ORAL ARGUMENT SCHEDULED FOR JANUARY 30, 2025

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

SUPPLEMENTAL BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

SHARON SWINGLE
SEAN JANDA
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3388

TABLE OF CONTENTS

Page

GLOSSARY

INTRODUCTION AND SUMMARY 1

STATEMENT 2

ARGUMENT 6

A. This Appeal Is Not Moot 6

B. If the Court Believes This Appeal Is Moot, It Should Vacate the Judgment or, at a Minimum, Make Clear that the Judgment Has No Ongoing Effects 14

CONCLUSION 18

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Already, LLC v. Nike, Inc.,
568 U.S. 85 (2013) 6, 7

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 6

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 12

Biden v. Feds for Med. Freedom,
144 S. Ct. 480 (2023) 16

Church of Scientology of Cal. v. United States,
506 U.S. 9 (1992) 7

Commissioner v. Sunnen,
333 U.S. 591 (1948) 13

Henderson v. Ford Motor Co.,
72 F.4th 1237 (11th Cir. 2023) 14

Horne v. Flores,
557 U.S. 433 (2009) 12

Mayorkas v. Innovation Law Lab,
141 S. Ct. 2842 (2021) 16

NRDC v. Pena,
147 F.3d 1012 (D.C. Cir. 1998) 10

Public Citizen, Inc. v. FERC,
92 F.4th 1124 (D.C. Cir. 2024) 7, 8, 9

Sierra Club v. Babbitt,
995 F.2d 571 (5th Cir. 1993) 17

Third Nat'l Bank v. Stone,
174 U.S. 432 (1899) 13

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 15

United States v. Sanchez-Gomez,
584 U.S. 381 (2018) 6

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 15

Yellen v. U.S. House of Representatives,
142 S. Ct. 332 (2021) 16

U.S. Constitution:

Art. III, § 2, cl. 1 6

Statute:

8 U.S.C. § 1440(a) 2

Other Authorities:

Memorandum from A.M. Kurta,
Performing the Duties of the Under Sec'y of Def. for Pers. & Readiness, to
Sec'ys of the Military Dep'ts & Commandant of the Coast Guard
(Oct. 13, 2017) 3

Memorandum from Virginia S. Penrod,
Acting Under Sec'y of Def. for Pers. & Readiness, to
Sec'ys of the Military Dep'ts & Commandant of the Coast Guard
(June 17, 2021) 4, 5, 8, 12

GLOSSARY

Department	Department of Defense
J.A.	Joint Appendix

INTRODUCTION AND SUMMARY

The government respectfully submits this supplemental brief in response to the Court's order requesting briefing "addressing whether this case is moot in light of the withdrawal of the policy at issue." Suppl. Br. Order (Dec. 6, 2024).

Although the Department of Defense has rescinded the specific time-in-service requirements challenged by plaintiffs, this appeal is not moot. The Department is actively considering whether to issue new time-in-service requirements that would replace the rescinded requirements. In these circumstances, there is a concrete, nonspeculative possibility that this Court's judgment would have a legal effect on the parties' rights.

In addition, the Department is suffering an ongoing injury from the district court's judgment, which is separate and apart from any injury that may be required to support plaintiffs' standing in the underlying lawsuit. The district court has entered an injunction that restrains the Department's conduct on an ongoing basis. And although the Department does not believe that the injunction or the judgment would prevent the Department—directly or as a matter of preclusion—from issuing new time-in-service requirements, plaintiffs in a future case may well claim the opposite. The ongoing possibility that the district court's judgment will impede the Department's ability to exercise its

statutory authority to issue time-in-service requirements prevents the case from being moot.

Nonetheless, if this Court believes that the case is moot, it should vacate the judgment below. It is the established practice to vacate a lower court judgment when a case becomes moot before appellate review may be completed. And equitable principles support such a remedy in a case like this one, where an Executive Branch agency has voluntarily ceased the challenged conduct for policy reasons unrelated to any attempt to influence the litigation.

Finally, if the Court believes this case is moot but is not inclined to vacate the judgment, it should—at the absolute least—make clear that the judgment will not have any coercive or preclusive effect if the Department determines to issue new time-in-service requirements.

