No. 18-657

# In the Supreme Court of the United States

JUSTIN GRIMSRUD, PETITIONER

*v.*

DEPARTMENT OF TRANSPORTATION

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the procedures used to terminate petitioner's employment as an air traffic control specialist based on a positive drug test violated petitioner's due process rights because petitioner's employer did not provide him with an aliquot of his urine sample for DNA testing.

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## OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 718 Fed. Appx. 987. The order of the Merit Systems Protection Board denying review (Pet. App. 77a-78a) is unreported. The decision of the administrative judge (Pet. App. 3a-76a) is unreported but is available at 2016 WL 526781.

## JURISDICTION

The judgment of the court of appeals was entered on April 11, 2018. A petition for rehearing en banc was denied on August 31, 2018 (Pet. App. 79a-81a). The petition for a writ of certiorari was filed on November 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1986, President Reagan issued an executive order requiring federal employees in certain sensitive positions to undergo periodic drug testing. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986). Air traffic control specialists are subject to drug testing under Department of Transportation (DOT) regulations implementing that order, as employees whose positions bear "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement or national security." *DOT Order 3910.1D*, https://www.transportation.gov/sites/dot.gov/files/docs/DOT_3910_1D.pdf.

The Department of Health and Human Services (HHS) has established standards for such drug testing, including procedures for collection, transmission, and testing of samples. 73 Fed. Reg. 71,858-71,907 (Nov. 25, 2008); see 5 U.S.C. 7301 note; Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, § 503, 101 Stat. 468. The regulations set forth detailed rules concerning collection and chain of custody in order to ensure the integrity of samples. See 73 Fed. Reg. at 71,884-71,886.

HHS regulations require "split specimen" collections, in which one portion of the specimen is subject to testing by an HHS-certified lab while a second portion is retained for further testing. Once a donor provides a sample to a collector under controlled conditions, the collector pours the urine from the collection container into two specimen bottles (Bottle A and Bottle B), while in the donor's presence. 73 Fed. Reg. at 71,885. The collector documents the collection process on a chain-of-custody form, which bears a unique specimen identification number. See Pet. App. 35a, 36a n.18, 48a; 73 Fed. Reg. at 71,878, 71,883, 71,886.

After the collector pours the sample into Bottle A and Bottle B, the collector must remove a pair of tamper-evident seals from the chain-of-custody form, and place the seals over the caps of the specimen bottles. The donor initials the seals on each bottle, and signs a statement on the chain-of-custody form certifying that the samples were his or hers. The collector then signs the chain-of-custody form and seals the specimen bottles and form in a package for transmission to an HHS-certified laboratory. 73 Fed. Reg. at 71,885. The collector uses packaging that indicates any tampering during transport. *Id.* at 71,883.

The HHS-certified laboratory that receives the samples must verify that the identification number on the chain-of-custody form matches the identification number on the security strip for each of the included vials. Pet. App. 18a; see 73 Fed. Reg. at 71,904. If the identification number does not match, the laboratory must reject the sample. 73 Fed. Reg. at 71,904. The laboratory must also verify that the tamper-evident seal on each specimen bottle is intact, and refuse any sample that shows signs of tampering. *Ibid.* After those verifications, the laboratory that receives the samples tests Bottle A. *Id.* at 71,894. If the drug test of Bottle A is positive, an employee can request testing of the Bottle B sample. In that case, a separate HHS-certified laboratory tests the second sample. *Ibid.*; see Pet. App. 18a. HHS regulations provide that an employee's test shall be deemed negative if either the initial test of Bottle A or the confirmatory test of Bottle B is negative. 73 Fed. Reg. at 71,894.

