No. 19-1194

In the Supreme Court of the United States

JIAHAO KUANG, ET AL., PETITIONERS

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under a now-rescinded policy of the Department of Defense, military recruits who are foreign nationals with lawful permanent resident status (but not United States citizen recruits) were required to complete their security background investigation before entering basic training, where they gain access to military facilities, personnel, and information. The question presented is whether the court of appeals' judgment vacating a preliminary injunction and ordering dismissal of petitioners' challenge to that former policy under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, should be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 778 Fed. Appx. 418. A prior order of the court of appeals denying a motion for a stay pending appeal (Pet. App. 88a-90a) is unreported. The order of the district court (Pet. App. 6a-87a) is reported at 340 F. Supp. 3d 873. Subsequent orders of the district court are not published in the Federal Supplement but are available at 2019 WL 718632 and 2019 WL 1597495.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2019. A petition for rehearing was denied on November 1, 2019 (Pet. App. 91a). On January 21, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 30, 2020, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are foreign nationals with lawful permanent resident (LPR) status. They challenged a now-rescinded policy of the Department of Defense (DoD) that required LPR military recruits to complete their security background investigation before entering basic training. The district court certified a class action and, based on petitioners' claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, preliminarily enjoined DoD from continuing to implement that policy. Pet. App. 86a-87a. The court of appeals reversed and remanded with instructions to dismiss petitioners' APA claim. *Id.* at 1a-5a. DoD held the challenged policy in abeyance beginning in July 2019, and rescinded the policy on February 3, 2021.

1. The Constitution assigns to Congress and the President the authority to establish the Nation's armed forces and to employ them for the protection of the Nation's security. U.S. Const. Art. I, § 8, Cls. 12-14 and Art. II, § 2, Cl. 1. Those Branches thus have "ultimate responsibility" for "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

As relevant here, Congress has provided that a "person may be enlisted in any armed force only if the person is" (1) a "national of the United States"; (2) an "alien who is lawfully admitted for permanent residence"; or (3) a "person described in section 341" of compacts

between the United States and certain Pacific island governments. 10 U.S.C. 504(b)(1).[1]

DoD has issued regulations establishing "basic entrance qualification standards for enlistment, appointment, and induction" into the military. 32 C.F.R. 66.1(a); see generally 32 C.F.R. Pt. 66. "The underlying purpose" of those standards "is to minimize entrance of persons who are likely to become * * * security risks" or "disrupt good order, morale, and discipline." 32 C.F.R. 66.6(b)(8). To that end, a DoD regulation bars from service a recruit who "[r]eceives an unfavorable final determination * * * on a completed [security background] investigation," which is adjudicated in accordance with the Executive Order that governs access to classified information. 32 C.F.R. 66.6(b)(8)(vi).

The "minimum level of background investigation for all service members," regardless of nationality, is a "Tier 3" investigation—which is used to determine eligibility for access to Confidential or Secret classified information. C.A. E.R. 242-243. Security determinations for military service (as for all Executive Branch agencies) are made using guidelines issued by the Office of the Director of National Intelligence (ODNI). See *id.* at 100-126 (ODNI, *Security Executive Agent Directive 4: National Security Adjudicative Guidelines* (June 8,

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[1] Section 504(b) permits individualized exceptions for potential recruits who are determined to have "a critical skill or expertise * * * vital to the national interest" that will be used in that person's "primary daily duties * * * as a member of the armed forces." 10 U.S.C. 504(b)(2). DoD previously used that provision to recruit military service members through the Military Accessions Vital to the National Interest (MAVNI) Pilot Program, but that program was discontinued beginning in September 2016 due to security concerns. C.A. E.R. 241. The MAVNI program is not at issue in this case.

2017)). The guidelines employ a "whole-person" approach that calls for "a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk." *Id.* at 105. A favorable determination can be made only when "eligibility is clearly consistent with the interests of national security," and "[a]ny doubt" must be "resolved in favor of the national security." *Ibid.*

The first three guidelines that must be given "careful consideration" in the background investigation address "allegiance to the United States," "foreign influence," and "foreign preference." C.A. E.R. 105, 107-110. The ODNI guidelines explain that "[f]oreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance." *Id.* at 108. Concern also arises if foreign contacts or interests "create circumstances in which the individual may be manipulated or * * * otherwise made vulnerable to pressure or coercion by any foreign interest." *Ibid.* Foreign preference to the detriment of U.S. national interests may be indicated by past "participation in foreign activities," such as employment in a foreign government or military organization. *Id.* at 110. Together, these guidelines establish that foreign contacts and circumstances suggesting possible foreign allegiance are sources of potential national-security risk that must be carefully and individually investigated before a person is provided with access to national-security information or given a sensitive position.

