# 01-2608

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ALLAN NOLAN,

Petitioner - Appellant,

-- against --

M. FRANCES HOLMES, DISTRICT DIRCTOR, IMMIGRATION & NATURALIZATION SERVICE, BUFFALO, NEW YORK,

Respondent - Appellee.

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ON PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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**BRIEF OF AMICUS CURIAE THE NATIONAL VETERANS LEGAL SERVICES PROGRAM, VIETNAM VETERANS OF AMERICA, BLACK VETERANS FOR SOCIAL JUSTICE, CITIZEN SOLDIER, CITIZENS AND IMMIGRANTS FOR EQUAL JUSTICE, THE IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION, THE LEGAL AID SOCIETY, AND THE ERIE COUNTY BAR ASSOCIATION VOLUNTEER LAWYERS PROJECT, INC., IN SUPPORT OF BRIEF FOR PETITIONER-APPELLANT SUPPORTING REVERSAL**

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## PRELIMINARY STATEMENT

This case raises an important legal issue of first impression: whether veterans who have served in the United States military during periods of armed conflict are subject to a separate inquiry into their "good moral character" when they apply for naturalization and whether, if they are subject to such an inquiry, they face a different standard than other applicants.[1] The Immigration and Nationality Service (INS) currently engages in the same good moral character inquiry with wartime veterans applying for naturalization under Section 329 of the Immigration and Nationality Act (INA) § 329, 8 U.S.C. § 1440 (2002), as it employs with all other naturalization applicants. Under this inquiry, any conviction for an aggravated felony – a term which includes some misdemeanors – would bar a wartime veteran from naturalizing under §329. This practice violates

[1] The Second Circuit has decided very few cases under the special naturalization provisions for wartime veterans. In these cases, this Court assumed that a good moral character requirement applied to wartime veterans without directly addressing the issue. Pignatello v. United States, 350 F.2d 719 (2d Cir. 1965) (assuming wartime veterans are subject to the general requirement of good moral character in INA § 316(a)); Werblow v. United States, 134 F.2d 791 (2d Cir. 1943) (assuming a previous wartime naturalization statute contains a good moral character requirement). In the case below, the agency applied an erroneous interpretation of law in refusing to consider termination of deportation by assuming Petitioner was ineligible for naturalization. See INS v. St. Cyr, 533 U.S. 289 (2001) (permitting habeas review of issues of law).

Congress's intent to afford wartime veterans special naturalization procedures and causes great hardship to veterans and their families.

In recognition of the great sacrifices attendant to wartime service, non-citizens who serve in wartime are afforded the benefit of special naturalization procedures, as outlined in §329. Throughout this country's history, Congress has determined that such procedures are appropriate to induce non-citizens to serve in the military during war and to honor those willing to sacrifice their lives for the United States. By putting their lives in danger for a country which is not their own by birth, non-citizen veterans are entitled to the more lenient naturalization procedures that Congress has enacted.

*Amici* have seen the grave consequences that result from the INS's application of the general, strict naturalization standard to this special class of naturalization applicants. As a result of this practice, a wartime veteran who commits a crime, even one as minor as misdemeanor theft, after honorably completing his service may be barred from naturalizing, without any consideration of his valuable service and loyalty to the United States. The practice also makes factors such as the veteran having citizen family members, developing strong ties to the community, and living many years in the United States irrelevant. As a result, wartime veterans are being

separated from their families and communities, and exiled to countries now foreign to them. If §329 procedures were applied as Congress provided, the service these veterans performed for the United States would be valued and, although punished for their crimes, these wartime veterans would be permitted to remain in the United States.

## INTERESTS OF *AMICI CURIAE*

**The National Veterans Legal Services Program (NVLSP)** is a non-profit organization, incorporated in the District of Columbia, that has been recognized by the Secretary of Veterans Affairs, pursuant to 38 U.S.C. § 5902, for the purpose of preparing and presenting claims under laws administered by the Department of Veterans Affairs. Since it was founded in 1981, NVLSP has served as a national support center to lawyer and non-lawyer advocates who represent former members of the uniformed services in a variety of forums and has represented hundreds of such members directly. In the past year, numerous honorably discharged and disabled veterans have written to NVLSP concerning current problems with the INS. NVLSP is concerned that veterans are being subjected to naturalization requirements that fail to recognize their honorable service in the U.S. armed forces.

