No. 10-

10-404

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## Supreme Court of the United States

MALCOLM G. SCHAEFER,

Petitioner,

v.

JOHN R. MCHUGH, SECRETARY OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

#### PETITION FOR A WRIT OF CERTIORARI

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### **QUESTION PRESENTED**

Whether a party challenging an agency's refusal to follow its own regulations under *United States ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), also bears the burden of establishing prejudice from that refusal.

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#### PETITION FOR A WRIT OF CERTIORARI

Petitioner Malcolm G. Schaefer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

#### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 608 F.3d 851. The district court's opinion (Pet. App. 8a-31a) is reported at 607 F. Supp. 2d 61. The decision of the Army Board for Correction of Military Records is unreported and reproduced at Pet. App. 32a-97a.

#### JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals entered judgment on June 22, 2010. Pet. App. 7a. This Court has jurisdiction under 28 U.S.C. § 1254.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent regulatory provisions are set out in the regulatory addendum.

#### STATEMENT OF THE CASE

The decision below deepens a preexisting three-way circuit split on an important and recurring question of administrative law: Whether a party challenging agency action must demonstrate prejudice from that agency's failure to comply with its own regulations. Petitioner sued the Secretary of the Army under the Administrative Procedure Act ("APA"), claiming among other things that the Army's attempted

revocation of his honorable discharge violated *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), which holds that administrative agencies are obligated to follow their own regulations. After Petitioner had received an honorable disability discharge from the Army, the Army sought to revoke that discharge without following its own regulations governing the procedures for alteration or revocation of disability discharge orders.

In the decision below, the D.C. Circuit assumed that the Army violated its regulations but excused that violation by holding that Petitioner failed to demonstrate any prejudice from the Army's refusal to abide by its regulations. Pet. App. 6a. In doing so, the D.C. Circuit joined two other circuits in holding that a party must demonstrate prejudice whenever challenging an agency's failure to follow its applicable regulations, regardless of the rights protected by those regulations. See Kohli v. Gonzales, 473 F.3d 1061, 1068-69 (9th Cir. 2007); PAM, S.p.A. v. United States, 463 F.3d 1345, 1348 (Fed. Cir. 2006). contrast, the Second, Third, and Seventh Circuits hold that no showing of prejudice is required when, as here, an agency departs from regulations designed to protect constitutional or statutory rights. Leslie v. Att'y Gen. of United States, 611 F.3d 171 (3d Cir. 2010); Martinez-Camargo v. INS, 282 F.3d 487, 490, 492 (7th Cir. 2002); Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1993). The decision below also conflicts with the Sixth Circuit, which has held that a claimant need not show prejudice when an agency disregards applicable regulations that confer important procedural rights and benefits. Wilson v. Comm'r. 378 F.3d 541, 546-47 (6th Cir. 2004).

Scholars have highlighted the conflict and confusion among the lower courts, noting that

application of this Court's holding in Accardi "is laced with uncertainties." Thomas W. Merrill, The Accardi Principle, 74 Geo. Wash. L. Rev. 569, 570 (2006); see also Joshua I. Schwartz, The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct, 44 Admin. L. Rev. 653, 669 (1992).

The decision below squarely implicates this deep conflict over a fundamental and recurring issue of federal administrative law. Here, the court of appeals excused an agency's failure to follow its regulations because it concluded that Petitioner also was obligated to establish prejudice. Pet. App. 6a. Likewise, the Ninth Circuit and Federal Circuit would have required a showing of "prejudice." contrast, in the Second, Third, Fourth, Sixth and Seventh Circuits, Petitioner would not have been required to make a showing of prejudice apart from the agency's refusal to follow regulations that were designed to protect the rights of individuals such as Petitioner. As a result, the conflict among the federal circuits is outcome determinative in this case.

The Court should grant the petition to resolve this conflict over the appropriate standard to apply under *Accardi* when agency action is challenged because the agency failed to follow its regulations.

#### I. REGULATORY BACKGROUND.

As directed by Congress and the Department of Defense, the Army has established, through detailed regulations, a Physical Disability Evaluation System ("Evaluation System") to govern the separation of disabled soldiers from the Army. 10 U.S.C. §§ 1216(a), 1222(c); Dep't of Defense Directive

("DODD") 1332.18; Army Reg. 635-40 ¶ 1–1 (1990) (Pet. App. 98a-193a).  $^1$ 

By their terms, these regulations are designed to "[p]rovide prompt disability processing while ensuring that the rights and interests of the Government and the soldier are protected." Army Reg. 635-40 ¶ 1–1(c). In furtherance of this purpose, the Army had to ensure that the Evaluation System "consist[s] of four elements: medical evaluation; physical disability evaluation, to include appellate review; counseling; and final disposition." DODD 1332.18 ¶ 3.2. Accordingly, Army regulations established:

- 1) Medical Evaluation Boards ("Medical Boards") to evaluate a soldier's "medical qualification for retention," Army Reg. 635-40 ¶ 4–10; id. ¶¶ 4–9 to 4–11;
- 2) Physical Evaluation Boards ("Physical Boards") to determine a soldier's fitness for duty and to make any recommendations necessary to establish a soldier's eligibility to be separated from the Army, id. ¶ 4–17(a), with review for approval, correction, or revision available through the U.S. Army Physical Disability Agency ("Disability Agency"), id. ¶ 4–22(a);
- 3) Physical Evaluation Board Liaison officers ("Liaison Officers") to provide counseling to the soldier during the evaluation process, id. ¶ 4–12; and
- 4) U.S. Total Army Personnel Command ("Personnel Command") to "[a]ccomplish final

<sup>&</sup>lt;sup>1</sup> Army Regulation 635-40 was subsequently revised on February 8, 2006. The proceedings in this matter were governed by the earlier regulation. See Pet. App. 9a n.2.

administrative actions," namely to "issue needed orders or other instructions for the S[ecretary of the] A[rmy]," id. ¶¶ 2-3, 4-24.

Medical Boards "document" a soldier's medical condition and refer "those soldiers who do not meet medical retention standards" to a Physical Board. *Id.* ¶¶ 4–10, –13. Physical Boards investigate the nature and extent of a soldier's disability, provide a hearing upon request from the soldier, and make "findings and recommendations" concerning the soldier's eligibility for a disability discharge. *Id.* ¶ 4–17(a)(1)-(4).

After receiving counseling on a Physical Board's findings, the soldier has ten days to concur or disagree with the findings and submit a rebuttal or request a hearing. Id.  $\P\P$  4-20(c), 4-21(s). If the soldier concurs, the Physical Board may approve the findings on behalf of the Secretary of the Army and forward the case to Personnel Command "for final disposition." Id. ¶ 4–20(e)(1)-(3); id. ¶ 4–19(b). If the soldier disputes the findings, the Disability Agency will review the case and decide whether to concur with the Physical Board, remand the case for reconsideration, or issue revised findings, id. ¶ 4-If the Disability Agency agrees with the 22(c). findings, it must "forward the case to [Personnel Command] for disposition." Id. ¶ 4–22(g)(5).

Under the regulations, Personnel Command has the overall responsibility to "dispose of the case by publishing orders or issuing proper instructions to subordinate headquarters, or return any disability evaluation case to [the Disability Agency] for clarification or reconsideration when newly discovered evidence becomes available." *Id.* ¶ 4–24; see id. ¶ 2–3(b). Personnel Command has authority to issue instructions for separation based on physical

disability or return a soldier to duty if that soldier is physically fit.  $Id. \ \P \ 4-24(b)(1)-(9)$ .

The actual orders are published by and are the responsibility of the adjutant at a particular headquarters (i.e., military installation), and "[o]nly the organization that published the original order may amend, rescind, or revoke the order." Army Reg. 600-8-105 ¶¶ 1-11(a), (b), 2-21(a). Once an adjutant has issued disability discharge orders, only Personnel Command may issue instructions to the adjutant to alter or revoke those orders. Army Reg. 635-40 App. E-9(e).<sup>2</sup>

A soldier is discharged from the Army when, according to his or her orders, (1) a facially valid discharge certificate is delivered (actually or constructively) to the soldier; (2) there is a final accounting of pay; and (3) the clearing process is completed. 10 U.S.C. §§ 1168(a), 1169; *United States* v. *King*, 42 M.J. 79, 80 (C.A.A.F. 1995). Discharge ends the Army's jurisdiction over a soldier, with the sole exception that Article 3(b) of the Uniform Code of Military Justice ("UCMJ") provides that a former soldier may be charged "with having fraudulently obtained his discharge [and] is [then] subject to trial by court-martial on that charge." 10 U.S.C. § 803(b).

#### II. BACKGROUND OF THE CASE.

#### A. Factual Background.

1. Petitioner Malcolm G. Schaefer graduated from West Point in 1990 and was commissioned as a Second Lieutenant in the Infantry. Pet. App. 47a. Later, Schaefer applied to the Army's Funded Legal Education Program, through which he attended the

<sup>&</sup>lt;sup>2</sup> The Disability Agency lacks authority to issue orders, including revocation orders. D.C. Circuit Appendix 44, 61, 124.

University of Virginia School of Law. Pet. App. 9a, 47a-48a. In 1996, Schaefer began serving a six-year commitment to the U.S. Army Judge Advocate General's Corps ("JAG Corps") at Fort Benning, Georgia, where he received superlative ratings. Pet. App. 2a, 9a, 48a.

Throughout his time in the military, Schaefer experienced increasing chronic knee pain. He had surgery on his left knee in 1996 and surgery on his right knee in 1999. D.C. Circuit Appendix ("CADC App.") 342-43. Despite extraordinary efforts at physical therapy, *id.* at 587-99, 600-02, Schaefer's knee condition continued to deteriorate, preventing his scheduled deployment overseas, *id.* at 223, 254-55.