STATEMENT

1. Congress has provided an expedited path to naturalization for certain noncitizen service members who have "served honorably" during wartime. 8 U.S.C. § 1440(a). "The executive department under which such person served shall determine whether persons have served honorably[.]" *Id.*

In October 2017, the Department of Defense issued a formal policy laying out the standards that a service member must meet in order to receive a certification that he has "served honorably" for purposes of Section 1440. *See*

Memorandum from A.M. Kurta, Performing the Duties of the Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Military Dep'ts & Commandant of the Coast Guard (Oct. 13, 2017) (October 2017 policy), J.A. 70-73. As particularly relevant to this case, Section I(3) of the policy, which has since been rescinded, provided that service members were generally required to complete basic training and either 180 consecutive days of active-duty service or one year of Selected-Reserve service before receiving an honorable-service certification. October 2017 Policy § I(3), J.A. 71-72. Section I of the policy also contains a number of additional requirements, including that the service member not be "the subject of pending disciplinary action," "pending adverse administrative action or proceeding," or "a law enforcement or command investigation." October 2017 Policy § I(1), J.A. 71.

In this lawsuit, noncitizen service members have challenged the October 2017 policy's time-in-service requirements. The district court certified a plaintiff class consisting of all individuals who: (1) "are non-citizens serving in the U.S. military"; (2) "are subject to Section I of the" October 2017 policy; (3) "have not received a certified N-426"; and (4) are not members of a class certified in a different suit not at issue here. J.A. 66-67. And the court ultimately granted summary judgment in the class's favor, concluding that the Department is not statutorily authorized to promulgate time-in-service

requirements for purposes of Section 1440 honorable-service certifications and that the requirements in the October 2017 policy were arbitrary and capricious. *See* J.A. 34-51. Based on those conclusions, the district court vacated "the Minimum Service Requirements in the N-426 Policy," J.A. 64, and enjoined the Department of Defense "from withholding certified Form N-426s from any class member based on a failure to complete the Minimum Service Requirements," *id.* (footnote omitted). In addition, the court ordered that the Department "shall endeavor to certify or deny a submitted Form N-426 expeditiously, but in no case shall it take longer than the 30 days allowed under" an April 2020 policy issued by the Department. J.A. 64-65.

2. The government appealed the district court's judgment in October 2020. *See* J.A. 177. In June 2021, while this appeal was pending, the Department "rescinded" the requirements contained in Section I(3) of the October 2017 policy—that is, the time-in-service requirements challenged by plaintiffs. *See* Memorandum from Virginia S. Penrod, Acting Under Sec'y of Def. for Pers. & Readiness, to Sec'ys of the Military Dep'ts & Commandant of the Coast Guard (June 17, 2021) (June 2021 memorandum).[1] The Department left in effect, however, the remaining requirements contained in Section I of

[1] The June 2021 memorandum is attached to the letter filed by the government in this Court on June 23, 2021.

the October 2017 policy. *See id.* And the Department explained that it "is currently reconsidering its policy on required service in order to certify honorable service for the purpose of applying for naturalization, and in the interim is rescinding its prior policy on minimum periods of service." *Id.* at 1.

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

As the government explained in its opening brief, because the government has rescinded the specific challenged portions of the October 2017 policy, the government does not challenge in this appeal the district court's conclusion that those requirements were arbitrary and capricious or the district court's decision to vacate those requirements. The government does, however,

continue to challenge the district court's conclusion that the Department lacks statutory authority to promulgate such requirements, and the Department takes the position that "to the extent [the district court's] injunction prevents the Department from enforcing such requirements in the future, that injunction is in error." *See* Opening Br. 14 & n.2.

3. This case has now been fully briefed and has been calendared for oral argument on January 30, 2025. The panel has requested that the parties submit supplemental briefs "addressing whether this case is moot in light of the withdrawal of the policy at issue." Suppl. Br. Order (Dec. 6, 2024).

