No. 19-705

IN THE

Supreme Court of the United States

CDR JOHN F. SHARPE, USN, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, CDR John F. Sharpe, USN (Petitioner), respectfully petitions for rehearing of its January 27, 2020, order (Order) denying his petition for a writ of certiorari (Petition).

STATEMENT

On November 20, 2019 (following preparation of the original Petition), the Solicitor General of the United States (SG) filed his opposition to certiorari in *Strother v. Baldwin*, No. 19-244. Therein he unequivocally defended precedents of this Court which are *controlling* in the present case: *Bell v. United States*, 366 U.S. 393 (1961), and *United States v. Larionoff*, 431 U.S. 864 (1977). For this reason alone, the Order should be held in abeyance and the SG's brief in opposition (BIO) obtained, because he will likely find certiorari, summary reversal of the Federal Circuit's opinion (which ignores those precedents), and remand to the applicable agency to be clearly warranted here – where "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error," *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981). Further grounds not previously presented also argue for this outcome: 1) this Court's controlling schemata requiring deference to the agency regulations applicable in this case (as to which the lower courts' disregard brings with it serious constitutional and judicial problems); and 2) the express Navy regulation governing changes to military duty assignments, which establishes the factual predicate upon which the lower courts should have, but did not, operate, in contravention also of *Seastrom v. United States*, 147 Ct. Cl. 453 (1959), binding precedent which should have, but did not, control their disposition of this case.

BACKGROUND

To appreciate the profound significance of the points herein advanced in support of rehearing requires a *crystal clear understanding* of how it is established that a military member whose record is corrected under 10 U.S.C. §1552 becomes entitled to certain military pay or allowances as a result of the correction. First, the statute and implementing regulations provide a means for the secretaries of military departments to correct a record to remedy error or injustice. App. 389a, 391a–393a. Second, once a correction is made, the question of pay or allowances which were lost due to the error or injustice, and which may need to be restored to the affected member, is handled by way of a *claim* against the United States which the member makes, App. 396a, to obtain the lost entitlements, and which is settled via a two-part process under a related but *separate* statutory and regulatory framework, App. 393a–406a.

This setup – where the correction of facts in military records by military secretaries acting through correction boards is hermetically sealed off from the mechanism whereby resultant claims to pay and allowances are settled by pay officials and (ultimately) by the Defense Office of Hearings and Appeals (DOHA), App. 403a, 406a (successor to the Comptroller General of the United States (CG), App. 398a–402a), under the authority of 31 U.S.C. §3702, App. 402a – is almost seventy years old, dating from 1951, when the statute providing for military record corrections was amended to permit payment of *claims* arising from those corrections, App. 388a. The *significance* of the setup (which the lower court *grossly* misunderstood, App. 36a)) is that while a military correction board enjoys broad discretion to correct a record where error or injustice so require, neither the

board nor the secretary nor any other government body or official enjoys *any discretion*, Pet. 21 (citing *Ray v. United States*, 197 Ct. Cl. 1, 6 (1972)) (also plainly misunderstood by the lower court, App. 49a), with regard to settlement of a service member's claim to lost pay or allowances stemming from the record correction. Instead, the figuring of what is owed on such a claim is to be accomplished solely by a process incorporating two key components: first, identifying the predicate law and facts, namely, a) applicable pay statutes and regulations and b) the service member's record – *as provided* to pay officials (whom it finally and conclusively binds, App. 389a, Pet. 23, 25) *by the record-correction board*; and, second, applying the law and regulations, at the appropriate retroactive time, Pet. 4 n.5, *Seastrom*, 147 Ct. Cl. at 458, to arrive at the correct entitlements. This is what the law clearly means: from its text, App. 388a,389a, its history, Pet. 11–18, and its interpretation by agency implementing regulations, Pet. 24, contemporaneous construction, Pet. 19–21, and subsequent consistent interpretive practice, Pet. 22–23. Moreover, as explained below, this is the proposition that the SG's recently cited cases stand for, and it is the framework that the lower courts should have acknowledged and enforced based upon the decisions of this Court which unequivocally oblige the judiciary to give full effect to the intent of Congress and to all agency regulations not manifestly contrary thereto.