HHS's regulations provide that specimens collected under the drug-testing protocols "must only be tested for drugs and to determine their validity" and may not

be subjected to DNA testing. 73 Fed. Reg. at 71,880; see *id.* at 71,861. DOT regulations also prohibit DNA testing and any other testing not authorized by DOT regulations. See 49 C.F.R. 40.13(c) (stating that a laboratory "must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations," "may not test a DOT urine specimen for additional drugs," and "is prohibited from making a DOT urine specimen available for a DNA test or other types of specimen identity testing"). The regulations bar such testing because "a properly completed chain of custody conclusively establishes the identity of a specimen." 65 Fed. Reg. 79,462, 79,484 (Dec. 19, 2000). In contrast, DNA testing can only determine "whether a specimen and a reference specimen were produced by the same individual." *Ibid.* A mismatch could reflect a testing error or, alternatively, that "the employee provided a substituted specimen" in the original collection, as the reference specimen, or at both steps. *Ibid.* When a proper chain of custody has been completed, the latter three possibilities are "significantly more probable in practice than the first." *Ibid.* Agency rules therefore do not provide for DNA testing on the ground that a mismatch in such a test would not justify setting aside the drug-test results. *Ibid.*

2. DOT employed petitioner as an air traffic control specialist. Pet. App. 5a. In 2010, petitioner enrolled in an FAA-approved and monitored Treatment and Rehabilitation Plan for alcohol abuse. *Id.* at 6a & n.4, 83a.[*]

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[*] Petitioner testified before an administrative judge at the hearing in which he challenged his dismissal that he was in the program because of an "alcohol-related incident" involving a car accident, but

Under that plan, petitioner was regularly tested for illegal drugs. *Id.* at 5a. Petitioner took a urine test for such drugs in March 2012. *Id.* at 6a. Alere Toxicology Services, an HHS-certified laboratory, tested the portion of petitioner's split sample in Bottle A, and determined that it contained cocaine metabolite. *Ibid.* Petitioner exercised his right to have his second sample tested. *Id.* at 7a; see 73 Fed. Reg. at 71,902. A different laboratory, Medtox Laboratories, Inc., conducted a test of the second sample in Bottle B, which was again positive for cocaine metabolite. Pet. App. 8a.

DOT gave petitioner the option of referral to a rehabilitation program. Pet. App. 8a. After petitioner declined, DOT ended petitioner's employment. *Id.* at 8a-9a.

3. Petitioner challenged his removal before the Merit Systems Protection Board (Board). In advance of his hearing, petitioner asked the administrative judge to order that the DOT produce his urine sample so that he could perform his own DNA tests and additional drug testing on the sample. The administrative judge orally denied petitioner's request. Pet. App. 21a n.14.

The administrative judge then conducted a four-day hearing on petitioner's removal, at which both petitioner and the DOT offered evidence. Pet. App. 4a. Petitioner testified that he never knowingly took any drugs but "whether or not he had ingested them is an entirely different matter." *Id.* at 14a n.10. Petitioner also offered evidence of negative drug tests results on later dates, and evidence that he had passed a polygraph test in which he denied cocaine use. *Id.* at 11a-12a. The government's witnesses included David Green, the director of Alere Toxicology Services, and Stephen

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that "he was not the driver of the vehicle" and "'may have been drugged.'" Pet. App. 11a.

Malone, the specimen collector who administered petitioner's urine collection. *Id.* at 16a-20a, 26a. The parties stipulated that employees who had performed the testing at both Alere Toxicology Services and Medtox Laboratories were appropriately trained and certified, and had tested the samples in accordance with HHS and DOT guidelines. *Id.* at 8a.

The administrative judge upheld petitioner's dismissal in a lengthy opinion. The administrative judge first determined that the agency had established by a preponderance of the evidence that petitioner had tested positive for cocaine. Pet. App. 18a-20a. The administrative judge then rejected petitioner's claims of procedural error in the collection process. She found petitioner had failed to demonstrate any deficiency in the specimen collector's training. *Id.* at 24a-33a. And she determined after detailed analysis of the evidence surrounding petitioner's collection that petitioner had not shown any harmful procedural error by DOT or its specimen collector. *Id.* at 33a-66a. She also upheld the DOT's determination that removal was warranted. *Id.* at 66a-75a.