A DoD regulation allows, but does not require, the military to "access" a recruit (*i.e.*, bring the recruit into military service) before a full background check has

been completed. Specifically, "[a]n applicant may be accessed (including shipping him or her to training or a first duty assignment) provided that" a background investigation has been initiated, a fingerprint check has been run, and no disqualifying background information has been identified. 32 C.F.R. 66.6(b)(8)(vi)(A). Pursuant to that authority, DoD has generally permitted United States citizens to proceed to basic training after their background checks have been initiated, but before a final security determination has been made. Prior to the policy at issue here, DoD generally allowed LPR recruits to do the same, although in practice only half of LPR recruits actually accessed before their investigations were completed. C.A. E.R. 229.

2. a. On October 13, 2017, DoD adopted a new accession policy "to respond directly to the security and counter-intelligence concerns presented by the LPR population," including their increased "risk of being subjected to influence by foreign governments" and documented difficulties in the process of vetting foreign nationals. C.A. E.R. 243-246. DoD determined that permitting the LPR population to "formally enter into the armed services prior to undergoing a Tier 3 security analysis" and adjudication created an "undue risk to national security." *Id.* at 240. Accordingly, the Office of the Under Secretary of Defense for Personnel and Readiness announced that military recruits with LPR status must receive favorable national-security and military-suitability determinations—meaning they must successfully complete their background investigation—"prior to" entry into military service. *Id.* at 77-78 (October 13 Memo). The October 13 Memo modified only the "timing of when LPR enlistees are required to re-

ceive" favorable security and suitability determinations; it did not affect the scope of the background investigation or the substantive standards applied to LPR recruits. *Id.* at 246.

b. Petitioners are foreign nationals with LPR status who signed military enlistment contracts prior to October 13, 2017. See Pet. App. 7a-8a. Those contracts are standard DoD forms, in which the petitioners acknowledged that they were joining the "Delayed Entry/ Enlistment Program (DEP)" for "a period not to exceed 365 days, unless this period of time is otherwise extended" by the relevant military service. C.A. E.R. 254 (capitalization altered); see Pet. App. 8a. The contracts further provided that, while in DEP, petitioners were "in a nonpay status and * * * not entitled to any benefits or privileges" of military service. C.A. E.R. 254.

Pursuant to the October 13 Memo, DoD initially did not permit petitioners to access and begin basic training before their background investigation was completed. See Pet. App. 16a.

c. Petitioners filed this putative class action in June 2018 on behalf of all similarly situated LPRs who had signed enlistment contracts but were not permitted by the October 13 Memo to begin basic training before completion of their background investigation. Pet. App. 17a, 19a. Petitioners principally claimed that the October 13 Memo violates the Constitution and the APA, *id.* at 17a, because DoD had "failed to explain the purpose behind" it, C.A. E.R. 283; see *id.* at 21 ("Plaintiffs' main claim, although brought under multiple doctrines, is that DoD's policy lacks adequate justification."). Although the complaint included claims alleging a denial of equal protection and due process of law, petitioners

moved for an injunction against application of the October 13 Memo based "solely" on their APA claim that the October 13 Memo was arbitrary and capricious and exceeded DoD's statutory authority. Pet. App. 17a; see 5 U.S.C. 706(2).

The district court certified the class, denied the government's motion to dismiss for failure to state a claim for relief, and granted petitioners' requested preliminary injunction. Pet. App. 18a-87a. The court first rejected the government's arguments that petitioners' claims were non-justiciable. Most relevant here, the court rejected the government's argument for judicial deference under the "*Mindes*" doctrine, *id.* at 27a-36a, which the Ninth Circuit and a majority of the courts of appeals use to assess whether a military decision is suitable for "review[] in a judicial forum," *Khalsa* v. *Weinberger*, 779 F.2d 1393, 1396 (9th Cir. 1986) (citing *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971)). The district court found that petitioners had presented facially sufficient claims that they had been impeded from entering military service (and receiving military benefits), and that exercising judicial review here would not significantly interfere with the military's discretion and expertise. See Pet. App. 27a-36a. The court also rejected the government's argument that petitioners' APA claims are unreviewable under 5 U.S.C. 701(a)(2) because they are "committed to agency discretion" by law. Pet. App. 51a-57a.

The district court went on to conclude that petitioners had shown a likelihood of success on their claim that the October 13 Memo was arbitrary and capricious, and that the balance of equities tipped in petitioners' favor. Pet. App. 78a-86a. The court enjoined DoD "from taking any action continuing to implement the October 13

Memo" and ordered DoD to "return to the pre-October 13, 2017 practices for the accession of [LPRs] into the military." *Id.* at 87a.