REASONS FOR GRANTING THE PETITION

As detailed below, the following intervening circumstance and substantial grounds not previously presented warrant either summary reversal of the decision below or holding the Order in abeyance pending receipt and consideration of a BIO from the SG.

A. The SG has recently acknowledged that entitlement to military pay and allowances is *only provided by authorizing statute and regulation*

In a recent BIO, the SG decisively confirmed, as a matter of hornbook law, a principle that is dispositive in this case: "[I]t is well settled that a 'soldier's entitlement to pay is dependent upon *statutory* right,'" Br. in Opp'n to Pet. for Cert. at 8, *Strother*, *supra* (Pet. for Cert. denied Jan. 13, 2020) (quoting *Bell*, 366 U.S. at 401). Notably, the emphasis in the quotation is the SG's – illustrating the importance he attributes to the reality (as originally briefed, Pet. 28–30) that equitable or other *non-statutory* considerations have *absolutely no place* in determinations of entitlement to military pay. The same lesson is taught by *Larionoff*, the other precedent that the SG cited as standing clearly for the proposition that entitlement to military "pay depend[s] on the statutes and regulations governing military pay," Br. in Opp'n at 9, *supra* (citing *Larionoff*, 431 U.S. at 869). *Bell* and *Larionoff* disposed of the issue in *Strother*, the SG explained, because the petitioner in that case could not "assert any *statutory entitlement* to the [pay] at issue." *Id.* (emphasis added).

Petitioner in this case relies, like the SG, upon this Court's dispositive holdings in *Bell* and *Larionoff* to make *the same argument* made by the SG in the *Strother* opposition. In the present case, the lower courts not only ignored these two key decisions[1] but went further and relied upon non-statutory considerations that they *definitively exclude* from adjudication of claims for military pay – namely (as noted,

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[1] The Federal Circuit was advised of the importance of the *Bell* decision. *See* Reply Br. for Appellant at 32, *Sharpe v. United States*, 935 F.3d 1352 (2019) (No. 2018-1406).

Pet. 30): where Petitioner *lived* rather than where he was assigned (*pace* the *regulatory requirement*, App. 412a–414a), App. 9a, 45a; the equities that allegedly needed accounting for to avoid a windfall for Petitioner (though it seems impossible for a vested, statutory right to ever be such[2]), App. 10a, 42a, 45a, 46a, and arrive at a result that was "reasonable," App. 10a, 16a, 46a, 49a; and Petitioner's actual *performance* (or not) of seagoing duty (rather than the *status* of his assignment to a ship whose mission is primarily performed while at sea, *as statute and regulation provide*, App. 416a–422a), App. 10a,18a, 47a.

The bottom line is that if the SG is correct – as he clearly is – that *Strother* is not entitled to prevail on a breach of contract claim relating to a purported contract promising a type of military pay, because *only statutes and regulations fix the right to such pay*, then Petitioner is equally correct that he is entitled to prevail on claims (which the lower courts improperly rejected) that are rooted *purely in statute and regulation*. And before this Court forecloses the possibility (by denying the Petition) of clearing the books of the arguably incorrect decisions below, the SG should be invited to submit his BIO so that the Court can benefit from his insights and expertise in applying *Bell* and *Larionoff* to cases dealing with military pay. If he takes the position that he took in *Strother*, he will no doubt conclude, with Petitioner, that the regrettably erroneous lower-court decisions should be summarily reversed.

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[2] A "doctrine [where vested entitlements are considered a windfall] will shock most Americans. Particularly will it shock them when, as here, *it is used by the United States to welsh on its own monetary obligations*." *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 103 (2nd Cir. 1952) (Frank, J., dissenting) (emphasis added).