In September 2000, Schaefer was referred into the Army's Evaluation System. Pet. App. 9a, 48a. June 11, 2001, a Physical Board determined that Schaefer was physically unable to perform the duties required by his grade and military specialty, id. at 48a, and recommended his separation from the Army, id. at 10a, 48a. Schaefer concurred with this finding, and, on July 2, 2001, the Fort Benning Headquarters, through the Adjutant General, published selfexecuting separation orders to Schaefer. Id. at 10a-11a. These orders commanded Schaefer to report on September 14, 2001, to a transition point to be discharged from the Army. Id. at 11a, 49a. Schaefer promptly notified his JAG supervisor of the discharge orders, and together they informed the JAG Corps' Personnel, Plans and Training Office ("Training Office"). CADC App. 189-90, 125, 413, 419, 449.

Shortly thereafter, in August 2001, individuals within the JAG Corps attempted to revoke Schaefer's discharge orders. The Commander of the Disability Agency, without a request to or authority from

Personnel Command, instructed a Disability Agency lawyer to hold Schaefer's discharge. Pet. App. 12a; CADC App. 246, 274, 278. That lawyer instructed a technician to remove a computer code that authorized Schaefer's separation. Pet. App. 12a. She later did so, but left Schaefer's September 14, 2001 discharge date unchanged. *Id.* at 12a-13a; CADC App. 193, 274, 428, 431.

The chief of the Training Office submitted to the Disability Agency a memorandum stating his view that Schaefer could effectively perform his assigned duties. Pet. App. 11a-12a. Unbeknownst to Schaefer and without authorization from Personnel Command. the Disability Agency returned Schaefer's file to the Physical Board on the basis of a conversation between the Agency's lawyer and a Board member. Id. at 12a; CADC App. 294. The Physical Board then undertook to re-evaluate Schaefer's case and, on August 30, 2001, made an initial determination that Schaefer was fit for duty, asserting that its previous determination was superseded. Pet. App. 12a, 49a. Schaefer agreed with a Liaison Officer that the Physical Board's finding would not be final under Army regulations until after Schaefer's September 14, 2001 discharge date. Id. at 49a-50a.

Personnel Command never altered Schaefer's preexisting discharge orders, nor did Fort Benning Headquarters ever issue a subsequent order or instruction rescinding or revoking Schaefer's July 2 orders prior to his September 14th discharge date. CADC App. 125, 200-01, 270, 316, 464-66, 469. On the advice of counsel, Schaefer appeared at the transition point on September 14, 2001, as required by his discharge orders. Pet. App. 13a. The Army issued Schaefer a discharge certificate and completed his Honorable Discharge from the Army. *Ibid*.

On September 18, four days after his discharge from the Army, Fort Benning headquarters issued orders purporting to revoke Schaefer's discharge orders. Pet. App. 49a-50a. On October 29, 2001, the Army ordered Schaefer to report for duty at the JAG Corps office at Fort Benning, claiming that his discharge was invalid and threatening to "take 'appropriate measures to return [him] to military control." Id. at 14a. Schaefer sought a temporary restraining order against the Army, see Schaefer v. White, 174 F. Supp. 2d 1374 (M.D. Ga. 2001), and the Army brought court-martial charges against him for fraudulent separation, Pet. App. 14a; see 10 U.S.C. § 883. After being denied a temporary restraining order, and in light of the court-martial charges, Schaefer involuntarily returned to the Army to face court-martial proceedings. Pet. App. 15a.

In December 2001, the Army conducted an Article 32 investigation (the military substitute for a grand jury), see 10 U.S.C. § 832, after which the investigating officer determined that there were no reasonable grounds to believe Schaefer obtained a fraudulent discharge because his discharge orders remained valid when he appeared for separation. Pet. App. 16a; CADC App. 186. The investigating officer concluded that "the bases for the discharge orders had not been overturned or revoked on September 14, 2001 when [Schaefer] presented himself for separation." Pet. App. 16a.

The Commanding General, on the advice of his Staff Judge Advocate, nevertheless referred the fraudulent separation charge to a general court-martial on March 1, 2002. Pet. App. 16a. After arraignment, but prior to trial, Schaefer submitted a Resignation for the Good of the Service in Lieu of Court-Martial. *Id.* at 16a-17a. In the resignation,

Schaefer made clear that he was a civilian who had been discharged on September 14, 2001, and that he had not voluntarily submitted to the Army's jurisdiction. *Id.* at 74a-75a. On July 19, 2002, the Army approved Schaefer's resignation, and, on October 1, 2002, gave Schaefer a General (Under Honorable Conditions) Discharge. *Id.* at 17a, 82a. That discharge was a step below the Honorable Discharge that Schaefer received on September 14, 2001.