3. a. A divided panel of the court of appeals denied the government's motion for a stay pending appeal. Pet. App. 88a-90a. Judge Gould dissented, explaining that: petitioners' claims "are weak, if not non-justiciable" under the *Mindes* doctrine; the burden imposed on petitioners by the October 13 Memo—a mere delay in their accession—was minimal compared to the risk of irreparable harm to the government if a person were permitted to enter training on a military base while "harbor[ing] interests hostile to the United States government"; and "the judgments to be made on this subject are of the type that should be within military discretion because the expertise of the military on national security matters is paramount." *Id.* at 89a-90a.

b. Subsequently, in deciding the merits of the government's appeal, the court of appeals, in an unpublished opinion, unanimously vacated the district court's preliminary injunction and remanded with instructions to dismiss petitioners' APA claim "pursuant to the *Mindes* doctrine." Pet. App. 5a; see *id.* at 1a-5a. The court of appeals explained that, under its decades-old precedents derived from *Mindes*, *supra*, the court considers four factors "[t]o assess whether a claim against the military" is "amenable to judicial review": "(1) the nature and strength of the plaintiffs' claim, (2) the potential injury to the plaintiffs if review is refused, (3) the extent to which review would interfere with military functions, and (4) the extent to which military discretion or expertise is involved." *Id.* at 3a (citing *Khalsa*, 779 F.2d at 1398, and *Wallace* v. *Chappell*, 661 F.2d 729, 732-733 (9th Cir. 1981), rev'd on other grounds, 462 U.S.

296 (1983)). Here, the court found, all four factors weighed against judicial review.

The court of appeals first observed that petitioners' motion for a preliminary injunction was based on the APA rather than the Constitution, and such claims provide a less weighty basis for judicial review. Pet. App. 3a-4a. The court noted that petitioners had "point[ed] to no prior case in which an APA-based challenge to an internal military policy survived *Mindes* scrutiny." *Id.* at 4a. The court then explained that, contrary to the district court's conclusion that petitioners' claim was "strong on the merits" because DoD had "'withheld all of the relevant facts'" justifying the October 13 Memo, the administrative record "reveals at least two factual underpinnings" for the policy. *Ibid.* First, the ODNI guidelines for background investigations require careful consideration of subjects' "'allegiance to the United States,' 'foreign influence,' and 'foreign preference[,]' * * * all of which have self-evident implications for LPRs." *Ibid.* Second, "a 2017 [DoD] study [had] identified several difficulties in screening LPR recruits that did not occur when screening citizens." *Ibid.* The court of appeals determined that those facts had led DoD to "reasonably conclude[] that delaying the accession of LPR recruits would mitigate the risks" of giving a disloyal recruit access to military facilities and information. *Id.* at 4a-5a.

The court of appeals next found that petitioners would suffer "no grave injury" without judicial review of their APA claim, because they "were not entitled to quick or immediate accession on enlistment, and they [had been] expressly advised * * * that accession might not take place for up to two years after enlistment." Pet. App. 5a. The court also found that the record "does

not support [petitioners'] contention that they suffer stigma from delayed accession." *Ibid.*

Last, the court of appeals "observe[d] that military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches." Pet. App. 5a (citing, *inter alia*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988), and *Gilligan*, 413 U.S. at 10). The court explained that it is "not compelled to be credulous," and would not defer to "[a]ssertions by the military that are 'palpably untrue or highly questionable.'" *Ibid.* (citation omitted). "But," the court concluded, "[DoD's] claim to expertise in this case is not seriously in doubt, and its assertions about national-security risks are not far-fetched." *Ibid.*

c. The court of appeals denied rehearing en banc. Pet. App. 91a-92a.

4. a. On July 31, 2019, DoD adopted a new accession policy, the "Expedited Screening Protocol" (ESP), to further improve its screening of military recruits and to address the same concerns about their possible exploitation by foreign actors that had underlaid the October 13 Memo. See D. Ct. Doc. 115 & Ex. A (July 31, 2019). The ESP uses a centralized screening capability to better assess earlier in the screening process whether a recruit poses risks relating to allegiance, foreign preference, or foreign influence that warrant delaying the recruit's access to military facilities, systems, and information. See D. Ct. Doc. 115 Ex. A, at 3. Under the ESP, all recruits—regardless of nationality—have their accession delayed if certain responses on their background-investigation form signal a need for further scrutiny. See *ibid.* DoD's implementation of the ESP obviated the need for the policy in the October 13

Memo, and DoD therefore held the October 13 Memo in abeyance pending a review of the ESP's effectiveness. See *id.* at 2.

b. DoD completed its review of the ESP in early 2021, and determined the ESP had performed favorably in supporting the "effective and efficient security processing of military accessions." App., *infra*, 1a. The Under Secretary for Personnel and Readiness then "rescinded" the October 13 Memo on February 3, 2021. *Ibid.*

DISCUSSION

Petitioners have acknowledged (Pet. 28) that DoD's rescission of the October 13 Memo and replacement of it with the ESP on a permanent basis would render this case moot, and that their petition for a writ of certiorari should accordingly be dismissed. Petitioners appear to suggest, however, that in that event, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case with instructions to dismiss petitioners' complaint under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). See Pet. 28. But "not every moot case will warrant vacatur"; rather, because vacatur on mootness grounds "is rooted in equity, the decision whether to vacate turns on 'the conditions and circumstances of the particular case.'" *Azar* v. *Garza*, 138 S. Ct. 1790, 1792-1793 (2018) (per curiam) (quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)).