4. Petitioner filed a petition for review by the Board, raising numerous claims. The Board had only two members at the time of the petition, and they disagreed on whether to institute review. As a result, the administrative judge's decision became the final decision of the Board in petitioner's case, but without precedential value in any future case. Pet. App. 77a-78a; see 5 C.F.R. 1200.3(d).

5. The court of appeals affirmed petitioner's removal in an unpublished per curiam order. Pet. App. 1a-2a.

Petitioner filed a petition for panel rehearing or rehearing en banc, raising two arguments: that the agency official who directed petitioner's removal had not understood his authority to order a penalty other than removal and that the agency had erred in failing to direct petitioner to a rehabilitation program. The court of appeals denied the petition. Pet. App. 81a.

Two judges dissented from the denial of rehearing en banc. Judge Newman, joined by Judge Wallach, argued that due process required the agency to enable petitioner "to obtain a test of his urine specimen for his identity as well as for cocaine." Pet. App. 98a; see *id.* at 90a-98a. The dissent relied in part on a 1982 decision in the Fifth Circuit that had suppressed the results of two employees' drug tests on the ground that the agency had failed to preserve the employees' specimens so that the employees could perform their own testing. *Id.* at 92a-93a (discussing *Banks* v. *Federal Aviation Admin.*, 687 F.2d 92 (5th Cir. 1982)). Judge Wallach also dissented separately to express his view "that the possibility of sample contamination simply has not been eliminated on this record." *Id.* at 99a; see *id.* at 99a-100a.

Judge Lourie, joined by Judge Chen, concurred in the denial of the petition for rehearing en banc. Pet. App. 82a-89a. The concurrence noted that the due process question was "unraised" in the petition for en banc review. *Id.* at 83a. The concurrence also rejected the dissent's suggestion of a conflict with *Banks*, *supra*, which predated "split specimen" procedures and involved removal based on a positive drug test by a single private laboratory that had not preserved samples for retesting. Pet. App. 84a-85a. In contrast, the concurrence observed, petitioner's "specimen was not destroyed, and [petitioner] availed himself of the agency's

procedure permitting additional drug testing of the specimen following a positive result," under procedures that permitted him to "select[] any HHS-certified laboratory to perform the testing on Bottle B." *Id.* at 85a. The concurrence viewed that procedure as consistent with *Banks*, which required that an employee be given "an opportunity . . . to test [the sample] on [his] own behalf to evaluate the accuracy of the government-sponsored tests." *Ibid.* (quoting *Banks*, 687 F.2d at 96) (brackets in original). The concurrence also concluded that this Court's subsequent decision in *California* v. *Trombetta*, 467 U.S. 479 (1984), finding no due process requirement that the government retain and provide defendants with breath samples in criminal prosecutions for drunken driving, "counsel[ed] against applying the reasoning in *Banks* to find a due process violation here." Pet. App. 85a-86a. Finally, the concurrence agreed with the D.C. Circuit decision in *Swaters* v. *United States Department of Transportation*, 826 F.3d 507, 512 (2016), that DOT had reasonable rationales for disallowing release of urine specimens for DNA testing. Pet. App. 87a-88a.

**ARGUMENT**

Petitioner contends (Pet. 5-18) that the termination of his employment as an air traffic control specialist based on a positive drug test deprived him of due process because DOT did not provide him with an aliquot of his urine sample so that he could obtain DNA analysis of that sample. The court of appeals correctly rejected that claim in an unpublished summary affirmance, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's due process challenge to his termination. The procedures that are constitutionally required before the deprivation of a property interest depend on a balancing of the "interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used," "the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens [of] the additional or substitute procedural requirement." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

The extensive procedural safeguards that must be satisfied before the removal of an air traffic control specialist based on a positive drug test are constitutionally adequate under this framework. HHS regulations provide detailed rules for obtaining urine samples and maintaining a secure chain of custody from the time that a sample is obtained until the time that it is tested. 73 Fed. Reg. at 71,858-71,907. In the event that a test is positive, split-specimen procedures afford the employee a right to have a second portion of his or her sample tested by a different HHS-certified laboratory of the employee's choice. See Pet. App. 85a (Lourie, J., concurring in the denial of rehearing en banc).

