

No. 17-383

In the Supreme Court of the United States

CHRISTOPHER P. DOWNEY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE ARMY, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent (“government”) does not dispute that the Army Board for the Correction of Military Records applied an incorrect burden of proof in its review of Petitioner Lieutenant Colonel Downey’s case. Nor does the government seriously dispute that having the correct burden of proof applied in a given case implicates a fundamental right to due process. Instead, the government dedicates the weight of its response to arguing that the specific facts of this case warrant the “harmless error” view espoused by the Fourth Circuit. The government attempts to reframe and minimize the significance of the legal question Lieutenant Colonel Downey’s case actually presents. This Court should reject the government’s half-hearted opposition and grant Lieutenant Colonel Downey’s petition.

Although the government spends considerable time presenting factual issues, this Court is not being asked to review facts. Rather, this Court is only being asked to resolve a simple legal question that Petitioner contends the Fourth Circuit, along with the Federal Circuit, has resolved incorrectly to his detriment and to the detriment of petitioners like him. This pressing and concrete legal question, which has been answered differently by different circuits, deserves an answer from this Court. The simple question is: must a reviewing court remand a matter for a new board hearing when an administrative board’s failure to follow its own regulations implicates a petitioner’s fundamental right to a fair hearing? If fundamental rights, such as the right to due process, are to be protected in an age when important decisions

impacting the lives and livelihoods of many Americans are made by unelected administrative boards, the answer to Petitioner's question must be "Yes." And this answer must not be delayed. Without this Court's intercession, administrative review boards, including the Army Board for Correction of Military Records, will continue to swallow core legislative and judicial power while simultaneously ignoring their own regulations and violating the fundamental rights of petitioners like Lieutenant Colonel Downey.

ARGUMENT

I. The Decision Below Implicates A Significant Conflict Among the Circuits on a Fundamental and Recurring Issue of Administrative Law.

The government suggests that there is no circuit split. But, as discussed in the instant petition for certiorari, not only do the circuits have contrary holdings on the question presented, the divergent opinions have been directly acknowledged by at least one circuit. The Third Circuit correctly noted that "[c]ourts have taken diverse approaches to reconciling the tension between *American Farm Lines* and *Accardi*, some imposing explicit prejudice requirements . . . and others explicitly rejecting a prejudice requirement." *Leslie v. Att'y Gen. of the U.S.*, 611 F.3d 171, 177 (3d Cir. 2010) (citations omitted) (collecting cases).

As discussed in the petition for certiorari, several courts of appeals have recognized that the violation of fundamental procedural rules is automatically deemed prejudicial. Pet. 16-20. A serious agency error affecting important rights such as occurred in

Lieutenant Colonel Downey's case would have resulted in a remand as a matter of right in the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits, but not in the Fourth or Federal Circuits. *Montilla v. INS*, 926 F.2d 162, 166-69 (2d Cir. 1991) ("All that need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them."); *Leslie*, 611 F.3d at 180 ("[W]hen an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party."); *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 544 (6th Cir. 2004) ("Although substantial evidence otherwise supports the decision of the Commissioner in this case, reversal is required because the agency failed to follow its own procedural regulation, and the regulation was intended to protect applicants like [the petitioner]."); *Martinez-Camargo v. INS*, 282 F.3d 487, 491-92 (7th Cir. 2002) (declining to remand case after examining *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), and finding that the administrative rule violated did not impact the appellant's substantial rights); *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (holding, in line with *Accardi* and its progeny, that an agency's failure to give an appellant the evidentiary hearing required by regulation necessitated remand and noting that "[w]here a prescribed procedure is intended to protect the interests of the party before the agency, 'even though generous beyond the requirements that bind

such agency, that procedure must be scrupulously observed” (quoting *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959)); *Port of Jacksonville Mar. Ad. Hoc Comm., Inc. v. United States Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986) (setting forth review process in line with *American Farm Lines* and recognizing that where the regulation an agency violated was intended to confer procedural benefit to a claimant, the agency’s action should be invalidated).

Contrary to the bright line rule of these circuits, the Fourth Circuit and the Federal Circuit have espoused a contradictory view. The Fourth Circuit and the Federal Circuit require a showing of prejudice before invalidating an agency decision and will not reverse if the court makes a determination of “harmless error.” The Federal Circuit has similarly shown extraordinary and unwarranted deference to administrative agencies by applying the harmless error test even when the administrative agency violates a regulation that is intended to confer important procedural benefits. See *Pam, S.p.A. v. United States*, 463 F.3d 1345, 1348-49 (Fed. Cir. 2006).

The government suggests that there is no conflict because there is no specific case law regarding the fundamental right to have the correct burden of proof applied in the context of military review boards or regarding the specific regulation at issue here. Br. in Opp. 12. This assertion defies reason. The government is suggesting that each burden of proof across every regulation of every administrative agency be weighed and valued differently. Indeed, even the Fourth Circuit’s flawed reliance on *Sea “B” Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016), undercuts

the government's argument. *Sea "B" Mining Co.* had nothing to do with a military review board or 32 C.F.R. § 581.3(e)(2), the regulatory provision governing the burden of proof for the Army Board for the Correction of Military Records. The court in *Sea "B" Mining* considered an administrative law judge's evidentiary error in a decision awarding black lung benefits. *Id.* As is the case in most judicial proceedings, the court cited a precedential case because it believed the proposition of law was applicable, or the legal question presented was the same, not because the facts of the cases were necessarily similar to the case before it.