2. On September 8, 2004, Schaefer requested that the Army Board for Correction of Military Records ("Correction Board") correct his military records by, among other things, confirming that he was honorably discharged on September 14, 2001, and declaring his subsequent October 2002 discharge null and void. Pet. App. 34a. Schaefer showed that his original discharge orders had never been revoked because the Army had failed to follow applicable regulations necessary for revocation of discharge orders. Specifically, Personnel Command never issued instructions rescinding, holding, or revoking his orders, nor had it recalled his case for a second Physical Board determination. Accordingly, on September 14, 2001, Schaefer had been discharged from the Army and was beyond its jurisdiction. Schaefer further demonstrated that, because he was a civilian, the Army's attempt to exercise jurisdiction over him under Article 3(b) of the UCMJ was unconstitutional under United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).

The Correction Board denied Schaefer's request. Although the Correction Board agreed with Schaefer that Army regulations provide that only Personnel Command can issue instructions to revoke duly issued discharge orders, it stated that the governing

regulations were "outdated." Pet. App. 90a. According to the Correction Board, the functions of Personnel Command have been assumed by the Disability Branch, which is an adjunct of the Disability Agency and under its authority. *Ibid.* Thus, the Correction Board concluded that, despite clear contrary Army Regulations, the Disability Agency had the authority to direct Fort Benning to revoke Schaefer's discharge orders and that the Disability Agency or Physical Board could then reconsider Schaefer's case. *Ibid.* 

As to the Army's claim of fraudulent separation, the Correction Board concluded that even though Schaefer complied with facially valid discharge orders, he nevertheless misrepresented himself on September, 14, 2001, because he knew the second Physical Board findings "would probably be approved" and thus that his discharge orders would likely be revoked. Pet. App. 92a (emphasis added).

### B. Procedural Background.

On August 30, 2007, Schaefer filed suit against the Secretary of the Army, alleging that the Army violated his constitutional rights and the APA. Among other things, Schaefer claimed that the Correction Board acted arbitrarily, capriciously, and contrary to law in refusing to correct his military records because the Army had violated the *Accardi* doctrine by disregarding applicable regulations. Pet. App. 24a.

The district court granted summary judgment in favor of the Secretary. Pet. App. 31a. Although the court recognized that agencies must follow their regulations, id. at 24a, it gave "deference" to the Correction Board's view of the "outdated" Army regulations, holding that the board did not act

arbitrarily, capriciously, or otherwise contrary to law, *id.* at 24a-25a. The court thus approved the Correction Board's finding that Schaefer was not actually discharged from the Army until October 2002. Schaefer timely appealed.

The Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court. Pet. App. 7a. The court assumed that the Army failed to abide by applicable regulations when it revoked the authorization for Schaefer's discharge and resolved the case solely on whether the regulatory violation resulted in prejudice to Schaefer. Id. at 6a. Citing the rule it adopted in Steenholdt v. FAA, 314 F.3d 633, 639-40 (D.C. Cir. 2003), and affirmed in Battle v. FAA, 393 F.3d 1330, 1336 (D.C. Cir. 2005), the court held that "[a] party claiming harm from an agency's failure to follow its own rules must demonstrate some form of prejudice." Pet. App. 6a. The court concluded that "Schaefer failed to show that he suffered any prejudice from the Army's alleged error regarding which entity could technically revoke the authorization for his discharge." Ibid.

### REASONS FOR GRANTING THE PETITION

The decision below directly implicates a three-way conflict among the circuits on a fundamental and recurring issue of administrative law: Whether a claimant bears the burden of demonstrating prejudice from an agency's failure to follow its own regulations to prevail in a challenge to that agency's decision.

First, the decision below applies the same standard as two other circuits—the Ninth and Federal—in holding that a party must always demonstrate prejudice when challenging an agency's failure to follow applicable regulations. In contrast with these circuits, the Second, Third, and Seventh Circuits hold

that no showing of prejudice is required when an agency violates regulations designed to protect constitutional or statutory rights. The Sixth Circuit, by contrast, holds that a claimant does not need to show prejudice when an agency fails to follow applicable regulations that confer important procedural rights and benefits.

Under the law in the Second, Third, Seventh, and Sixth Circuits, Schaefer would have been entitled to relief. Because this case was brought in the D.C. Circuit, however, he was denied relief because that court requires an additional showing of prejudice. Accordingly, this case is an appropriate vehicle to resolve the underlying conflict among the federal circuit courts. This Court should grant this petition to resolve the conflict.

Second, the Court should also grant the petition because the decision below conflicts with this Court's decisions under United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Under the Accardi doctrine, this Court has stated that no showing of prejudice is necessary when an agency fails to abide by regulations that are designed to important benefits "confer procedural individuals." Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970). These types of rules stand in contrast with "procedural rules adopted for the orderly transaction of business," the violation of which may not warrant relief absent a showing of prejudice. Id. at 539. The D.C. Circuit here adopted a test that requires a showing of prejudice in all cases. Review should be granted because the decision below conflicts sharply with this Court's jurisprudence.