**Vietnam Veterans of America** (**VVA)** is a Congressionally-chartered national veterans service organization that is expressly dedicated to ensuring the rights of Vietnam-era veterans. See Pub. L. No. 99-318; 36 U.S.C. §§ 230501-230513. VVA assists veterans and their families, both members and non-members, in the prosecution of claims for benefits by providing them with *pro bono* legal representation before the agency, the Board of Veterans Appeals and on appeal to the U.S. Court of Appeals for Veterans Claims. In addition, VVA's advocacy concerning issues of importance to individual veterans, as well as veterans as a whole, extends to the legislative arena and broad-impact litigation.

As a general principle, so that veterans who have been affected by their military service receive all to which they are legally entitled, VVA supports the widest possible access to procedural and substantive due process. This includes preventing the *ultra vires* application of more restrictive citizenship and deportation standards to Vietnam and other veterans with honorable wartime service than those standards mandated by Congress.

**Black Veterans for Social Justice (BVSJ)** is a non-profit organization with twenty-three years of experience serving New York's veterans. BVSJ is the largest veterans organization in New York State.

BVSJ works closely with veterans on a wide range of issues, including homelessness, substance abuse, and incarceration. We have observed directly the stresses that military service places on veterans and their unique claims to supportive programs when they complete their military service. The veterans we work with have placed their lives on the line for the United States. Through their service, veterans have demonstrated their citizenship in this country. BVSJ is therefore deeply concerned with assuring that fair citizenship rules are applied to the veteran community.

**Citizen Soldier** is a non-profit veterans/GI rights advocacy organization which was founded in 1969 to assist returning Vietnam combat veterans. Over the past thirty-three years, we have been involved in a broad range of issues which bear on the physical and mental health of America's military veterans, including advocating on behalf of veterans exposed to low level radiation during US nuclear bomb tests and veterans suffering from Gulf War Syndrome, and participating in the class action lawsuit against the manufacturers of Agent Orange. Through our advocacy we have become concerned about this important issue of veterans not being provided proper naturalization procedures due them following service.

**Citizens and Immigrants for Equal Justice (CIEJ)** is a national coalition of over 1,000 families in twenty-nine states whose integrity has

been directly threatened by the deportation of lawful permanent resident family members. Many of our members face the loss of loved ones who served honorably in the United States military. CIEJ is committed to protecting the full rights of lawful permanent residents who have made their homes in the United States and who have demonstrated their allegiance to this country.

**The Immigrant Defense Project (IDP) of the New York State Defenders Association** (NYSDA) is a legal and community advocacy center that seeks to promote the legal, constitutional, and human rights of immigrants accused of crimes. NYSDA is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. In 1997, NYSDA established the IDP in order to provide immigrants, immigrant advocates, and criminal defense lawyers who represent immigrants with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law. Over the years, the IDP has been contacted by dozens of lawful resident immigrants whom the government has sought or is seeking to deport from the United States despite having served this country honorably in the U.S. military services.

**The Legal Aid Society** in New York City was founded in 1876 to provide legal assistance to poor immigrants. The Civil Division of the Legal Aid Society helps low income non-citizens on a wide range of immigration matters, including adjustment of status, asylum, naturalization, waivers of deportation and cancellation of removal. The Legal Aid Society is the only non-profit legal services organization in New York City that specializes in representing non-citizens with criminal convictions in INS removal proceedings. Legal Aid has had several non-citizen clients who served in the United States military, were honorably discharged and who have been subject to the impermissibly strict naturalization standard challenged in this case.

**The Erie County Bar Association Volunteer Lawyers Project, Inc. (VLP)** is a non-profit agency that has managed *pro bono* projects for the Erie County Bar Association for almost twenty years. Our mission is to provide quality *pro bono* legal representation, assistance and information to low-income people and vulnerable populations, and to coordinate, train and assist local attorneys in the delivery of these services. VLP has handled the cases of at least two veterans with claims under §329.

## STATUTORY AND REGULATORY FRAMEWORK

### A. General naturalization procedures under the INA

#### 1. *INA § 316, 8 U.S.C. § 1427 (2002)*

To naturalize, a civilian non-citizen must satisfy several general naturalization requirements. One of these requirements is the §316 residence requirement, set forth in a subsection titled "Residence." INA § 316(a), 8 U.S.C. § 1427(a) (2002). In order to satisfy this residence requirement, a non-citizen must comply with all three elements of §316(a). The first and second elements prescribe physical presence and residence requirements, including continuous residence in the United States for five years. The third component of §316(a) states that the non-citizen shall, "*during all the periods* referred to in this subsection ha[ve] been and still [be] a person of good moral character…" INA § 316(a) (emphasis added). Unless the non-citizen belongs to a class of naturalization applicants exempt from the residence requirement, all three components of §316(a) must be met in order to satisfy the general residence requirement.