Vacatur is inappropriate here because this case would not have warranted certiorari in the absence of mootness, for several reasons: Petitioners failed to present their challenge to "the viability of the so-called

'*Mindes* test,'" Pet. 11, at any prior point in this litigation; the decision below is both unpublished and correct, and it does not conflict with any decision of this Court or another court of appeals; and the judgment below is supported by alternative grounds. The petition for a writ of certiorari should therefore be denied.

1. DoD's decision to rescind the October 13 Memo and replace it permanently with the ESP means that this action no longer presents a live case or controversy for purposes of Article III. See *Uzuegbunam* v. *Preczewski*, No. 19-968 (Mar. 8, 2021), slip op. 1 ("At all stages of litigation, a plaintiff must maintain a personal interest in the dispute."). Petitioners' suit sought only prospective relief, C.A. E.R. 307, and their claims were grounded on their contention that DoD had acted unlawfully by treating LPR military recruits differently than U.S.-citizen recruits, see, *e.g.*, *id.* at 283. But the ESP applies the same way to all military recruits regardless of nationality. See p. 10, *supra*.

Petitioners have agreed (Pet. 28) that this case would become moot, and that their petition should be dismissed, upon DoD's permanent adoption of the ESP and rescission of the October 13 Memo. But by citing (*ibid.*) this Court's decision in *Munsingwear*, they appear to suggest that the judgment of the court of appeals should be vacated. Petitioners are incorrect. Vacatur does not generally follow where, as here, a case becomes moot after the court of appeals has entered judgment and while a petition for a writ of certiorari is pending. A losing party has no right to Supreme Court review, which is discretionary and exercised circumspectly. See Sup. Ct. R. 10. If this Court would have denied a writ of certiorari in any event, then vacatur would give the

petitioners a windfall that they would not have received if the controversy had remained live.

It has therefore been the longstanding position of the United States that this Court should ordinarily deny certiorari in a case that has become moot after the court of appeals entered its judgment, but before this Court has acted on the petition, when the case does not present any question that would independently be worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chem. Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900); Stephen M. Shapiro et al., *Supreme Court Practice* § 5.13, at 5-50 (11th ed. 2019).

"[O]bservation of the Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denies certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review." *Supreme Court Practice* § 19.4, at 19-28 n.34; see, *e.g.*, *Electronic Privacy Info. Ctr.* v. *Presidential Advisory Comm'n on Election Integrity*, 139 S. Ct. 791 (2019) (No. 18-267); *Strong* v. *United States*, 552 U.S. 1188 (2008) (No. 07-6432); *McFarling* v. *Monsanto Co.*, 545 U.S. 1139 (2005) (No. 04-31); *Enron Power Mktg.* v. *Northern States Power Co.*, 528 U.S. 1182 (2000) (No. 99-916); cf. *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (vacating under *Munsingwear* where the court of appeals' decision was independently "appropriate for review"). The Court's practice has the added benefit of enabling it to avoid "the often difficult question of mootness at the certiorari stage when a case is otherwise not worthy of review." *Supreme Court Practice* § 19.4, at 19-28 n.34.

Before this case became moot, petitioners "ask[ed] the Court to consider the viability of the so-called '*Mindes* test'" adopted by the Fifth Circuit in *Mindes*

v. *Seaman*, 453 F.2d 197 (1971), and still used by a majority of the circuit courts "to determine whether and when a court should review military decisions." Pet. 11. The petition for a writ of certiorari should be denied because, even if this case were not moot, the decision below would not have warranted further review by this Court for any of several reasons.

2. In the first place, the certiorari petition marks the first time in this litigation that petitioners have asked any court to consider the viability of *Mindes*. Petitioners' forfeiture would be a sufficient reason by itself for this Court to deny the petition.

This Court is one "of final review, 'not of first view,'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), and its "traditional rule * * * precludes a grant of certiorari" on a question that "'was not pressed or passed upon below,'" *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001) (refusing to "allow a petitioner to assert new or substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it"). Petitioners never asked the court of appeals or the district court to consider whether "*Mindes* [can] be squared with this Court's case law." Pet. 11. Even in their petition for rehearing en banc, petitioners urged only that rehearing was warranted "to correct the panel's misapplication of the *Mindes* doctrine." Pet. C.A. Petition for Reh'g 2. Petitioners offer no reason for this Court to deviate from its normal practice of declining to consider arguments that they did not raise below.

