No. 18-657

IN THE

Supreme Court of the United States

JUSTIN GRIMSRUD,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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> Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

Exec. Order No. 12,564, 51 Fed. Reg. 32,889, 32,891 (Sept. 17, 1986). Notwithstanding this edict, Petitioner was denied the opportunity to have an aliquot of his purported urine sample for DNA testing to prove that he "ha[d] not used illegal drugs." *Id.*

In its Brief in Opposition, the government relies on *Swaters v. United States Department of Transport-*

ation, 826 F.3d 507 (D.C. Cir. 2016), the Department of Health and Human Services' (HHS) Mandatory Guidelines for Federal Workplace Drug Testing Programs, 73 Fed. Reg. 71,858–71,907 (Nov. 25, 2008), and 49 C.F.R. 40.13(c), to support the decision below. But the government's reliance on these authorities is misplaced and only serves to emphasize the breadth and importance of the question presented here.

Petitioner's property was taken in contravention of the "immutable" requirement that "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Green v. McElroy*, 360 U.S. 474, 496 (1959). Review by this Court is necessary to ensure that the government may not take property without providing a full and fair opportunity to challenge the evidence upon which its action is based.

1. The Government's Brief in Opposition discusses at length the dictates of HHS's standards for collection, transmission, and testing of drug test samples. Because "a properly completed chain of custody conclusively establishes the identity of a specimen," 65 Fed. Reg. 79,462, 79,484 (Dec. 19, 2000), the government asserts, laboratories are properly prohibited from "making a DOT urine specimen available for a DNA test . . . ." 49 C.F.R. 40.13(c). The Government asserts that

> [a]s the D.C. Circuit has explained, such a test would not reveal whether a mismatch "was due to an error in handling or

> to the tested employee's substitution of someone else's urine in the original sample, the reference sample, or both." *Swaters*, 826 F.3d at 512.

Op. Br. at 10. And, because it would be "significantly more probable in practice" that there would be employee manipulation than error by the laboratory, it is proper to presume that the employee was responsible for the inconsistency. 65 Fed. Reg. at 79484.

Importantly, however, the Government does not discuss, and *Swaters* did not consider, a significant amendment to the procedures for specimen collection that renders employee substitution of the sample next to impossible. Specifically, in 2008—eight years after the adoption of 49 C.F.R. § 40.13(c)—the Department of Transportation (DOT) promulgated the "Direct Observation Rule." This rule requires transportation industry employers to use direct observation testing procedures when collecting drug testing samples. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 73 Fed. Reg. 62,910, 62,918 (Oct. 22, 2008). DOT expressly concluded that in light of the "by-now well-recognized availability of substances and devices for substituting or adulterating specimens . . . taking additional steps to combat cheating on drug tests was appropriate." *Id.* at 62,912.

In contrast to *Swaters,* Petitioner's urine specimen was collected *after* adoption of the "Direct Observation Rule." That is, as the Administrative Judge noted, "because this was an 'observed' collection, [the tester]

procee[ded] to the urinal with [Petitioner] and watche[d] him void his urine into the collection cup." Pet. App. B at 34a.

Because the testing in *Swaters* was not observed, employee manipulation of the test sample was possible. But when the sample is collected under direct observation, the possibility of the "employee's substitution of someone else's urine in the original sample" is all but eliminated—the moment the employee urinates into the container *under the direct observation of the tester*, he loses physical control of the sample and cannot engage in the kind of tampering that would have been previously possible.

DOT's prohibition of DNA testing was expressly based on the finding that such testing "would not reveal whether a mismatch 'was due to an error in handling or to the tested employee's substitution of someone else's urine in the original sample, the reference sample, or both.'" *Swaters*, 826 F.3d at 512 (citation omitted). But with the Direct Observation Rule, this conclusion is wholly inapt—substitution of the sample in a random test under direct observation would take a feat of prestidigitation beyond the skill of David Copperfield. With direct observation, a DNA mismatch would conclusively prove that the tested sample did not belong to the subject employee.

Petitioner was entitled to show that "the evidence used to prove the Government's case . . . is untrue." *Green v. McElroy*, 360 U.S. at 496. Instead, he was denied the opportunity to test the evidence upon which

his removal was based and met with an irrebuttable presumption that such testing would at best reveal that he had manipulated or substituted the sample. In light of the Direct Observation Rule, however, this presumption is wholly inapt and arbitrary.

2. The government asserts that because the Fifth Circuit's decision in *Banks*[1] is "decades" old there is no extant circuit split. But *Banks* remains the controlling precedent of the Fifth Circuit; indeed it was followed as recently as 2017. *See Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 251 F.Supp. 3d 1168, 1178 (S.D. Tx. 2017).

Moreover, the decision below perpetuates the misplaced reliance on 49 C.F.R. § 40.13(c) and its outdated and irrational interdiction of DNA testing. Employers in the transportation industry nationwide are obligated to comply with this regulation and, as such, laboratories conducting drug testing of transportation workers are prohibited from conducting DNA testing. Even after the adoption of the "Direct Observation Rule," courts continue to rely on this regulation to foreclose DNA testing. *See*, *e.g.*, *Moreno v. ODACS, Inc.*, 21 N.E.3d 363, 366 (Ohio Ct. App. 2014) (holding, six years after the adoption of the Direct Observation Rule, that providing the employee access to his urine sample for DNA testing, "is preempted by the DOT regulations.").

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[1] *Banks v. Federal Aviation Admin.*, 687 F.2d 92 (5th Cir. 1982).

When defending their property interests, federal employees have an "immutable" right to access "the evidence used to prove the Government's case [and the] opportunity to show that [that evidence] is untrue." *Green v. McElroy*, 360 U.S. at 496. Review by this Court is necessary to ensure that this right is not extirpated by fealty to an outdated and inapt DOT regulation that creates an irrebuttable presumption of employee manipulation of testing specimens when such manipulation is not remotely possible.

For the foregoing reasons and those stated in the Petition for *Certiorari*, the Petition should be granted.

Respectfully submitted,

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