#### 2. *INA § 101(f), 8 U.S.C. § 1101(f) (2002)*

The INA does not include an affirmative definition of good moral character. It does include a negative provision, §101(f), which prohibits some persons from showing good moral character. Section 101(f) defines a

non-citizen as being unable to establish good moral character if, "*during the period* for which good moral character is required to be established," he falls into certain enumerated categories. INA § 101(f) (emphasis added). If the statute contains a time period for showing good moral character, then §101(f) applies to bar an applicant who falls into one of the categories, despite any factors which would weigh in favor of finding good moral character.[2]

As originally enacted, §101(f)(8) barred non-citizens who had committed murder from being able to establish good moral character. INA § 101(f)(8), Pub. L. No. 82-414, 66 Stat. 163 (1952). However, in 1990, Congress amended §101(f)(8) to include all non-citizens convicted of an aggravated felony as defined in §101(a)(43). Immigration Act of 1990, Pub. L. No. 101-649, § 509, 104 Stat. 4978, 5051. The definition of an aggravated felony in §101(a)(43) has been amended many times since its enactment; it includes a wide range of offenses,[3] and the term serves varied

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[2] Even those applicants who fall within §101(f)(8), having been convicted of an aggravated felony "at any time," are still within the preamble of §101(f) which links its categories to a statutory period. INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (2002).

[3] Section 101(a)(43) currently defines "aggravated felony" to include more than twenty broad categories of crimes, among these, receipt of stolen property, tax evasion, and offenses related to document fraud. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2002). See generally United States v. Pacheco, 225 F.3d 148 (2d Cir. 2000).

purposes throughout the INA. Therefore, when Congress amends §101(a)(43), the changes have broad implications for many sections of the INA[4] in addition to altering the categories of non-citizens barred from establishing a statutory period of good moral character in §101(f).

B. Special naturalization procedures for wartime veterans, INA § 329, 8 U.S.C. § 1440 (2002).

A non-citizen who has completed active-duty service in the Armed Forces during World War I, World War II, the Korean Hostilities, the Vietnam Hostilities, or during other periods of military hostilities designated by Congress or the Executive, can seek naturalization under §329, in lieu of naturalizing under the general naturalization sections of the INA. To qualify under §329, the non-citizen must demonstrate: service during a qualifying period; presence in the United States or territory at the time of enlistment, reenlistment, extension, or induction, or lawful admittance; and honorable service in active-duty status and an honorable discharge. INA § 329(a), 8 U.S.C. § 1440(a) (2002). This section covers veterans who served during periods of hostility, regardless of where or in what capacity they served.

[4] These changing definitions of who is included within the definition of good moral character have implications throughout the INA. See, e.g., INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B) (2002) (providing that an applicant for cancellation of removal or adjustment of status must have been a person of good moral character during the required ten-year period of physical presence).

Section 329 expressly exempts wartime veterans from the residence requirement of §316(a) and, by doing so, implicitly exempts them from the good moral character requirement. INA § 329(b)(2), 8 U.S.C. § 1440(b)(2) (2002). Additionally, unlike civilian applicants, wartime veterans may naturalize while in removal proceedings, even when facing a final order of removal. INA § 329(b)(1), 8 U.S.C. § 1440(b)(1) (2002). Otherwise, wartime veterans must "comply in all other respects with the requirements of" the Nationality and Naturalization Title of the INA, such as knowing an elementary level of English and the fundamentals of United States history and government. INA § 312, 8 U.S.C. § 1423 (2002). Wartime veterans are also subject to naturalization bars not dependent on a time period. See, e.g., INA § 313(a)(1), 8 U.S.C. § 1424(a)(1) (2002) (barring persons opposed to organized government); INA § 313(a)(2), 8 U.S.C. § 1424(a)(2) (2002) (barring members of the communist party); INA § 313(a)(4), 8 U.S.C. § 1424(a)(4) (2002) (barring persons trying to overthrow the United States government); INA § 315(a), 8 U.S.C. § 1426(a) (2002) (barring aliens relieved from selective service on the grounds of alienage).

Section 329 does not contain an express good moral character requirement.

C. INS regulations interpreting §329

Prior to 1991, the INS regulations promulgated under §329 contained no good moral character requirement or any period in which to show good moral character. See 31 Fed. Reg. 14078 (Nov. 3, 1966); 23 Fed. Reg. 5819 (Aug 1, 1958). When the INS amended 8 CFR 329.2 in 1991, it added 8 CFR 329.2(d), which requires an applicant to establish that he or she "[h]as been, for at least one year prior to filing the application for naturalization, and continues to be, of good moral character…" 8 C.F.R. § 329.2(d) (2002).