I. THIS CASE **IMPLICATES** A DEEP CONFLICT **AMONG** THE **FEDERAL** ON WHETHER CIRCUITS Α **PARTY** CHALLENGING AN AGENCY'S FAILURE TO FOLLOW ITS REGULATIONS ALSO MUST ESTABLISH PREJUDICE.

The Court should grant the petition to resolve a three-way conflict among the circuit courts on a fundamental issue of administrative law. decision below, the D.C. Circuit denied Schaefer relief because it concluded that he was obligated to show that the Army's failure to follow its own regulations resulted in prejudice to his rights. The Ninth and Federal Circuits apply the same standard. contrast, the Second, Third, and Seventh Circuits do not require any showing of prejudice when an agency violates regulations which, as here, are designed to constitutional orstatutory rights protect individuals. Similarly, the Sixth Circuit does not require a showing of prejudice when an agency fails to abide by regulations that confer important procedural rights and benefits.

- A. There Is A Deep Conflict Over Whether A Party Challenging An Agency's Refusal to Follow Its Regulations Must Demonstrate Prejudice.
- 1. In the decision below, the D.C. Circuit held that "[a] party claiming harm from an agency's failure to follow its own rules must demonstrate some form of prejudice." Pet. App. 6a. The court assumed "procedural error" and a "violation of regulations" by the Army when it revoked the authorization for Schaefer's September 14, 2001 discharge order. *Ibid.* It nevertheless rejected Schaefer's challenge because it concluded that he supposedly "failed to show that he suffered any prejudice from the Army's alleged

error." *Ibid*. That is, the court adopted a standard by which any party challenging an agency's failure to follow its regulations also must demonstrate prejudice.<sup>3</sup>

The Ninth and Federal Circuits similarly require a showing of prejudice by all who contend that an agency has failed to follow applicable regulations. In Kohli v. Gonzales, 473 F.3d 1061 (9th Cir. 2007), the Ninth Circuit reviewed a petition seeking to vacate a Board of Immigration Appeals ("BIA") order because the signature and title of the issuing officer on the original notice to appear were illegible. Id. at 1064. Kohli argued that the lack of information deprived the BIA of jurisdiction. Id. at 1063. The court explained that "[w]hen presented with allegations that an agency has violated its own regulations, we have recognized that ... in order to be granted relief 'the claimant must show that he was prejudiced by the agency's mistake." Id. at 1066 (quoting Patel v. INS, 790 F.2d 786, 788 (9th Cir. 1986)).4 The court concluded that "the alleged defect was prejudicial," and in the absence of any showing that the illegible name and signature "obscured the

<sup>&</sup>lt;sup>3</sup> This decision follows other D.C. Circuit's decisions requiring a showing of prejudice for *Accardi* claims. See *Battle*, 393 F.3d at 1336 ("*Accardi* has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others."); *Steenholdt*, 314 F.3d at 639 (holding that without individualized prejudice "the *Accardi* doctrine" does not provide "a basis for review").

<sup>&</sup>lt;sup>4</sup> This simply restated the long-standing rule in the Ninth Circuit: "Violation of a regulation renders [agency action] unlawful only if the violation prejudiced interests of the [person] which were protected by the regulation." *United States* v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979) (emphasis added).

charges against her or obstructed her ability to respond to the charges and present her requests for asylum and other relief," it would deny relief. *Id.* at 1068-69.

The Federal Circuit likewise requires a showing of prejudice in all circumstances. In PAM, S.p.A v. United States, 463 F.3d 1345 (Fed. Cir. 2006), the Federal Circuit addressed whether the Department of Commerce could relax its own regulations on service of requests for administrative review. Id. at 1346. There, the Court of International Trade held void an anti-dumping duty order as applied to PAM because Commerce had inappropriately relaxed regulations, rather than requiring strict adherence. The Federal Circuit vacated, holding that "the Court of International Trade should have conducted an analysis of whether PAM proved substantial prejudice, regardless whether the regulation confers an important procedural benefit." *Id.* at 1348 (emphasis added); see also Intercargo Ins. Co. v. United States, 83 F.3d 391, 396 (Fed. Cir. 1996) (reversing judgment for importer that "suffered no prejudice").

2. In direct conflict, the Third, Second, and Seventh Circuits hold that an agency's failure to abide by its regulations designed to protect constitutional and statutory rights is *per se* grounds for invalidation, without any showing of prejudice.

In Leslie v. Attorney General of the United States, 611 F.3d 171 (3d Cir. 2010), the Third Circuit vacated a removal order because the immigration judge failed to advise the alien of the availability of free legal services, as required by Immigration and Naturalization Service ("INS") regulations. Id. at 182. The court determined that the applicable regulation was "designed to protect an alien's

fundamental statutory and constitutional right to counsel at a removal hearing," *id.* at 182, and held that "when an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation," regardless of "prejudice resulting from its violation," *id.* at 180-82.