Adherence to the Court's traditional rule is especially appropriate here because petitioners did not simply fail to object to the *Mindes* test in the courts below; they embraced *Mindes* as the governing framework for determining the justiciability of their claim. Petitioners argued to the court of appeals that, "[u]nder *Mindes*, courts look to four factors in assessing whether a claim challenging military policy is justiciable"—the same factors that the court ultimately applied—and they maintained simply that those "four factors weigh in favor of review here." Pet. C.A. Br. 17-18; see Pet. C.A. Petition for Reh'g 2, 11-18. Petitioners did not invoke either *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), or *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), the two cases that they now claim "set forth the 'basic parameters' for assessing the justiciability of claims against the military." Pet. 21 (citation omitted). To the contrary, petitioners argued that *Gilligan* does not "have any bearing on the reviewability analysis" for their APA claim. Pet. C.A. Br. 32 n.17. Having argued below entirely within the *Mindes* framework, petitioners should not now be heard in this Court to "claim[] that the course followed was reversible error." *Freytag* v. *Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring in part and concurring in the judgment).

3. Even if petitioners had not forfeited their challenge to the *Mindes* framework, the unpublished decision below would not have warranted further review because it is correct. *Mindes* reflects separation-of-powers principles derived from the text of the Constitution, and precedents of this Court, which together require lower courts to exercise caution before intervening in sensitive military matters.

As discussed above, the Constitution assigns to Congress and the President the authority to establish and maintain the Nation's armed forces for the protection of national security. See p. 2, *supra*. Thus, "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan*, 413 U.S. at 10. Because such broad authority over military matters is entrusted to Congress and the President—not to the courts—"[o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff*, 345 U.S. at 94.

Moreover, the judiciary typically lacks the expertise necessary to make decisions regarding military matters. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10. This Court has therefore long recognized that it is not appropriate for a "civilian court to second-guess military decisions," especially those that go "directly to the 'management' of the military [and] call[] into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 57-58 (1985). While the Court's rulings have not necessarily been framed in terms of justiciability, the Court has declined to review claims that "would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 59; see, *e.g.*, *Feres* v. *United States*, 340 U.S. 135, 146 (1950). And the Court has counseled lower courts to, "at the very least, hesitate long before entertaining a suit which asks the court

to tamper with the established relationship between enlisted military personnel and their superior officers." *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983).

Even when faced with constitutional claims by military service members, this Court has frequently undertaken judicial review only by affording significant deference. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986). And the Court has not permitted review of all constitutional claims. See *Chappell*, 462 U.S. at 297-298 (declining to permit a constitutional cause of action for damages based on alleged race discrimination in assignment of military duties); *Orloff*, 345 U.S. at 91 (holding that the Court lacked authority to order the President to issue a military commission in response to a service member's claim that the commission had been withheld as punishment for invoking the privilege against self-incrimination).

More generally, this Court has not applied to the military the same presumption of judicial review that applies to civilian agencies. See, *e.g.*, *Turner* v. *Egan*, 414 U.S. 1105 (1973) (summarily affirming the dismissal of a challenge to a forced retirement based on application of *Mindes*); *Reaves* v. *Ainsworth*, 219 U.S. 296 (1911). Rather, the Court has looked for an express statutory mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); see also, *e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (narrowly construing the scope of federal habeas corpus relief available to service members); *Gilligan*, 413 U.S. at 10

(declining to assume jurisdiction over challenges to training, weaponry, and orders of the National Guard); *Schlesinger* v. *Councilman*, 420 U.S. 738, 757-758 (1975) (limiting ability of service members to obtain injunctive relief for alleged wrongs, including constitutional wrongs); *Shearer*, 473 U.S. at 59 (explaining that the Court has denied review under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, of "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs").[2]

Those are the types of considerations underlying the *Mindes* test. See *Mindes*, 453 F.2d at 199 (deriving the test from *Orloff* and other "precedents of the Supreme Court"). The court of appeals appropriately applied those considerations in the decision below. The court recognized that "military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion, subject to the control of the political branches." Pet. App. 5a (citing *Egan*, 484 U.S. at 527, and *Gilligan*, 413 U.S. at 10). It also recognized the military's expertise in such matters. *Ibid.* The court declined to probe the military's judgment on those matters for the sake of petitioners' APA claim that DoD's screening policy lacked an adequate justification, *ibid.*—a claim that, even if successful,

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[2] This Court has recognized that service members can bring an APA claim challenging actions taken by a board for the correction of military records. See *Chappell*, 462 U.S. at 303. But the board is "a civilian body within the military service" with responsibility to review a servicemember's discharge or dismissal, or to "'correct an error or remove an injustice' in a military record." *Clinton* v. *Goldsmith*, 526 U.S. 529, 538 (1999) (quoting 10 U.S.C. 1552(a)(1) (1994)). Review of such decisions by the board would not "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Shearer*, 473 U.S. at 59.

would merely have required DoD to provide additional explanation for the challenged policy. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). And the court explained that it was particularly appropriate to show deference to the military's judgments here given that the challenged policy threatened "no grave injury" to petitioners, who had no legal right "to quick or immediate accession on enlistment" and had been put on notice that their accession could be delayed for up to two years. Pet. App. 5a; see also 10 U.S.C. 513(b).