## ARGUMENT

### I. CONGRESS HAS CONSISTENTLY LOWERED BARRIERS TO NATURALIZATION FOR WARTIME VETERANS TO INDUCE NON-CITIZENS TO SERVE IN TIMES OF WAR AND TO HONOR THOSE WHO DO SERVE.

The United States has an unbroken history of providing special naturalization procedures for wartime veterans.[5] Through these procedures, Congress recognizes the sacrifices of non-citizens who serve the country during times of war. By treating wartime veterans differently from civilian applicants, Congress provides inducements to non-citizens to serve in wartime and honors those who do serve. See United States v. Convento, 336 F.2d 954, 954-55 (D.C. Cir. 1964) (per curiam) (opinion of Bazelon, C.J.) ("Easing naturalization requirements for those who have served our country in wartime is a congressional policy of long standing.").

During the Civil War, Congress adopted the Alien Soldiers Naturalization Act, which provided citizenship under significantly relaxed requirements, to any alien serving honorably in the volunteer or regular

[5] The notion of citizenship as a reward for military service predates the Constitution. In 1783, for example, Pennsylvania granted the privileges of citizenship to Baron von Steuben, a Prussian soldier who served as Washington's inspector-general, in gratitude for his military service. Joseph P. Doyle, Frederick William von Steuben and the American Revolution 326 (Burt Franklin 1970).

Union armies.[6] Act of July 17, 1862, ch. 254, § 21, 12 Stat. 594, 597. In 1906, when Congress first standardized naturalization procedures among district courts under the aegis of a new federal Bureau of Immigration and Naturalization, it left these provisions undisturbed. See Act of June 29, 1906, ch. 3592, 34 Stat. 596.

Congress again liberalized naturalization procedures when the United States entered World War I, providing particularly generous provisions for non-citizens serving during the war.[7] See Act of May 9, 1918, ch. 69, § 7, 40 Stat. 542. When Congress revised the immigration laws in 1940, it provided a provision for those serving in the military in both peacetime and wartime. See Nationality Act of 1940, ch. 876, § 324(a), 54 Stat. 1137, 1149. But when war broke out the following year, Congress once again made a special provision for those serving during wartime, adding a new section to the Nationality Act, which waived practically all general

[6] Where other applicants needed five years of residency, soldiers needed only show one year.

[7] The good moral character requirement of civilian applicants was one of many requirements relaxed for wartime veteran applicants. Where civilian applicants had to provide the testimony of two U.S. citizens as to their good moral character, Act of June 29, 1906, § 4, 34 Stat. 597, servicemen (in peacetime or wartime) were allowed to present an honorable discharge certificate or certificate of good conduct as "prima facie evidence to satisfy all the requirements of residence . . . and good moral character required by law" when accompanied by the affidavits of two U.S. citizen witnesses that the petitioner was the person named in the documents. Act of May 9, 1918, sec. 1, § 13, 40 Stat. at 546.

naturalization requirements and removed procedural barriers. Second War Powers Act, ch. 199, Sec. 1001, § 701, 56 Stat. 176, 182 (1942). This program sunset at the end of 1947, but a year later Congress enacted a new provision for veterans who served honorably in active-duty during either World War I or World War II. Act of June 1, 1948, ch. 360, sec. 1, § 324A, 62 Stat. 281, 282. While substantially similar to the one enacted in 1942, this act exempted wartime veterans from having to establish lawful admission and removed racial eligibility requirements.[8] Id.

In 1952 Congress undertook a sweeping and comprehensive revision of the immigration laws, the Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952), and, for the first time, created a permanent mechanism, §329, for the naturalization of wartime veterans, replacing the series of ad hoc provisions. Section 329 recodified §324A of the Nationality Act of 1940, expressly "carr[ying] forward" Congress's commitment to provide liberal naturalization procedures for wartime veterans. S. Rep. No. 82-1137, at 42 (1952). Veterans who served in wars after the enactment of the INA have been included under §329 by

[8]By removing racial eligibility requirements, these statutes created a class of beneficiaries that included non-citizens who were otherwise unable to naturalize. In contrast, it was not until a decade later that Congress removed race-based prohibitions for naturalization to non-veterans, in the Nationality Act of 1952. INA § 311 (codified as amended at 8 U.S.C. § 1422 (1994)).

amendments or presidential proclamations. See, e.g. Act of Sept. 26, 1961, Pub. L. 90-633, 75 Stat. 654 (including Korean War veterans); Act of Oct. 24, 1968, Pub. L. 97-116, § 15(a), 82 Stat. 1343, 1344 (including Vietnam veterans).