Thereafter, if both of an employee's samples have tested positive for illegal drugs, the employee has recourse to procedural protections that the D.C. Circuit has appropriately described as "ample." *Swaters* v. *United States Dep't of Transp.*, 826 F.3d 507, 513 (2016). The employee has "an opportunity to challenge the test result in an administrative hearing" before an administrative judge "with subpoena power," at which the em-

ployee has "the right to present evidence, to depose witnesses, and to testify, among other procedural rights." *Ibid.* The employer must establish the employee's removability by a preponderance of the evidence. Pet. App. 9a. And even if the employer meets that burden, its removal decision cannot be sustained if the employee demonstrates any harmful error in the application of the agency's procedures. *Id.* at 21a-22a; see 5 U.S.C. 7701(c)(2)(A). Afterward, the employee has "the right to an administrative appeal" and "to petition for judicial review." *Swaters*, 826 F.3d at 513. The chain-of-custody requirements, split-specimen testing protocols, and multiple layers of review to ensure compliance with those procedures ensure that the risk of an erroneous deprivation of any property interest in federal employment is exceedingly small. See *Eldridge*, 424 U.S. at 335.

Moreover, as the D.C. Circuit has observed, the government's interests in a drug-free air-traffic-controller workforce support its policy against release of urine-sample aliquots for DNA testing. *Swaters*, 826 F.3d at 512. Agency regulations do not allow such releases because "a properly completed chain of custody conclusively establishes the identity of a specimen." 65 Fed. Reg. at 79,484. A DNA test, in contrast, would only indicate "whether a specimen and a reference specimen were produced by the same individual." *Ibid.* As 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. As a result, the agency has reasonably concluded that airline safety is best served by using a chain of custody to match employees

to their samples, in lieu of DNA testing that is susceptible to manipulation. *Ibid.* (stating that "[b]ecause a properly preserved chain of custody renders" handling errors "very unlikely" and an employee's substitution of another person's sample "would arise only if a guilty employee was trying to defeat the test," DOT "quite reasonably" seeks "to avoid reinstating a pilot's license on the basis of a DNA mismatch" in light of its interest in "airline safety").

*California* v. *Trombetta*, 467 U.S. 479 (1984), reinforces that due process does not require DOT to provide petitioner with an aliquot of his urine sample for DNA testing. This Court in *Trombetta* held that the government may use the results of breath-analysis tests against a defendant in a prosecution for drunk driving without preserving the defendant's breath sample and making it available to him for his own testing. *Id.* at 491. The Court stated that the Due Process Clause requires that prosecutions "comport with prevailing notions of fundamental fairness," which requires that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* at 485. But the Court held that this duty did not extend to the preservation of breath samples because such samples would not "be expected to play a significant role in the suspect's defense." *Id.* at 488. The Court emphasized that "the chances are extremely low that preserved samples would have been exculpatory," given the accuracy of testing methods, and that the defendants were not "without alternative means of demonstrating their innocence," such as cross-examination and impeachment of the government's breath-test methodology. *Id.* at 489-490. *Trombetta*'s holding that due process does

not require the government to make the samples underlying scientific tests available to defendants in criminal proceedings strongly suggests that the government need not make such samples available in civil proceedings.