B. This Court's precedents make Petitioner's interpretation of §1552(c) and the agency regulations that implement it absolutely binding on the lower courts, who cannot ignore them without raising grave Constitutional and judicial issues

A court "must give effect to the unambiguously expressed intent of Congress," *Chevron USA v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984), which intent is determined by resort to "traditional tools of statutory construction," *id.* at 843, n.9, including "analysis of legislative history." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring); *accord Sullivan v. Stroop*, 496 U.S. 478, 493 (1990). This non-negotiable principle alone compelled the lower courts to interrogate §1552(c) (though they did not) for the constraints (which he made clear at all stages of litigation) it placed on the process by which Petitioner's military pay claims were assessed.

As if the clear meaning of the statute weren't enough, the lower courts were also bound to "give [the relevant regulations] effect, as [they] would any law," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), and the regulations governing the pay claim settlement process, Pet. 24, leave not only no room for guesswork about the meaning of §1552(c), but warrant unquestionable judicial deference as representing the

> contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, [and] of making the parts work efficiently and smoothly while they [were] yet untried and new,

Norwegian Nitrogen Prods. Co. v. United States, 288

U.S. 294, 315 (1933) (citations omitted), *accord Kisor*, 139 S. Ct. at 2426, as both the legislative history and subsequent administrative practice make unmistakably clear, Pet. 11–25. Deference that the lower courts should have shown (but did not) to those regulations is furthermore indicated by all recognized criteria: a court "defer[s] to the agency's construction of its own regulation," *Kisor*, 139 S. Ct. at 2411, especially where: "the regulatory interpretation [is] . . . actually made by the agency," *id.* at 2416, it implicates the agency's "substantive expertise," is based on their "[a]dministrative knowledge and experience," *id.* at 2417, and reflects the "fair and considered judgment" of the agency, rather than (ironically) being what the lower courts accepted, namely, the Navy's "convenient litigation position," *id.* (citations and internal quotation marks omitted); *see* Pet. 7. Finally, "a regulation [has] particular force if it is a substantially contemporaneous construction of the statute by those . . . aware of congressional intent," *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1978) – as the CG officials were, Pet. 14–15.

In the Court's memorable words, "The plain language of the statute, its legislative history and underlying purposes, as well as the explicit regulations authorized by the statute itself all indicate that the Government"[3] may not base military pay entitlements incident to record-correction actions upon any considerations other than the application of *relevant law* to the facts established *by the relevant correction board*. But this is precisely what the lower courts sanctioned in ignoring both the substantive regulations governing the military pay and allow-

[3] *United States v. Morton*, 467 U.S. 822, 836 (1984).

ances at issue in this case, App. 410a–422a, and the procedural rules controlling how claims are settled in this context, App. 393a–406a. In consequence, they blatantly contravened this Court's precedents, which make such regulations *binding upon the courts*, and were "wrong" to act as if those precedents were "implicitly overruled," *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) – because "it is this Court's prerogative alone to overrule . . . its precedents," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), for its decisions are "binding . . . until [the Court] see[s] fit to reconsider them," *Hohn v. United States*, 524 U.S. 236, 253 (1998).

Finally, as Justice Brandeis has emphasized, and Justice Gorusch has applied to the question of deference to agency regulations, "The inexorable safeguard which the due process clause assures is . . . that there will be opportunity for a court to determine *whether the applicable rules of law . . . were observed*." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (Brandeis, J., concurring) (emphasis supplied) (quoted in *Kisor*, 139 S. Ct. at 2426 (Gorusch, J., concurring)). Regrettably, it is this inexorable safeguard of the due process clause, U.S. Const. amend. V, that the lower courts' disregard of applicable law and regulation has thwarted, and which it falls to this Court to remedy.

C. Navy regulations provide that, following BCNR action, Petitioner's duty station was USS Carl Vinson – *the* predicate fact upon which his entitlements should have been determined

The Naval Military Personnel Manual Article 1320-300 (2014) (MPM) is unequivocal about how a naval officer's permanent duty station (PDS) is changed:

"Change of duty orders detach members from one duty station and assign them to another station." *Id.*, para. 3.a. Absent issuance of such orders by competent authority, App. 407a, a member's duty station does not change.