Likewise, in Waldron v. INS, 17 F.3d 511 (2d Cir. 1993), the Second Circuit held that a claimant need not demonstrate prejudice for agency violations of regulations implicating fundamental constitutional or statutory rights. There, an immigration judge failed to certify the case and notify the alien of his right to contact diplomatic officials, in violation of INS regulations. Id. at 518. The court determined that because the applicable regulations did not implicate "fundamental rights with constitutional or federal statutory origins," the challenged proceeding would be invalidated "only upon a showing of prejudice to the rights sought to be protected by the subject regulation." *Ibid*. The court explicitly "decline[d] to adopt the Calderon-Medina approach" of the Ninth Circuit, "which requires a demonstration of prejudice irrespective of whether the subject regulation was designed to protect a fundamental right derived from the Constitution or a federal statute." *Ibid.* Instead, the Second Circuit explained that "when a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute," failure to abide by it requires remand. However, when the regulation "does not affect fundamental rights," the court held that "it is best to invalidate a challenged proceeding only upon a showing of prejudice." Ibid.

The Seventh Circuit recognized the same rule in Martinez-Camargo v. INS, 282 F.3d 487 (7th Cir.

- 2002). There, the Seventh Circuit determined that the INS violated agency regulations when an arresting officer interrogated a detained alien but upheld the subsequent deportation order because the alien "failed to allege or to prove that he suffered prejudice" as a result of the officer's conduct. *Id.* at 490. Although the court stated that a regulatory violation renders agency action unlawful if it "can be deemed prejudicial," it explained that "an agency action can be deemed prejudicial" automatically "when it violates the Constitution," or it involves a "complete disregard of a framework designed to insure the fair processing of an individual," *id.* at 492.
- Finally, the Sixth Circuit has held that a party need not show prejudice when an agency violates regulations that confer important procedural rights and benefits. In Wilson v. Commissioner of Social Security, 378 F.3d 541 (6th Cir. 2004), the Sixth Circuit confronted an administrative law judge's failure to give "good reasons" for rejecting a treating physician's opinion, as required by the Social Security Administration's ("SSA") regulations. *Id.* at 546. The court vacated the SSA decision, concluding that "[a] court cannot excuse the denial of a mandatory procedural protection" regardless of the particular harm that may accompany its violation. Following this Court's decision in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), the Sixth Circuit distinguished between regulations that "bestow[] a 'substantial right' on parties" and those that are "adopted for the orderly transaction of business." Wilson, 378 F.3d at 547. Agencies must strictly comply with rules that bestow substantial rights and benefits on parties, but relief from a failure to follow a procedural rule designed for the orderly transaction of business

"substantial prejudice to the complaining party." *Ibid.* In this case, the court determined that the applicable regulation conferred a "substantial" procedural right that the SSA was not free to disregard. *Ibid.* 

Thereafter, in Bowen v. Commissioner of Social Security, 478 F.3d 742 (6th Cir. 2007), the Sixth Circuit vacated an SSA decision on the ground that the administrative law judge failed to address the opinion of the claimant's treating psychologist, as required by department regulations. Id. at 743. The court reasoned that because the applicable regulation "provides claimants with an 'important procedural safeguard,' the SSA was not free to relax or disregard the rule," id. at 747 (quoting Wilson, 378 F.3d at 547), and declined to recognize a "harmless-error exception" in reaching its conclusion that the SSA decision was invalid, id. at 750.

The Fourth Circuit also has strongly suggested its agreement with the Sixth Circuit's approach. United States v. Morgan, 193 F.3d 252 (4th Cir. 1999), the court of appeals faced an apparent violation of Bureau of Prison regulations that "established certain procedural benefits for inmates in the custody of the Attorney General facing the medication." forcible entitlement to a qualified staff representative. Id. at 265. In evaluating this apparent failure, the court generally "claimants explained that demonstrate prejudice resulting from the violation" of regulations but that showing was unnecessary when "[t]he rules were ... intended primarily to confer important procedural benefits upon individuals." Id. at 267 (quoting Am. Farm Lines, 397 U.S. at 538-39). The court recognized that the "fact that a particular regulation or procedure is not mandated by the Constitution or by statute is of no moment for purposes of an analysis under the *Accardi* doctrine." *Ibid*.