ARGUMENT

A. This Appeal Is Not Moot

The Constitution limits the federal courts' jurisdiction to resolving "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "[A]n actual controversy must be extant at all stages of review[.]" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quotation omitted). Thus, a "case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 584 U.S. 381, 385-86 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

A case has become moot when "the parties lack a legally cognizable interest in [its] outcome." *Already*, 568 U.S. at 91 (quotation omitted). That is true if an intervening event "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). Or, as this Court has described the "ordinary standard" for mootness, a "case is moot if a decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Public Citizen, Inc. v. FERC*, 92 F.4th 1124, 1128 (D.C. Cir. 2024) (quotation omitted).

This case, however, is not moot, for two reasons. First, the Department is actively considering whether to impose new time-in-service requirements, which means that a decision by this Court has a more-than-speculative chance of affecting the parties' rights. Second, to the extent that the district court's judgment is understood to constrain the Department moving forward, that judgment itself inflicts an injury on the Department that this Court's decision could remedy.

1. Assuming that the ordinary standard for mootness applies in the circumstances of this case, the case is not moot because there is a more-than-speculative chance that a decision from this Court will affect the parties' rights. As the Department explained when it rescinded the challenged portions of the

October 2017 policy, that rescission did not reflect a judgment by the Department that it did not wish to implement time-in-service requirements. *See* June 2021 Memorandum. Instead, the Department was (and is) engaged in "reconsidering its policy" and simply rescinded the "prior policy" "in the interim." *Id.* at 1.

Over the last three years, the Executive Branch has engaged in substantial internal deliberations regarding the appropriate content of any future policy relating to time-in-service requirements for Section 1440 certifications. Those deliberations remain ongoing, and the Department expects that one possible result of those deliberations will be that the Department issues a new policy that—like the October 2017 policy—contains time-in-service requirements. If the Department were to issue such a policy and attempt to implement it as to the plaintiff class, then this Court's determination whether the Department has statutory authority to issue time-in-service requirements would properly affect the rights of the parties.

The Department's ongoing, active deliberation regarding whether to issue new time-in-service requirements distinguishes this case from *Public Citizen*. In that case, the petitioner challenged an order of the Federal Energy Regulatory Commission relating to a liquefied natural gas facility that an energy company, Nopetro, planned to build. *See* 92 F.4th at 1126. While the

case was pending, "the Commission informed [this Court]—and Nopetro confirmed—that Nopetro had abandoned its plans to build the facility." *Id.* at 1126-27. Nopetro explained to the Court that it was "currently" "not pursuing" the project in question and that it had "no current plans to do so in the future." *Id.* at 1130 (quotation omitted). And Nopetro further explained that its decision "was due to market conditions, including the price of natural gas," and that "it might reconsider its decision only if (1) the price of natural gas increases; (2) it can identify customers in one of its target export countries; and (3) it can acquire the requisite land rights." *Id.* (quotation omitted). "Given the substantial uncertainty surrounding each of those requirements," this Court concluded that any "judgment on appeal" would not "have a more-than-speculative chance of affecting" the rights of the parties in the future. *Id.* (quotation omitted).

By contrast, unlike Nopetro, the Department is currently considering whether to resume the conduct that plaintiffs challenged. And perhaps as importantly, also unlike Nopetro, the Department's decision whether to issue a new policy is not contingent on external conditions over which the Department has little or no control. Instead, if the Department were to conclude its internal deliberations and determine that it was appropriate to issue new time-in-service requirements, it would be able to do so immediately

without any additional action by third parties. In these circumstances, the possibility that the Department will reissue time-in-service requirements is more than speculative, and this case is not moot.

2. Separate and apart from the question whether plaintiffs' underlying claims would remain live, this appeal is not moot if the district court's judgment is understood to constrain the Department's policymaking discretion moving forward. As this Court has explained, for purposes of appellate jurisdiction, the Court's focus may "shift[] to injury caused by the judgment rather than injury caused by the underlying facts." *NRDC v. Pena*, 147 F.3d 1012, 1018 (D.C. Cir. 1998) (quotation omitted). And in this case, the district court's final judgment might be understood to cause the Department two distinct ongoing injuries.