The reasoning of the courts below flouted this regulatory constraint (and the separation-of-powers principle it implicates, Pet. 31) governing military personnel assignments, instead relying upon a memorandum drafted by litigation counsel, Pet. 7, 8; App. 57a–63a, or upon their own speculation, for evidence that Petitioner was removed from the ship (Carl Vinson) to which he was assigned at the time of his separation from the Navy, App. 6a, 15a, 18a, 45a. Because, however, there was absolutely no "change of duty" order in Petitioner's case, and because the order detaching him from the ship issued to separate him from the Navy was subsequently voided, Pet. 3–4, the inexorable conclusion is that the last effective order in Petitioner's *record* was that of December 2006, directing him to "*continue present duty*" aboard Carl Vinson, App. 371a (emphasis added). *This* order, constituting an undisputed part of Petitioner's record *as it left BCNR's hands* en route consideration by agency pay officials, and *not* the illegal and ineffective litigation counsel memorandum, Pet. 26–27, is what the lower courts *should have used* as the predicate fact to which it applied the relevant law in adjudicating Petitioner's military pay claims, App. 410a–422a, because this is what Defense Department –

> Payment based on a *correction of military records* must be made . . . by applying pertinent laws and regulations to all the material facts *shown in the corrected record*,

App. 395a (emphasis added) – and Navy –

> Settlement of claims shall be upon the basis of the *decision and recommendation of the [BCNR]*,

App. 397a (emphasis added) – regulations *unequivocally require*. And by doing so, they likewise exclude the rectitude of reliance by pay officials or courts upon extraneous material injected into service-member records by litigation counsel or unrelated personnel officials having no part in the record-correction process, Pet. 27, compelling instead – as the cited MPM provision illustrates – reliance for determination of a service member's PDS the last valid change-duty order shown in his correction-board established record.

The decision in *Seastrom v. United States*, 147 Ct. Cl. 453 (1959), which controlled in (but was ignored by) the Federal Circuit,[4] equally commands this conclusion. There, the United States Court of Claims was tasked with ruling upon the pay implications of a sailor's record correction by BCNR. Its decision affirmed unreservedly the position advanced here – that eligibility for pay resulting from a record correction is based exclusively upon the retroactive effect of applicable law upon "records [as] corrected" by the correction board, *Seastrom*, 147 at 458–59 – and it should have been followed by the lower courts.

CONCLUSION

This Court should grant the petition for rehearing and hold its Order in abeyance pending receipt of the SG's BIO, which should be requested. Alternatively, because, perhaps as clearly in this particular case as

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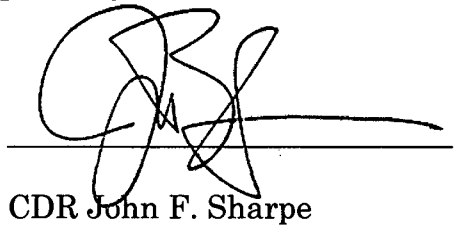
[4] *See South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982).

in any other, summary disposition lies under the standard set forth in *Schweiker v. Hansen*, *supra*, the Court should modify its Order, grant the Petition, and summarily reverse the Federal Circuit (to both clear the books of erroneous precedent and allow subsequent resolution of the case by DOHA[5]), thereby protecting the integrity of correction board claims settlement jurisprudence, to the benefit of the thousands of service members and veterans who will in the future have recourse to the salutary, remedial process that Congress created seventy-five years ago for their benefit.

Very respectfully submitted.



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February 21, 2020

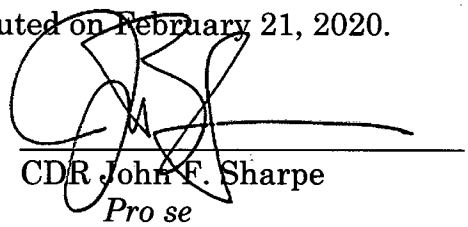
[5] The SG understands DOHA's role in military pay claims; that office both settled and mooted the claim put forward in *Strother*. Br. in Opp'n at 2, 12, *supra*.

CERTIFICATE

I certify that this petition for rehearing is restricted to the grounds specified in Supreme Court Rule 44.2 and is presented in good faith and not for delay.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2020.



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