- B. The Conflict Among The Federal Courts Concerns A Recurring And Fundamentally Important Question That Is Squarely Implicated In This Case.
- Whether a party challenging agency action must demonstrate prejudice from that agency's failure to follow its own regulations is an important and recurring issue that warrants this Court's review. The Accardi doctrine—that agencies must comply with their regulations—has roots in several important principles of law. The Court has recognized that this requirement is (i) "inherent in the nature of delegated 'legislative power," (ii) "required by due process," and (iii) "a principle of administrative common law." Merrill, supra at 569. Yet, the requirement that claimants prove prejudice has been described as one in a judicial "bag of tricks for manipulating the Accardi principle." Id. at 594. Given this possible manipulation of a foundational principle of administrative law, courts continually struggled with whether, and when, a showing of prejudice is required. See, e.g., Leslie, 611 180-82 (discussing various approaches). This Court should intervene to provide needed clarity regarding the scope of the Accardi doctrine.
- 2. This case provides an ideal vehicle for resolving this conflict among the federal courts. In the decision below, the D.C. Circuit declined to conduct any inquiry into the regulations that the Army refused to follow when it purported to reverse the original unfit for duty finding and to revoke

Schaefer's honorable discharge. Pet. App. 6a. Instead, the court simply applied a blanket "prejudice" test that would immunize an agency's failure to follow its own rules and concluded that Schaefer "failed to show that he suffered any prejudice" from the regulatory violation. *Ibid.* Had this case arisen in the Second, Third, or Seventh Circuits, or in the Sixth Circuit, the result would have been different.

In the Second, Third, and Seventh Circuits, a claimant need not demonstrate prejudice from an agency's failure to follow its regulations when those regulations are designed to "protect a fundamental right derived from the Constitution or a federal Waldron, 17 F.3d at 518. Here, the statute." regulations protect numerous constitutional and statutory rights that turn on whether an individual is a soldier or civilian. While civilians enjoy the full protections of the United States Constitution structural, procedural, and substantive-Congress may establish certain rules for soldiers that do not meet all the typical constitutional safeguards. U.S. Const. art. I, § 8, cl. 14 ("The Congress shall have Power ... [t]o make Rules for the Government and Regulation of the land and naval Forces"); see Reid v. Covert, 354 U.S. 1, 7, 19-20 (1957) (plurality); United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857). As such, the Constitution draws important distinctions between the rights of soldiers and civilians. See, e.g., Solorio v. United States, 483 U.S. 435, 439 (1987) ("In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.").

The regulations that were disregarded below are designed to provide a procedural system to ensure the precise line between soldier and civilian for those in the Army's disability evaluation system. commanding the Army to establish an Evaluation System, the Department of Defense specifically mandated that the system consist of four distinct elements, one of which governs "final disposition." DODD 1332.18 ¶ 3.2. In furtherance of that command, the Army gave Personnel Command authority exclusive to "[alccomplish administrative actions" and "issue needed orders and other instructions for the Secretary of the Army, Army Reg. 635-40 ¶ 2-3, 4-24, including to "dispose of the case ... or issue proper instructions to subordinate headquarters," id. ¶ 4-24, such as rescinding or revoking discharge orders, id. App. E-9(e).

Here, the Army disregarded the regulations requiring Personnel Command to issue orders and instructions that alter existing discharge orders. After Schaefer received a valid discharge order from the Army, the regulations provided that only Personnel Command could issue instructions to revoke those discharge orders or to return a closed case back to a Physical Board. Army Reg. App. E-9(e); id. ¶¶ 2–3(b), 4–24. It is undisputed that Personnel Command never issued any instructions to suspend or revoke those orders. Nor did it authorize the return of Schaefer's case to the Physical Board. See *id*.  $\P$  4–19(p). Instead, other entities (or individuals) within the Evaluation System attempted to circumvent the regulations and act on their own. Indeed, the Correction Board dismissed the violation of the Army's regulations by characterizing the existing regulations as "outdated."

Army and DOD regulations specify the entities that have authority to affect a soldier's discharge from the This delineation of authority ensures a definitive understanding as to whether a soldier has been discharged and is guaranteed full constitutional protections, or remains in the military and enjoys only limited protections. Because the Army disregarded regulations designed to protect constitutional rights, Schaefer would not have been required to demonstrate "prejudice" if this case had arisen in the Second, Third, or Seventh Circuits.

For similar reasons, the result in this case would have been different in the Sixth Circuit too. In the Sixth Circuit, a showing of prejudice is not required when the agency violates regulations that bestow important procedural rights and benefits. Those are precisely the type of regulations the Army violated here. An explicit objective of the Army's regulations establishing the Evaluation System is to "ensur[e] that the rights and interests of ... the soldier are protected." Army Reg. 635-40 ¶ 1–1(c). And the Army's violation of those regulations runs against a crucial element of that Evaluation System.

As explained above, the Army gave Personnel Command authority over final dispositions and instructions affecting disabled soldiers who are being separated from service. The multiphase process created by the regulations is not a rule of administrative efficiency, see *Wilson*, 378 F.3d at 547; rather, the regulations mandating separate and final disposition by Personnel Command were adopted to establish a physical disability evaluation system with four distinct and sequential elements serving unique purposes. DODD 1332.18 ¶ 3.2 (directing the Army to establish an evaluation system that "consist[s] of four elements: medical evaluation; physical disability

evaluation, to include appellate review; counseling: and final disposition."). The ultimate objective of that system is to protect the rights of the soldier. Yet, the Army disregarded the requirement that only Personnel Command may issue instructions that revoke a previously-issued discharge order. It did so even though the Army's regulations governing Schaefer's discharge specify that they are designed not only to protect the Army's interests, but also to ensure that the "rights and interests of ... the soldier are protected." Army Reg. 635-40 ¶¶ 1-1(c). Given the "important procedural safeguard[s]" that the regulations ensure, Wilson, 378 F.3d at 547, the Army "was not free to relax or disregard" the regulations, Bowen, 478 F.3d at 747. No prejudice showing would have been required in the Sixth Circuit.