Although these numerous wartime naturalization enactments had slightly different requirements, all were designed to induce non-citizens to serve in the United States military during wartime and to reward their service. Recruitment by inducing non-citizens to serve has long been regarded as essential to fighting war. Discussing the Civil War-era naturalization statute, one court explained that it "endeavor[ed] to raise large bodies of troops to carry on a gigantic war upon land, and . . . [served as] a means to aid in accomplishing that end – to induce aliens to enlist in the armies of the United States." In re Bailey, 2 F. Cas. 360, 362 (D. Or. 1872). Congress has often enacted special naturalization statutes while in the midst of war to induce enlistment and discourage immigrants from taking exemptions from service on the basis of alienage. See Hearing before the Subcomm. on Immigration, Refugees, and Int'l Law, 101st Cong. 53 (1989) (statement of Rep. Benjamin A. Gilman) (referring to wartime service statutes as "ample precedent for this method of military recruitment"). Wartime veterans have long been regarded as deserving of citizenship

because of their willingness to sacrifice their lives for the United States. Courts have understood wartime service statutes as conferring a "reward" for military service as well as signaling "recognition that no further demonstration of attachment to this country and its ideals is necessary." Convento, 336 F.2d at 955.

## II. WARTIME VETERANS ARE NOT REQUIRED TO SHOW GOOD MORAL CHARACTER UNDER §329.

### A. The text of §329 includes neither an express nor an implied good moral character requirement.

A wartime veteran applying for naturalization under §329 is not required to show good moral character because the section neither provides an independent good moral character requirement, nor triggers the good moral character requirement that is incorporated in §316(a) by reference to a period of residence. To read §329 to contain an implied or express good moral character requirement would contradict and defeat the purpose set forth in the express terms of the statute.

"[T]he starting point for interpreting a statute is the language of the statute itself." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); see also Bailey v. United States, 516 U.S. 137, 144-145 (1995). The language of §329 does not mention good moral character, a good moral character requirement, or a showing of good moral character.

Neither these explicit words are used nor is there language suggesting this type of character evaluation applies to wartime veterans. The Magistrate Judge, in the decision below, agreed that "[c]learly, the words 'good moral character' do not appear in § 329." Order of Honorable H. Kenneth Schroeder, Jr., United States Magistrate Judge ("Magistrate Judge Order") at 18.

A good moral character requirement is also not incorporated into §329 by reference to another section. The only general requirement for showing good moral character under the naturalization provision is contained in §316(a) which states:

> (a) Residence
>
> No person, except as otherwise provided in this title, shall be naturalized unless such applicant, (1)…has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years…(3) *during all the periods referred to in this subsection* has been and still is a person of good moral character…"

INA § 316(a) (emphasis added). By the text of the statute, the good moral character requirement in §316(a) is tied to and dependent upon the "the periods referred to in" §316(a), the residence period.

Section 329(b)(2) exempts the wartime veteran from the residence requirement of §316(a). Section 329(b) states:

> (b) Exceptions
>
> A person filing an application under subsection (a) of this section shall comply in all other respects with the requirements of this title, except that –
>
> (2) *No period of residence or specified period of physical presence* within the United States or any State or district of the Service in the United States shall be required…

INA §329(b) (emphasis added). This exception from a "period of residence or specified period of physical presence," refers to the period of §316(a) and therefore exempts §329 applicants from the period in §316. Because the good moral character requirement is only activated by reference to a period in subsection §316(a), without such period, the good moral character requirement does not apply. Besides §316(a), there is no other "requirement[] of this title" regarding good moral character that applies to wartime veterans. INA § 329(b).

B. A comparison of §329 to other naturalization provisions further demonstrates that §329 does not require a showing of good moral character.

Had Congress intended for §329 to include a good moral character requirement, it would have added this requirement expressly in §329 as it did in other naturalization provisions also exempt from residence. Reading §329 in the context of these other provisions, supports the plain reading of §329 that it contains no good moral character requirement.

In stark contrast to the absence of a good moral character requirement in §329, §328 details an intricate statutory scheme which requires some peacetime veterans to show good moral character.[9] INA § 328, 8 U.S.C. § 1439 (2002). The complex scheme in §328 essentially provides that good moral character must be shown for the periods of time that the peacetime veteran did not serve.[10] On the other hand, §329 contains none of this intricacy and detail; all wartime veterans are exempt from the residence requirement and there is no express good moral character requirement. It is a fundamental principle of statutory interpretation that "where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." INS v.

