 F.2d 307, 310 (1st Cir. 1948); *In re Garcia*, 240 F. Supp. 458, 459-60 & n.5 (D.D.C. 1965); and *In re Delgado*, 57 F.

Supp. 460 (N.D. Cal. 1944)). As plaintiffs themselves describe those decisions, they hold only that the statute itself (or the predecessor 1942 version) does not impose a time-in-service requirement. But nothing about those cases addresses the question whether the Department has authority to define the boundaries of honorable service, including by imposing minimum-service requirements. They thus do not advance plaintiffs' case, even if (as plaintiffs argue) the Court must "presume that Congress was aware of" those cases, Resp. Br. 40-41—a presumption that plaintiffs do not support with any actual evidence of Congressional awareness.

2. In addition, to the extent that any doubt about the Department's statutory authority remained, Congress has recently (and actually) acquiesced in the Department's understanding of the statute. As explained in the government's brief, in 2019, the Senate Armed Services Committee released a report that discussed the time-in-service requirements in the October 2017 policy and, following that report, Congress addressed the subject by enacting a provision directing the Secretary of Defense to designate the appropriate level of certifying officer for Form N-426s. That report and provision together demonstrate Congress's awareness of the Department's policy, Congress's determination not to contradict the Department's understanding of its

authority, and Congress's understanding that certification of honorable service is not a mere ministerial function. *See* Opening Br. 23-24.

In response, plaintiffs do not dispute that Congress explicitly looked at this policy and determined not to amend Section 1440 to preclude the Department's interpretation, notwithstanding Congress's legislating in the same area. Instead, plaintiffs primarily argue (at 42-43) that the 2019 Committee Report is not persuasive evidence because it "expresses no view about the legality or wisdom of the" policy. But as explained, specific "evidence exists of the Congress's awareness of and familiarity with" the Department's understanding of its own authority, and Congress specifically "engage[d] with" the N-426 certification process after being aware of that understanding. *Jackson v. Modly*, 949 F.3d 763, 773-74 (D.C. Cir. 2020). In these circumstances, Congress's decision not to amend the relevant language in Section 1440 to preclude the Department's interpretation provides at least some indication that the Department is correct. And plaintiffs' attempt to downplay the probative value of Congress's acquiescence is particularly unwarranted given their separate argument, discussed above, that this Court must "presume" that Congress was aware of and ratified individual (inapposite) district court decisions even in the absence of evidence of such awareness. Resp. Br. 40-41.

Moreover, plaintiffs improperly downplay (at 43-44) the significance of Congress's direction to the Secretary of Defense to designate the appropriate level of official to certify Form N-426s. Although plaintiffs are correct that this direction does not itself make clear that the Department has authority to establish substantive certification requirements, it certainly appears to reflect Congress's view that certification of an N-426 requires the exercise of some degree of discretion. By contrast, if plaintiffs were correct in their primary argument that certification is nothing more than a ministerial exercise, it is hard to understand why Congress would have wanted to ensure that any particular rank of military official had responsibility for certifying.

C. Plaintiffs' Remaining Arguments Are Unavailing

In an effort to undermine the import of Section 1440's clear text, plaintiffs also attempt to draw various inferences from Congress's purported general purpose in enacting Section 1440, snippets of legislative history, and the Department's previous practice. None of these secondary indications of the statute's meaning could, in any event, detract from the clear text of Section 1440. But plaintiffs' argument with respect to each is also unpersuasive on its own terms.

At the outset, plaintiffs argue (at 30-35, 41-42) that Section 1440 reflects a general Congressional purpose to allow service members to naturalize before

they are exposed to combat and that minimum-service requirements are not compatible with this purpose. But that argument is unavailing on all levels.

For one, "even the most formidable argument concerning the statute's purposes could not overcome the clarity" of Section 1440's "text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012). That is particularly true in this case, where plaintiffs' attempt to divine this general statutory purpose is cobbled together from individual snippets of evidence culled variously from the legislative history of predecessor statutes, other related statutes, decades-old amendments, and more recent amendments—but, notably, not from the 1948 initial enactment of the relevant language.

Regardless, plaintiffs fail to persuasively explain how the general purpose they divine from the statute is incompatible with a minimum-service requirement. Indeed, in plaintiffs' own telling, when Congress imposed a 90-day time-in-service requirement in 1953, the underlying committee reports still "reflect[ed] a continued desire for non-citizens serving during the Korean War to naturalize before assignment overseas." Resp. Br. 34-35. Thus, even under plaintiffs' view of the relevant history, it is clear that Congress has not perceived there to be incompatibility between time-in-service requirements and the general purpose of allowing noncitizens to naturalize before being exposed to combat.

Indeed, the October 2017 policy itself incorporated, as a policy matter, an exception to the otherwise applicable time-in-service requirement that ameliorates much of this concern; that policy provided that service members were eligible to receive an honorable-service certification after "at least one day of active duty service in a location designated as a combat zone." J.A. 72. According to plaintiffs, neither this exception nor the general expectation that a service member may receive a certification before being assigned to active combat was sufficient to address Congress's general concern because the process of naturalization may then take many months. Resp. Br. 32-33. But plaintiffs cannot persuasively suggest that Congress intended to implicitly preclude the Department from exercising its traditional authority to impose minimum-service requirements, all to ensure that immigration officials may then take many months to process a naturalization application.

Failing to find any purchase in general statutory purpose, plaintiffs next turn (at 30-32, 37-39) to legislative history, contending that various floor statements and hearing colloquies—and a single statement in a Committee Report—confirm that Section 1440 allows for immediate naturalization eligibility. But courts "do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). And here, the legislative history is itself cloudy—as the government explained (at

22-23), other statements in the legislative history reflect a desire to delay naturalization beyond a service member's first day in service through the honorable-service requirement. Regardless, plaintiffs' citation to statements describing the lack of any time-in-service requirement in the statute are again inapposite; such statements do not address—and thus do not cast any doubt on—the Department's authority to impose minimum-service requirements as part of its determination of the boundaries of honorable service.

Finally, plaintiffs do not advance the ball in arguing (at 45-49) that the Department has previously issued Form N-426 certifications shortly after service members begin basic training. Even assuming plaintiffs correctly recount the Department's practice, plaintiffs nowhere cite evidence suggesting that the practice derived from a view that the Department was precluded by statute from imposing minimum-service requirements—rather than a policy choice by the Department not to exercise its authority to impose such requirements in this context.

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 4334 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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