First, the district court's injunction might be understood to preclude the Department from issuing new time-in-service requirements in the future. As explained, in addition to vacating "the Minimum Service Requirements in the N-426 Policy," J.A. 64, the district court enjoined the Department of Defense "from withholding certified Form N-426s from any class member based on a failure to complete the Minimum Service Requirements," *id.* (footnote omitted). That injunction is based in part on the district court's conclusion that

the Department lacks statutory authority to impose any minimum time-in-service requirements for purposes of Section 1440 certifications.

In the Department's view, that injunction is not properly read to prevent the Department from issuing new minimum time-in-service requirements, even if those requirements are substantially similar or identical to the requirements in the October 2017 policy. Instead, the injunction is best understood to prevent the Department from enforcing only the specific "Minimum Service Requirements" contained in the October 2017 policy. *Cf.* J.A. 63-64 (seeming to define the term "Minimum Service Requirements" to be the requirements in the October 2017 policy).

Nonetheless, to the extent the district court's order could be viewed as ambiguous on this point, future plaintiffs might contend that the court's injunction prohibits the Department from imposing any minimum time-in-service requirements. The possibility that the Department's policymaking discretion will be limited on an ongoing basis by the injunction reflects a concrete injury sufficient to maintain this appeal.

Regardless, the mere fact of the injunction itself suffices to shield this appeal from mootness. As the Supreme Court has explained, a "judgment adverse" to a defendant is "an adjudication of legal rights which constitutes the kind of injury cognizable" on appellate review, because the judgment has

"disabling effects upon" the defendant and a successful appeal would eliminate those effects. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618-19 (1989); *cf. Horne v. Flores*, 557 U.S. 433, 445-46 (2009) (explaining that where an "injunction runs against" a party, that party has "a sufficiently personal stake in the outcome of the controversy to support standing" because the "order[] specifically direct[s] it to take or refrain from taking action" (quotation omitted)). That is particularly true in this case, where one component of the district court's injunction orders the Department to "endeavor to certify or deny" any request for an honorable-service certification "expeditiously" and to "in no case" take more than 30 days to act on such a request. J.A. 64-65. That component of the injunction continues to bind the Department—on pain of possible contempt—at least as to the plaintiff class members, even though the Department no longer seeks to apply the requirements in the October 2017 policy.

Second, plaintiffs might contend that the district court's judgment should have preclusive effect in any future suit over new time-in-service requirements. As explained, the plaintiff class consists of service members who, as relevant here, "are subject to Section I of the" October 2017 policy. J.A. 66-67. Although the Department has rescinded the challenged requirements in Section I(3) of the October 2017 policy, it has not rescinded the remainder of Section I. *See* June 2021 Memorandum. As a result, at least unless and until

the remainder of Section I is rescinded, each new noncitizen service member who joins the military may be understood to be a member of the plaintiff class entitled to the benefits of the judgment.

If the Department were to issue new time-in-service requirements and attempt to apply them to members of the plaintiff class, those class members might contend that principles of collateral estoppel preclude the Department from arguing that such requirements are statutorily authorized. Of course, any such contention would likely be unpersuasive, given courts' proper hesitation to apply preclusion to bar the government from fully defending new government actions even when previous similar actions have been held unlawful. *See, e.g.*, *Commissioner v. Sunnen*, 333 U.S. 591 (1948) (refusing to apply estoppel to prevent government from deeming taxpayer liable for taxes on income generated from licensing agreements based on tax court's determination that the taxpayer was not liable for income generated in earlier years based on a similar agreement); *Third Nat'l Bank v. Stone*, 174 U.S. 432, 434 (1899) (initial determination that a bank charter conferred a tax exemption for one year could not preclude litigation of the exemption question for later years, because a "question cannot be held to have been adjudged before an issue on the subject could possibly have arisen").

Nonetheless, members of the plaintiff class may still seek to invoke preclusion principles. As courts have recognized, when a party "is prejudiced by the collateral estoppel effect of the district court's order," that effect reflects an ongoing injury sufficient to support the party's standing to pursue an appeal. *Henderson v. Ford Motor Co.*, 72 F.4th 1237, 1245 (11th Cir. 2023) (quotation omitted). Thus, the possibility that the district court might accept plaintiffs' invocation of those principles reflects an ongoing injury from the judgment in this case that permits the government to continue this appeal.