Petitioners fail to demonstrate that the court of appeals erred in its application of the multiple precedents of this and other Courts requiring deference to sensitive military judgments. Petitioners merely disagree (Pet. 31-32) with the Ninth Circuit's assessment of the strength of their claim, particularly its conclusion that the administrative record provided "at least two factual underpinnings for DOD's decision to adjust the accession timeline for LPR recruits." Pet. App. 4a. That objection lacks merit. The ODNI guidelines in the record reflect the judgment of the Director of National Intelligence that ties to foreign countries can be sources of national-security risks and must be evaluated carefully when conducting background investigations. C.A. E.R. 107-110. Those guidelines, as the court of appeals recognized, "have self-evident implications for LPRs." Pet. App. 4a. The record also contains a summary of a 2017 DoD study that "identified several difficulties in screening LPR recruits that did not occur when screening citizens." *Ibid.*; see C.A. E.R. 216-217. And the court further observed in a footnote that the record "included internal [DoD] memos regarding the potential security risk of other noncitizen recruits," Pet. App. 4a

n.3, and reflecting DoD's judgment that LPR recruits "share[] many of the same risk factors" and should be subjected to similar screening standards, C.A. E.R. 229.

Because those record documents identify risks that could be mitigated by "delaying the accession of LPR recruits," they establish that the October 13 Policy was "reasonabl[e]"—and therefore consistent with the APA. Pet. App. 4a. Indeed, quite aside from the *Mindes* doctrine, the record was more than adequate to show that petitioners were unlikely to succeed on their arbitrary-and-capricious challenge to the October 13 Memo.

Petitioners further argue (Pet. 33) that their claim "would not interfere with military functions at all." But the relief that they requested—an injunction against application of the October 13 Memo at a time when DoD had determined that it did not have an adequate screening protocol available for foreign-national recruits—would have "force[d] DoD to entrust military bases, equipment, and information to a recruit without determining whether he or she poses an undue risk, thus placing military personnel and the national security more generally at risk." C.A. E.R. 248; see Pet. App. 5a.

4. a. Petitioners contend (Pet. 11) that the decision below would have warranted further review because "the courts of appeals have fractured—extensively and intractably—over whether or to what extent to adopt *Mindes*." But petitioners do not identify any court of appeals that has found a military policy relating to the composition of military forces and based on national-security concern subject to judicial review under the APA on a claim that the policy was insufficiently explained.

Nor have petitioners shown that the result below would have been different in a circuit that did not employ the *Mindes* doctrine. They point (Pet. 19-20) to a decision of the D.C. Circuit rejecting *Mindes* and undertaking judicial review of a claim seeking the correction of a single service member's past military records. See *Kreis* v. *Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989). But that case does not conflict with the decision below. The D.C. Circuit recognized that there is a "realm of nonjusticiable military personnel decisions" where review would improperly ask a court to "second-guess [DoD's] decision about how best to allocate military personnel in order to serve the security needs of the Nation." *Id.* at 1511. In that particular case, the challenge to the military's "decision not to take certain corrective action" with respect to one service member's historical records was unlikely to produce such inappropriate second-guessing. *Ibid.*; see *id.* at 1511-1512. Here, by contrast, petitioners' challenge to DoD's security-screening policy decisions in the October 13 Memo would raise exactly the sort of concerns that the D.C. Circuit warned against in *Kreis*.

Petitioners also rely (Pet. 20) on *Knutson* v. *Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir.), cert. denied, 510 U.S. 933 (1993). But the Seventh Circuit in that case recognized that certain military decisions should *not* be subject to judicial review. The plaintiff in *Knutson*, a member of the Wisconsin National Guard, claimed that his termination violated his due process rights and sued under 42 U.S.C. 1983 for injunctive relief, damages, and reinstatement. See 995 F.2d at 766-767. The Seventh Circuit "prefer[red] a different approach" to evaluating justiciability than the one in *Mindes*, but the court nevertheless denied review in

that case, because the plaintiff's challenge would have required the court "to intrude on a province committed to the military's discretion," even though the plaintiff's claims did not "come within the parameters" of *Orloff* and *Gilligan*. *Id.* at 768-769, 771. Notably, the court took into account the nature of the plaintiff's claim, which "implicate[d] only the nature of the procedure used in his termination," *id.* at 771—one of the same considerations that *Mindes* found relevant to justiciability.