[9] In accordance with Congress's policy of providing veterans with more lenient naturalization procedures than civilians, both peacetime and wartime veterans are exempt from many general requirements. Even when peacetime veterans must comply with the general requirements, they must meet a lower standard to satisfy the requirement. However, in harmony with the value Congress places on veterans who serve during wartime, §329 has even more relaxed procedures than §328.

[10] Section 328 provides different naturalization procedures for peacetime veterans depending on when they filed their application and whether or not their service was continuous. Peacetime veterans who do not serve for a continuous three-year period must show good moral character for periods of time not in the military. INA § 328(c). Likewise, peacetime veterans applying six months after service must comply with §316(a); however, in lieu of complying with the good moral character requirement of §316(a), for the times of service the veteran may simply demonstrate honorable service. INA §§ 328(d), (e).

Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). The Magistrate Judge concurred that "general statutory interpretation suggests that Congress intended to exclude the good moral character requirement from §329 when it specifically included it in §328 and put no such language in §329." Magistrate Judge Order at 20.

The contrast becomes more apparent when §329 is compared to naturalization provisions exempt from residence which have more simplistic requirements for showing good moral character. Section 324(a), for example, a provision allowing former citizens to regain their citizenship, exempts its applicants from residence but adds "Additional requirements" in §324(b), which includes the requirement of good moral character. INA § 324, 8 U.S.C. § 1435 (2002). A related provision, §327, also exempts its applicants from §316(a) but expressly requires a showing of good moral character. INA § 327, 8 U.S.C. § 1438 (2002). Legislative history of the INA at the time of enactment further supports this argument. The Senate Committee of the Judiciary's Report described that for the four sections exempt from §316(a), "spouses of citizens, aliens in the Armed Forces, children, and former citizens who are regaining citizenship. " Congress

expressly included a good moral character requirement only in the section, "Persons Regaining Citizenship." S. Rep. No. 82-1137, at 41 (1952).

C. If a section neither expressly contains a good moral character requirement nor implies this requirement by reference to another section, then good moral character is not required.

The intentional statutory void in §329 cannot be filled by assuming the application of either a good moral character requirement that is independent of the residence requirement or some universal good moral character requirement. Applying a requirement that is unconnected to the language of the statute trumps the express intent of Congress when crafting the statutory scheme for naturalization.

One court that has assumed the existence of a good moral character requirement is the Ninth Circuit. This court has failed to account for the fact that the good moral character requirement is dependent on the residence requirement. In Santamaria-Ames v. INS, the court assumed that a good moral character requirement applied even though it reasoned that §329 applicants are exempt from §316(a). 104 F.3d 1127 (9th Cir. 1996); see Castiglia v. INS 108 F.3d. 1101 (9th Cir. 1997) (adopting this assumption). This reading, however, contradicts the plain meaning of the statute by ignoring that the good moral character requirement is triggered by the residence requirement of §316(a).

In contrast, the Magistrate Judge recognized the connection between the good moral character requirement and the residence requirement of §316(a). Magistrate Judge Order at 19-20. Nonetheless, the Magistrate Judge assumed the existence of a "universal requirement of good moral character" independent of §316(a). Magistrate Judge Order at 28. This finding is not rooted in any statutory language. If a universal requirement of good moral character exists, then Congress would not have expressly added the specific requirement of good moral character to some naturalization provisions exempt from residence because this universal requirement would have filled the void.

Congress could have included an express good moral character requirement in §329 to fill the void that the residence exemption created; yet, there is no independent mention that a showing of good moral character is required. It is presumed that Congress or the legislature "say[s] what it means and mean[s] what it says." Burgo v. General Dynamics Corp., 122 F.3d 140, 145 (2d Cir. 1997). See also Cardoza-Fonseca, 480 U.S. at 431-32 ("[w]ith regard to this very statutory scheme, we have considered ourselves bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.'" (citing INS v. Phinpathya, 464 U.S. 183, 189 (1984)).

## III. THE COURT BELOW ERRED IN LOOKING TO INS REGULATIONS AND POST-ENACTMENT LEGISLATIVE HISTORY TO FIND A GOOD MORAL CHARACTER REQUIREMENT IN §329.

Despite the fact that the Magistrate Judge recognized that principles of statutory interpretation supported the conclusion that §329 does not contain a good moral character requirement, the Judge looked to INS regulation 8 CFR 329.2(d) to find a good moral character requirement in §329. Magistrate Judge Order at 20. The judge examined the agency's interpretation that there is a good moral character requirement in §329 which can be satisfied by a showing of good moral character for one-year preceding filing for naturalization. A regulation, however, cannot contradict the statute's plain meaning. See INS v. St. Cyr, 533 U.S. 289, 320 (2001) (stating no deference under Chevron because the Court only defers to agency interpretations of statutes that, after applying normal "tools of statutory construction," remain ambiguous); Cardoza-Fonseca, 480 U.S. at 447-448 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n. 9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.")).