*Little* v. *Streater*, 452 U.S. 1 (1981), on which petitioner relies (Pet. 9), is inapposite. *Streater* concluded that due process required defendants in paternity suits to have access to blood testing even if they could not pay for such testing. 452 U.S. at 16. This Court's *Eldridge* balancing relied on the substantial risk of inaccurate determinations in the absence of blood testing and the high likelihood that blood testing would improve the accuracy of the paternity determination. *Id.* at 13-14. That balancing of interests has little relevance here. The government's rigorous drug-testing protocols do not pose a risk of error comparable to the process of determining paternity with no scientific testing that was at issue in *Streater*, and the additional procedure that petitioner asserts should be constitutionally required would not provide an accuracy benefit comparable to the blood testing sought in *Streater*.

2. Petitioner's case does not present any conflict warranting this Court's intervention. Contrary to petitioner's contention (Pet. 5-6), the decision below does not conflict with *Banks* v. *Federal Aviation Administration*, 687 F.2d 92 (5th Cir. 1982), which found a due process violation in the termination of two FAA employees under a materially different regimen. Each employee in that case was terminated based on a test by a single private lab. The FAA denied the employees' request for "production of the lab samples for independent inspection and testing * * * because the FAA had allowed the proprietary laboratory which it had used to dispose of the samples." *Id.* at 93. The court agreed

with the employees that there had been "a denial of due process based on their inability to have the critical laboratory samples evaluated." *Ibid.* It rejected the argument that the employees had adequate alternative channels to challenge the testing because "the director of the independent testing laboratory was available for cross-examination." *Id.* at 94. The court did not suggest that the government had defended its policy based on any governmental interest in accurate adjudications. See *id.* at 95 (describing the agency as explaining its policy on the ground that testing was performed by a private laboratory and that "since [the FAA] was not in possession of the samples, it was under no duty to preserve or order the control of the samples"). Indeed, the court suggested that agency regulations in effect at that time required retention and production of the samples. *Id.* at 95-96.

That 37-year-old decision on materially different facts does not conflict with the decision here. As noted above, this Court has made clear that whether some additional procedural safeguard is required for a deprivation of a property interest depends in part on the "risk of an erroneous deprivation * * * through the procedures used" and "the probable value, if any, of additional or substitute procedural safeguards." *Eldridge*, 424 U.S. at 335. The risk of an erroneous deprivation under the procedures in *Banks* greatly exceeded the risk of an erroneous deprivation under the procedures in petitioner's case. While *Banks* involved decisions based on testing by a single private lab that destroyed the relevant samples, the current split-specimen protocol entitled petitioner to independent confirmatory testing by an HHS-certified laboratory of petitioner's choos-

ing, and the specimens at issue—while not made available for DNA testing—were never destroyed. Pet. App. 85a (Lourie, J., concurring in the denial of rehearing en banc). Further, the agency declined to release an aliquot of petitioner's sample for DNA testing based on a governmental interest in accurate adjudications that was neither articulated nor considered in *Banks*. See *Eldridge*, 424 U.S. at 335 (explaining that procedural due process analysis must take into account the government's interests).

This case also presents no circuit conflict because the decision below establishes no binding precedent in the court of appeals. After the Board did not grant review in petitioner's case—thereby leaving in place the administrative judge's decision, but without precedential effect for future cases—the court of appeals issued a nonprecedential affirmance under Federal Circuit Rule 36. The decision thus does not establish any precedential due process rule in the court of appeals. See Fed. Cir. R. 32.1(d) ("The court * * * may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent.").

3. This Court's consideration of the question presented would also be premature. No court of appeals appears to have issued an opinion squarely addressing whether the current drug testing scheme for federal employees comports with principles of procedural due process. The D.C. Circuit upheld DOT's prohibition on the release of aliquots for DNA testing in *Swaters*, but the employee in that case argued principally that the DOT regulations were arbitrary and capricious, and did not raise a procedural due process argument. 826 F.3d at 512-513. As noted above, *Banks* did not address the

current federal framework. And in petitioner's case, neither the Federal Circuit nor even the Board issued a precedential disposition setting forth its analysis of the due process claim that petitioner presses. This Court would likely benefit from awaiting decisions addressing the procedural due process question here before undertaking its own review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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