The existence of a mere abstract disagreement among the courts of appeals over whether *Mindes* reflects the best articulation of the considerations governing review of claims against the military would not warrant this Court's review. The slight variations in the courts' approaches have existed for nearly forty years, see Pet. 18 (noting that the Third Circuit "reject[ed] *Mindes*" in 1981), but this Court has previously declined review in cases raising the issue. See, *e.g.*, *Harkness* v. *Spencer*, 138 S. Ct. 2648 (2018) (No. 17-955); *Burnett* v. *Alabama Nat'l Guard*, 537 U.S. 822 (2002) (No. 01-1795); *Knutson*, *supra* (No. 93-386); *Nieszner* v. *Orr*, 460 U.S. 1022 (1983) (No. 82-1007).

Furthermore, many of the cases that petitioners describe (Pet. 11) as part of a circuit split over the viability of *Mindes* are both irrelevant and consistent across circuits. For example, in four of the cases that petitioners characterize (Pet. 14) as "reject[ing]" *Mindes* or "limit[ing] its application," the courts actually adopted a *more categorical* justiciability bar that completely foreclosed claims by members of the National Guard arising from the members' military service. See *Aikens* v. *Ingram*, 811 F.3d 643, 648-650 (4th Cir. 2016); *Speigner* v. *Alexander*, 248 F.3d 1292, 1295-1298 (11th

Cir.), cert. denied, 534 U.S. 1056 (2001); *Wright* v. *Park*, 5 F.3d 586, 589-591 (1st Cir. 1993); *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004, 1009-1010 (8th Cir. 1989). There is broad agreement among the courts of appeals about the treatment of such cases, regardless of whether a court has adopted the *Mindes* framework or not. See *Knutson*, 995 F.2d at 771; see also *Aikens*, 811 F.3d at 649 (collecting examples).

b. Petitioners also have not identified any conflict between the decision below and this Court's precedents. As explained above, this Court has repeatedly avoided judicial review of matters that might "require[] the civilian court to second-guess military decisions" or that "go[] directly to the 'management' of the military." *Shearer*, 473 U.S. at 57-58; see pp. 15-18, *supra*. Petitioners maintain that the "Court has routinely reviewed challenges to military statutes, regulations, and policies." Pet. 24 (collecting examples). But the cases cited all involved constitutional challenges, which may provide a more substantial basis for judicial review, as the court of appeals recognized. See Pet. App. 3a-4a.

Petitioners do not cite any case in which this Court has considered an APA challenge to a military policy—much less one designed to mitigate national-security risks—on the ground that it was inadequately explained. Plaintiffs did not assert a constitutional claim in seeking the preliminary injunction, but even if they had, this Court has also never held that courts should intervene in military affairs whenever a plaintiff raises a constitutional claim. The plaintiff in *Orloff* argued, among other things, that the Army's decision not to grant him a commission was "punish[ment] for [his] having claimed a privilege which the Constitution guarantees" (*i.e.*, the privilege against self-incrimination).

345 U.S. at 91. Yet this Court declined to compel the Army to issue a commission, explaining that "[w]hether Orloff deserves appointment is not for judges to say." *Id.* at 92; see also *Turner*, *supra* (summarily affirming a district court decision denying review of constitutional claims).

5. Finally, even if this Court had been inclined to review the *Mindes* framework, this case would have presented a particularly poor vehicle for considering that issue.

a. First, as explained above, the court of appeals' opinion shows that *Mindes* made no practical difference to the outcome of this case. See pp. 19-20, *supra*. Quite aside from *Mindes*, the district court's preliminary injunction would have been vacated, and petitioners ultimately would not have obtained relief on their APA claim, because the court of appeals determined that the record established that the October 13 Memo was reasonable, not arbitrary and capricious for lack of any legitimate explanation. See *ibid.*

b. The judgment below is also supported by yet another ground independent of *Mindes*: the APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. 701(a)(2).

Section 701(a)(2) precludes judicial review in "area[s] of executive action 'in which courts have long been hesitant to intrude.'" *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (citation omitted). This case involves at least two such areas of traditional judicial deference. The first is national security, because determinations regarding the circumstances under which individuals may be trusted with access to sensitive information require efforts to "predict [the] possible future behavior"

of those trusted with that information as well as "outside and unknown influences" seeking to gain access. *Egan*, 484 U.S. at 528-529. Such "[p]redictive judgment" regarding the types of risks that "might compromise sensitive information * * * must be made by those with the necessary expertise in protecting [that] information." *Ibid.* (citations omitted). Second, as explained above, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530; see pp. 15-18, *supra*. Thus, the "strong presumption" of judicial review that applies in other context "runs aground when it encounters concerns of national security," particularly in a military context. *Egan*, 484 U.S. at 526-527 (citation omitted).