Promulgated 39 years after §329 was enacted, 8 CFR 329.2(d) prescribes a means of complying with a good moral character requirement that is neither express nor implied within §329.[11] Allowing this regulation to amend the requirements of this statutory scheme, by adding a good moral character requirement when the statute directs otherwise, would grant an administrative agency the power to alter the eligibility requirements for naturalization, a function solely within the power of Congress. See Fedorenko v. United States, 449 U.S. 490, 506 (1981) ("Congress alone has the constitutional authority to prescribe rules for naturalization"). Additionally, this agency interpretation should have been afforded little deference given that no previous regulation promulgated under §329 referenced a good moral character requirement. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." Cardoza-Fonseca, 480 U.S. at 447 n. 30 (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981)).

To find ambiguity in §329, the magistrate judge examined post-enactment legislative history, a 1968 Senate Report. The Magistrate Judge

[11] Indeed, the purpose of the amendments in 1991 were only to "define[] qualifying periods of honorable service and clarif[y] the statutory authority for ease of reading and to provide a single source of reference." Interim Rule, 56 Fed. Reg. 50,475, 50,477 (Oct. 7, 1991).

interpreted the language, "[r]elief from some of the general requirements has not, however, included exemption from the establishment of good moral character," as evidence of a general requirement of good moral character that exists independent of the special naturalization procedures afforded wartime veterans. Magistrate Judge Order at 27 (quoting S. Rep. No. 90-1292 (1968)). This legislative history is ambiguous. It is about the 1948 Act rather than the 1952 Act. In addition, it characterizes the 1948 Act as containing a general good moral character requirement when the provision only contained a *pro forma* requirement to provide affidavits attesting to good moral character. Act of June 1, 1948, ch. 360, sec. 1, §324A, 62 Stat. 281, 282. In any event, the 1968 legislation did not amend any of the relevant naturalization provisions of §329. It only added another qualifying time period. Therefore this legislative history cannot inform the reading of §329 as enacted in 1952.

## IV. IF THE COURT REQUIRES WARTIME VETERANS TO ESTABLISH GOOD MORAL CHARACTER, IT SHOULD APPLY A FLEXIBLE STANDARD, IN ACCORDANCE WITH THE POLICY OF AFFORDING WARTIME VETERANS SPECIAL NATURALIZATION PROCEDURES.

### A. The per se bars to showing good moral character in §101(f) cannot be applied to wartime veterans.

#### 1. *Section 101(f) does not apply to wartime veterans because there is no statutory period in §329 for which to show good moral character*.

Even if this Court determines that some showing of good moral character is required for wartime veterans, §101(f) cannot operate as a per se bar because it applies only to provisions which include a "period for which good moral character is required to be established." INA § 101(f). By exempting §329 applicants from the period of residence prescribed by §316(a) and not imposing an independent statutory period for which an applicant must establish good moral character, §329 contains no period which brings wartime veterans within the scope of §101(f).[12]

[12] In Castiglia, 108 F.3d at 1104, the Ninth Circuit assumed that §329 applicants are subject to both a good moral character requirement and the bars of §101(f). Castiglia, however, conflated two issues to reach this conclusion that §101(f) applies: first, whether §101(f) applies at all to §329 applicants, and second, whether, if it applies, the statutory language in the preamble trumps the language, "at any time," in §101(f)(8) and confines the aggravated felony bar to convictions during the statutory period.

The application of §101(f)'s statutory bar would undermine Congress's long-standing policy of providing more lenient naturalization procedures for wartime veterans. In light of this aim, courts have been reluctant to read the statute "restrictively to bar [§329 applicants] unless it is expressly commanded." Convento, 336 F.2d at 955 (granting naturalization to petitioner who was in the United States only for his re-enlistment, not his enlistment as required by the statute at the time).

Subjecting §329 applicants to §101(f) bars also runs counter to congressional policy because Congress frequently amends these bars without reference to how the changes will affect wartime veterans. Specifically, if §101(f)(8) is applied to wartime veterans, these veterans are subject to the constantly changing and broadening definition of what constitutes an aggravated felony in §101(a)(43).[13] When §101(f)(8) was amended in 1990 from a murder conviction to a conviction for any aggravated felony, Congress did not express an intent to raise the standard of naturalization for wartime veterans. Immigration Act of 1990, Pub. L. No. 101-649, § 509, 104 Stat. 4978, 5051. The conferees made no mention of §329 in connection with these changes, H.R. Rep. 101-955, at 132 (1990), rather

[13] See St. Cyr, 533 U.S. at 296 nn. 4 & 6 (noting that while aggravated felony "has always been defined expansively, it was broadened substantially by IIRIRA to include more "minor crimes").