The Court should grant the petition in this case to resolve the conflict among the courts of appeals.

### II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court also should grant the petition because the decision below conflicts with this Court's decisions under the *Accardi* doctrine. In the decision below, the D.C. Circuit required a showing of prejudice in all circumstances in which an agency violates its own regulations. That determination cannot be reconciled with this Court's decisions holding that a finding of prejudice is not required under these circumstances.

This Court has long maintained that federal agencies must comply with their own regulations. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 155 (1923) (an affected party is "legally entitled")

to insist upon the observance of rules promulgated by [an agency] pursuant to law"); Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 389 (1932) (an agency may not "ignore its own pronouncement promulgated in its quasi legislative capacity"). In United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954), the Court established what is now regarded as the Accardi doctrine—the principle that an agency is obligated to follow its own regulations—but made no mention of a prejudice requirement.

In Accardi, the Court vacated a BIA removal order because the agency violated the "unequivocal terms" of applicable regulations. Id. at 266. By regulation, the Attorney General had vested authority in the Board to dispose of cases. The Court held that by assigning authority to the Board through regulation, the Attorney General could not dictate the Board's decision, even though he had ultimate removal authority. Id. at 266-67. The court explained that "as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." Id. at 267.

This Court's initial application of the Accardi doctrine confirmed the absence of any prejudice inquiry in reviewing an agency's failure to abide by its own regulations. See Service v. Dulles, 354 U.S. 363, 388-89 (1957) (having adopted applicable regulations, the State Department could not "proceed without regard to them"); Vitarelli v. Seaton, 359 U.S. 535, 545 (1959); Yellin v. United States, 374 U.S. 109, 114-21 (1963) (reversing a contempt of Congress conviction based on "the Committee's failure to comply with its own rules"). The Court required agencies scrupulously to follow their own regulations,

finding a deviation from those regulations "illegal and of no effect." *Vitarelli*, 359 U.S. at 545.

In American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), the Court, in applying Accardi, distinguished between agency rules "intended primarily to confer important procedural benefits upon individuals," and "procedural rules adopted for the orderly transaction of business." Id. at 538-39. The Court concluded that violation of the latter need not result in judicial invalidation of the agency's action absent prejudice to the complaining party. Ibid.

Shortly thereafter, the Court reaffirmed that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures," without any reference to an evaluation of individual prejudice. *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974). This Court later emphasized that "[a] court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law." *United States* v. *Caceres*, 440 U.S. 741, 749 (1979).

In all of these cases, this Court recognized that presumptively an agency's failure to follow its regulations is "illegal and of no effect." Vitarelli, 359 U.S. at 545; see Am. Farm Lines, 397 U.S. at 538-39 (discussing this Court's precedent). The "premise that regulations bind with equal force whether or not they are outcome determinative" is implicit throughout this Court's decisions, particularly with respect to procedures designed to safeguard individual interests. United States v. Caceres, 440 U.S. 741, 764 (1979) (Marshall, J., dissenting) (noting that "[i]f prejudice becomes critical" to such determinations government officials "may simply

dispense with whatever procedures are unlikely to prove dispositive in a given case").

In direct conflict with this Court's clear rulings, the D.C. Circuit has joined two other circuits in adopting uniform prejudice requirement circumstances in which an agency departs from its own regulations. This rule conflicts with this Court's precedent and undermines a "firmly established" principle of administrative law, Vitarelli, 359 U.S. at 547 (Frankfurter, J., concurring). The decision below is particularly troubling because the regulations violated by the Army protect important procedural benefits for soldiers moving through the Evaluation System. Indeed, in this case, the Army relied upon its own violation of its regulations to assert personal jurisdiction over Schaefer after he had crossed the constitutional dividing line between soldier and civilian.

This Court has long emphasized that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures ... even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton*, 415 U.S. at 235; see also *Vitarelli*, 359 U.S. at 546-47 (Frankfurter, J., concurring) ("[I]f dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed."); *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) (identifying the "[m]eticulous care" agencies must have in abiding by "procedural requirements prescribed for the protection of [an individual]").

The D.C. Circuit's adoption of a prejudice requirement in all circumstances—including those involving regulations that protect the rights of individuals—cannot be reconciled with this Court's

cases. This Court should grant the petition to resolve this conflict.

#### **CONCLUSION**

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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