Those two traditional justifications for judicial deference demonstrate that petitioners' APA claim is nonjusticiable under Section 701(a)(2). Petitioners sought judicial review a military accession policy that involved just the sort of difficult predictive judgments that this Court discussed in *Egan*: the October 13 Memo was based on an assessment of the "security and counterintelligence concerns presented by the LPR population." C.A. E.R. 246. DoD then needed to balance that assessment against several other factors also committed to its expertise, including troop morale and military readiness. DoD determined that the October 13 Memo would not adversely affect morale, see *id.* at 248, and it further determined that, while delaying accession of LPR recruits would "impact the ability of some Military Service components to make recruiting" goals, that result was outweighed by the need to address the security risks DoD had identified, see *id.* at 229. This Court's

traditional reluctance to interfere in such determinations reflects the unique and vital role of the military in protecting the national security, as well as separation-of-power principles. See, *e.g.*, *Egan*, 484 U.S. at 527, 529-530; *Gilligan*, 413 U.S. at 10; *Orloff*, 345 U.S. at 93-95. And that longstanding policy of judicial deference—which predates the adoption of the APA, see, *e.g.*, *Reaves* v. *Ainsworth*, *supra* (1911)—is "another tradition that 5 U.S.C. § 701(a)(2) was meant to preserve." *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987).

The district court reasoned that Section 701(a)(2) did not preclude judicial review of petitioners' APA claim because the October 13 Memo involved "generally applicable requirements or procedures" rather than an assessment of a specific individual. Pet. App. 56a-57a. That distinction has no support in either the text of the APA or this Court's case law. See *Ryan* v. *Reno*, 168 F.3d 520, 523-524 (D.C. Cir. 1999) (holding that *Egan* barred review of claims challenging a security-based decision that applied to all foreign residents).

The district court also concluded that Section 701(a)(2) did not bar petitioners' challenge because the court could find "law to apply" in DoD's regulations. Pet. App. 54a-55a (citing 32 C.F.R. 66.4(a)(2) and (b)(8)). That too was error. None of those regulations limits DoD's discretion to decide the circumstances under which LPRs may ship to basic training, nor do they define the bounds of that discretion. Indeed, the only regulation that addresses the timing of accession into the military *preserves*, rather than constrains, the discretion that DoD exercised in the October 13 Memo.

See 32 C.F.R. 66.8(b)(8)(vi)(A) (providing that an enlistee "*may* be accessed" prior to completion of a background investigation) (emphasis added).

Furthermore, the regulatory provision invoked by the district court specifically states that "[t]he underlying purpose" of DoD's enlistment procedures "is to minimize entrance of persons who are likely to become * * * security risks." 32 C.F.R. 66.6(b)(8). To the extent that statement of purpose is intended to articulate a standard, it is materially indistinguishable from standards that this Court has found insufficient to overcome Section 701(a)(2) and supply a basis for judicial review. See *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (statutory phrase "advisable in the interests of the United States" did not enable judicial review); *Egan*, 484 U.S. at 528-529 (same for Executive document authorizing a security clearance where "clearly consistent with the interests of the national security").[3]

In sum, quite apart from *Mindes*, Section 701(a)(2) would have precluded judicial review of petitioners' APA claim because the judiciary lacks the means to "determine what constitutes an acceptable margin of error in assessing the potential risk" of as-yet unscreened military recruits, and Congress has not "specifically" authorized judicial review of that issue. *Egan*, 484 U.S. at 529-530.

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[3] The district court also mentioned a regulation declaring that it is DoD policy to "[u]se common entrance qualification standards," Pet. App. 56a (quoting 32 C.F.R. 66.4(a)) (brackets in original). But the October 13 Memo does not affect entrance standards, and that regulation does not address the timing of accession.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2021

APPENDIX

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

[FEB 03, 2021]

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
COMMANDANT OF THE COAST GUARD
DIRECTOR, DEPARTMENT OF DEFENSE CONSOLIDATED ADJUDICATIONS FACILITY

SUBJECT: Military Service Suitability Determinations for Foreign Nationals

Office of the Under Secretary of Defense for Personnel and Readiness Memorandum, "Military Service Suitability Determinations for Foreign Nationals Who Are Lawful Permanent Residents," dated October 13, 2017 (attached), is rescinded. Effective immediately, applicants for military service who are lawful permanent residents (LPRs), as well as applicants who are foreign nationals but not LPRs, will be subject to the policies found in Directive-type Memorandum 19-008, "Expedited Screening Protocol (ESP)," dated July 31, 2019, as amended.

This action is based upon advances in the effective and efficient security processing of military accessions under ESP. The policy in this memorandum will be incorporated, as appropriate, into the next update of DoD

Instruction 1304.26, "Qualification Standards for Enlistment, Appointment, and Induction," March 23, 2015, as amended.

/s/ VIRGINIA S. PENROD
VIRGINIA S. PENROD
Acting

Attachment:
As stated

cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Intelligence and Security
Chief of the National Guard Bureau
Assistant Secretary of the Army
for Manpower and Reserve Affairs
Assistant Secretary of the Navy
for Manpower and Reserve Affairs
Assistant Secretary of the Air Force
for Manpower and Reserve Affairs
Director, Washington Headquarters Services