Congress only addressed the routine case in which a civilian non-citizen sought to naturalize, or sought some benefit under the statute that required a showing of good moral character. In light of the long history of providing special naturalization procedures for wartime veterans, had Congress intended to take away benefits previously awarded by changing the definition of an aggravated felony, it would have expressed this intent.

2. *INS regulation 8 CFR 329.2(d) cannot invoke §101(f) bars because the bars only apply to applicants required to show good moral character for a statutory time period.*

The one-year period prescribed by 8 C.F.R. § 329.2(d) cannot be read to create a "period for which good moral character is required to be established" to substitute the absence of a statutory period in §329. INA § 101(f). Because the bars of §101(f) are applicable only to statutorily prescribed periods, this administratively prescribed period cannot apply to §101(f) or any other statutory provision in the INA which delimits a determination of good moral character. Adopting a contrary interpretation would have the result of granting an administrative agency the power to alter the eligibility requirements for naturalization.

B. If the Court upholds 8 CFR 329.2(d), then the standard for evaluating good moral character should be the Second Circuit's flexible community-based standard.

Should this Court determine that there is a requirement of good moral character, other than that linked to a period of residence, then the categorical bars of §101(f) would not apply to wartime veterans. Instead, the Court should apply its judicially determined standard which allows applicants to present many factors that weigh in favor of finding good moral character. This standard is flexible and non-quantitative, based on individual facts in the context of local community mores.[14] This Circuit has specifically rejected relying on "general principles" in this context, acknowledging, as Chief Judge Hand once did, that "almost every moral situation is unique." Johnson v. United States, 186 F.2d 588, 590 (2d Cir. 1951). Further, the standard for determining good moral character is forward-looking. It functions to assess who the applicant will be as a citizen, and is not "mean[t] to punish for past conduct." Posusta v. United States, 285 F.2d 533, 535-36 (2d Cir. 1961). This governing standard, therefore, contemplates and allows

[14] Under this standard, good moral character is measured in the context of an ordinary person in the applicant's community instead of a national moral standard. See, e.g., Johnson, 186 F.2d at 590 (rejecting the standpoint "of some ethical elite"); Posusta, 285 F.2d at 535 ("the test is not the personal moral principles of the individual judge or court before whom the applicant may come.").

for the possibility that an applicant can transform his or her character.[15] Additionally, this standard has allowed applicants to demonstrate good moral character even when they are incarcerated or on parole during the prescribed period. See Dadonna v. United States, 170 F.2d 964, 966 (2d Cir. 1948), cert. denied, 336 U.S. 961 (1949) ("Good behavior during incarceration may be one indication of the fitness of the applicant to assume the duties of citizenship.").

While these standards were developed primarily in the context of non-veteran applicants, courts have extended these principles even more liberally to wartime veterans.[16] In this context, courts have recognized that a §329 applicant "stands in a somewhat different position" than applicants under other naturalization laws because §329 "provisions were enacted as a reward for services rendered." Yuen Jung v. Barber, 184 F.2d 491, 497 (9th Cir. 1950).

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[15] Courts have recognized a wide range of characteristics that demonstrate reform. See Gatcliffe v. Reno, 23 F. Supp.2d 581 (D.Vi.I. 1998) (finding that petitioner demonstrated change by expressing regret, marrying, becoming a part of his community and starting a business); Marcantonio v. United States, 185 F.2d 934, 935-36 (1950) (finding transformation through evidence of church attendance, parental skills, and having started a business, as well as on a police officer's testimony to his good status in the community).

[16] See Pignatello, 350 F.2d 719 (2d Cir. 1965); Santamaria-Ames v. INS, 104 F.3d 1127 (9th Cir. 1996); Yuen Jung v. Barber, 184 F.2d 491 (9th Cir. 1950); Tan v. INS, 931 F. Supp. 725 (D. Haw. 1996); In re Brodie, 394 F. Supp. 1208 (D. Or. 1975).

## V. CONCLUSION

Presenting the Court with the full scope of legal arguments on this important issue, *amici* seek a ruling that will afford wartime veterans facing deportation the proper procedures guaranteed them by law.

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Respectfully submitted,

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