The government further argues that the cases discussed in the petition for certiorari are inapplicable because they demonstrate only the significance of the burden of proof at an initial civil or criminal proceeding where "it may not be possible to determine how the factfinder would have resolved the ultimate issue under the appropriate standard, thus necessitating a remand." Br. in Opp. 10-11 citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998); *Santosky v. Kramer*, 455 U.S. 745, 757 (1982); *Addington v. Texas*, 441 U.S. 418 (1979). But it fails to explain why the application of the wrong burden of proof lacks the same critical importance in a collateral proceeding. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156-57 (10th Cir. 2016) (Gorsuch, J., concurring) (noting "while concerns about due process and fair notice surely reach their apex in the criminal context, I am uncertain why we would view that as license to neglect attending to them in the civil context."). The government's position lacks merit. This Court has been unequivocal in affirming the importance of all standards of proof: "[i]t is hard to imagine a more

violent breach of [the] requirement [of reasoned decision-making] than applying a . . . standard of proof which is in fact different from the rule or standard formally announced.” *Allentown Mack Sales & Serv.*, 522 U.S. at 374.

The conflict among the circuits that Lieutenant Colonel Downey’s petition highlights involves the same legal question as the cases discussed in his petition: whether a claimant bears the burden of demonstrating prejudice from an agency’s failure to follow its own regulations where the agency’s regulatory failure implicates a fundamental right. This Court should resolve the conflict by definitively answering that question.

II. Petitioner Has Consistently and Vehemently Argued that the Board’s Application of the Wrong Burden of Proof Constitutes Reversible Error.

Petitioner has adequately preserved the issue presented in this petition. The government argues that Petitioner failed to preserve his argument and that it is now waived because the lower courts did not have an opportunity to address it in the first instance. The record belies this contention.

Petitioner has consistently argued, including in his brief to the Fourth Circuit, that “[t]he standard of review that is applied to a petitioner’s case is critical and often determines the outcome of the case.” Pet. C.A. Br. 33. The Fourth Circuit had the opportunity to—and, in fact, did—address Lieutenant Colonel Downey’s argument “that the Board committed reversible error by incorrectly employing a clear and

convincing burden of proof.” Pet. App. 14 n. 6. Petitioner has also consistently claimed that the Army’s failure to follow its own regulations denied him due process, although the arguments did not focus solely or specifically on the incorrect application of 32 C.F.R. § 581.3(e)(2). Pet. C.A. Br. 47-48 (discussing the Army’s violation of its own regulations as a violation of due process). The arguments presented in the petition for certiorari are consistent with this Court’s “traditional rule . . . that ‘once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.’” *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). In *Lebron*, this Court allowed a petitioner to present a new argument, noting “even if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below.” *Lebron*, 513 U.S. at 379.

The Fourth Circuit, addressing the burden of proof claim advanced in Petitioner’s brief, acknowledged that the Board wrongly applied a higher clear and convincing evidence standard when it should have applied the preponderance of the evidence standard required by 32 C.F.R. § 581.3(e)(2). Pet. App. 14 n. 6. The court then relied upon its precedent in *Sea “B” Mining Co.*, to excuse this significant denial of due process as “harmless error.” *Id.* The harmless error standard that was applied by the Fourth Circuit to Lieutenant Colonel Downey’s case conflicts with not only *Accardi* and *American Farm Lines*, but with other circuit courts interpreting and applying the rationale set forth by those cases. Petitioner’s claim has been

consistent throughout this litigation that the board's application of the wrong burden of proof was a critical error that denied him the right to a fair hearing. He is not prohibited now from expanding this argument to include the significance of the *Accardi* and *American Farm Lines* progeny of cases as they relate to his case. *Lebron*, 513 U.S. at 379; *St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) ("It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for certiorari.").

III. This Court's Review is Warranted.

Petitioner Lieutenant Colonel Downey seeks a consistent standard that would protect fundamental rights and would obviate the need for reviewing courts to engage in fact-bound analysis when an administrative board's violation of its own regulations implicates a petitioner's fundamental right to a fair hearing. The government argues that "[t]he fact bound question of whether the evidentiary standard mattered in petitioner's particular proceeding before the Board does not warrant this Court's review." Br. in Opp. 8. This is not the question that Petitioner asks this Court to answer. On the contrary, Petitioner submits that, when an administrative review board requires an applicant to prove his claims under a higher burden of proof than what the board's governing regulations provide, an automatic remand to that board is warranted to protect fundamental due process rights.

Petitioner contends that a fair review of his case, considering all of the evidence and arguments that he

submitted and applying the correct standard of proof, would result in a different outcome. The government disagrees. For the purpose of this petition, it does not matter who is ultimately correct on this point. What matters is that the administrative review board that reviewed Lieutenant Colonel Downey's case violated its own regulations and denied Lieutenant Colonel Downey the full and fair review that he was guaranteed by the regulations themselves.

Unlike the Fourth and Federal Circuits, the Second, Third, Sixth, Seventh, Ninth, and Eleventh Circuits agree that an administrative board's violation of a fundamental right should result in remand. The government cites to *American Farm Lines* for the "general principle" that an agency may "relax or modify its procedural rules * * * when in a given case the ends of justice require it" and that to be reviewable the party challenging this action must demonstrate substantial prejudice.¹ Br. in Opp. 9 citing *American Farm Lines*, 397 U.S. at 539. But the government also recognizes that the Court in *American Farm Lines* "distinguished agency rules 'intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion.'" *Id.* citing *American Farm Lines*, at 538. Different circuits have interpreted

¹ Notably, there is no explanation for why "the ends of justice" would ever require an agency to hold a petitioner to a higher burden of proof than the one set forth in that agency's governing regulations. See *Montilla*, 926 F.2d at 164 ("The notion of fair play animating [the Fifth Amendment] precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule-maker may then with impunity ignore or disregard as it sees fit.")

the import of this significant holding differently. Accordingly, this Court's review is necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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