B. If the Court Believes This Appeal Is Moot, It Should Vacate the Judgment or, at a Minimum, Make Clear that the Judgment Has No Ongoing Effects

As explained, the government believes that this case is not moot, both because there is a concrete possibility that the Department will issue a new time-in-service requirement and because the judgment could be understood to have ongoing adverse effects on the Department's ability to issue new time-in-service requirements. If the Court disagrees and believes that the case is moot, it should vacate the judgment below—or, at an absolute minimum, it should make clear its understanding that the case is moot precisely because the judgment will have no future coercive or preclusive effect.

1. If this Court believes this case is moot, it should vacate the district court's judgment. In the circumstance where a case becomes moot on appeal,

the "established practice" is to "vacate the judgment below" in order to "clear[] the path for future relitigation." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). That practice ensures that no party is "prejudiced by" the district court's decision and "prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.* at 40-41.

As the Supreme Court has explained, the determination whether to vacate the judgment when a case becomes moot while pending appellate review "is an equitable one" that requires the disposition that would be "most consonant to justice" in the circumstances. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24, 29 (1994) (quotation omitted). The equities here favor vacatur. If the case is moot, it is because the Department has rescinded the challenged requirements while it considers whether it would prefer to exercise its statutory discretion in a different manner. No principle of equity would support requiring the Department to maintain the October 2017 policy if it may wish to exercise its discretion differently merely to preserve the opportunity to ask this Court to reverse the district court's erroneous judgment.

Moreover, although the Supreme Court has observed that vacatur may be unwarranted when "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal," *U.S. Bancorp.*, 513 U.S. at 25, 29, those principles do not apply when the potentially mooting event is an action

taken by the Executive Branch in the exercise of authority and discretion vested in it by statute, apart from litigation. Thus, the Supreme Court has repeatedly vacated lower court judgments when challenges to federal policies are mooted by Executive actions undertaken in good faith and for reasons unrelated to litigation. *See, e.g.*, *Biden v. Feds for Med. Freedom*, 144 S. Ct. 480, 480-81 (2023); *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332, 332 (2021); *Mayorkas v. Innovation Law Lab*, 141 S. Ct. 2842, 2842 (2021). As in those cases, neither justice nor the public interest would be served by forcing the Department to choose between maintaining a policy that it would prefer to reconsider and acquiescing in a final judgment and injunction that the Department believes may be contrary to its prerogatives and harmful to the public interest.

2. At an absolute minimum, if this Court believes that the case is moot but that vacatur is unwarranted, it should make clear that its decision is premised on the understanding that the judgment will not continue to have adverse legal effects on the Department. As explained, *see supra* pp. 10-14, the Department does not believe that the district court's injunction would properly be interpreted to prohibit the issuance of new time-in-service requirements—even those that are substantially similar or identical to the ones in the October

2017 policy—or that collateral estoppel would properly preclude the Department from fully defending any such future requirements.

Nonetheless, the Department is concerned that the definition of the plaintiff class and the terms of the judgment might be interpreted in ways that would allow service members to claim that the injunction forbids the Department from promulgating new time-in-service requirements or that the Department is precluded from fully defending the lawfulness of such requirements. As explained, if the Court were to believe that the judgment has such an ongoing adverse effect on the government, then this appeal is plainly not moot.

At the same time, if the Court believes that the judgment will not have any ongoing effects and, as a result, believes that this appeal is moot, the Court should state its understanding that the judgment will have no future coercive or preclusive effect in its order disposing of this appeal. As other courts have explained in dismissing an appeal for lack of jurisdiction, it is appropriate for a court to make clear that the district court's findings "are not to be regarded as res judicata" in "any judicial proceeding" in order to "assure the appellants that they will suffer no adverse consequences in future litigation from the judgment." *Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993) (quotation omitted).

CONCLUSION

For the foregoing reasons, this appeal is not moot; however, if the Court disagrees, it should vacate the judgment below or, at a minimum, make clear that the judgment will have no ongoing legal effect.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

SHARON SWINGLE

/s/ Sean Janda
SEAN JANDA
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-3388
sean.r.janda@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit set by this Court's order of December 6, 2024, because it contains 3787 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
Sean Janda