No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

AGUSTÍN AGUAYO,

Petitioner,

v.

**PETE GEREN, Secretary,
Department of the Army,**

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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November 2007

QUESTIONS PRESENTED

In applying the "basis in fact" test established by this Court for federal habeas corpus review of the military's denial of an application for discharge as a conscientious objector:

1. May an otherwise qualified applicant be denied because he did not come to his newly held religious beliefs through "study or contemplation," as held by the D.C. Circuit below, when any such limitation on the allowable faith-development process would create a preference for one religion over another in violation of the Religious Freedom Restoration Act and the First Amendment, and the applicable regulations do not impose such a restriction?

2. Must an otherwise qualified CO applicant come forward with evidence to corroborate his sincerity, beyond his undisputed testimony that he served a tour of duty in combat without loading his weapon, as held by the D.C. Circuit, or is he entitled to prevail unless the Army points to "objective facts [which] cast doubt on the sincerity of his claim," as held by this Court in Witmer v. United States, 348 U.S. 375, 382 (1955)?

3. May the Army support its denial with reasons articulated only after the applicant has filed his petition in court?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Aguayo and the respondent Secretary).

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MISCELLANEOUS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AGUSTÍN AGUAYO respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the denial of his application for a writ of habeas corpus to direct his honorable discharge from the United States Army as a conscientious objector.

OPINIONS BELOW

The D.C. Circuit's precedential Opinion (per Sentelle, J., with Ginsburg, Ch.J., and Randolph, J.) was filed on February 16, 2007; see Aguayo v. Harvey, 476 F.3d 971; Appx. A. The opinion of the United States District Court for the District of Columbia (per Lamberth, J.) was filed August 24, 2006, and is published as Aguayo v. Harvey, 445 F.Supp.2d 29. A copy is Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the denial of a petition for a writ of habeas corpus under 28 U.S.C. § 2241 to a member of the United States Army seeking a discharge, was filed and entered on February 16, 2007. A copy is attached as Appendix A. Appellant's petition for rehearing by the panel or en banc was denied by Orders dated, filed and entered June 7, 2007. Copies are attached as Appendix C. By Order

dated August 29, 2007, under No. 07A174, the Chief Justice extended until Sunday, November 4, 2007, the time for filing a petition for a writ of certiorari in this case. This petition is being filed by postmark on the first business day following that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The federal habeas corpus statute provides, in pertinent part:

> (a) Writs of habeas corpus may be granted by ... the district courts ... within their respective jurisdictions. ...
>
> * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless --
>
> (1) He is in custody under or by color of the authority of the United States ....
>
> * * * *

28 U.S.C. § 2241.

The regulations of the Department of Defense governing the discharge of conscientious objectors, 32 C.F.R. part 75, are attached as Appendix D.

STATEMENT OF THE CASE

This petition arises out of a habeas corpus proceeding, in which petitioner sought review of the decision of the Secretary of the Army, denying his application for discharge as a conscientious objector ("CO"). A CO, as defined by the applicable regulations,

is a person who has firm, fixed, and sincerely held convictions which require that individual to refuse personal participation in war in any form, or at least (in some cases) to oppose the bearing of arms. Those convictions must be religious in nature, and must not have pre-existed the individual's enlistment.

a. Procedural History

The petitioner, Agustín Aguayo, a decorated combat medic, sought discharge from the United States Army pursuant to 32 C.F.R. part 75 and Army Reg. (AR) AR 600-43, as a conscientious objector. After the Army's Conscientious Objector Review Board ("DACORB") rejected petitioner's discharge application, see Parisi v. Davidson, 405 U.S. 34, 38 n.3 (1972) (Army Board's denial of CO discharge satisfies administrative exhaustion requirement), he petitioned the district court for review of that decision, a proceeding heard as a habeas corpus matter. The standard of review requires denial of the writ if the reasons given by the DACORB for its decision have any lawful "basis in fact." See Dickinson v. United States, 346 U.S. 389, 396 (1953).

In his habeas petition, petitioner advanced two principal contentions as to why the DACORB order was invalid. First, the Army violated its own regulation when it denied Mr. Aguayo's application for a meaningless and legally insufficient reason, and without making any legitimate reason for the denial part of the administrative record. Second, even if the Army denied Mr. Aguayo's CO application for the reasons eventually considered by the district court -- that is, reasons articulated by the Army only later, during and for the purpose of litigation -- those reasons have no legally sufficient basis in fact in the administrative record.

On appeal, the D.C. Circuit looked not to the reasons the Army gave when it denied petitioner Aguayo's application for discharge as a conscientious objector, but rather to the revised and expanded reasons it advanced after the litigation had begun. Appx. A, 476 F.3d at 980. The Court quoted the four reasons eventually given for denying the application:

> • Applicant lacks the religious foundation, the underpinning that supports Conscientious Objector beliefs.
>
> • Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status.
>
> • Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army.
>
> • Questionable timing of the application just prior to unit deployment.

Appx. A6-7, 476 F.3d at 975. The court of appeals noted that there was no basis in fact to support the Army's conclusion that Mr. Aguayo held qualifying beliefs before he enlisted, and held that the timing of Mr. Aguayo's application for discharge could not in and of itself support the denial of his application for discharge. Appx. A, 476 F.3d at 981. The court nevertheless found bases in fact in the record to support the Army's first two reasons for denying Mr. Aguayo's application, and on that ground affirmed the district court's denial of habeas relief.

b. Statement of Facts

Agustín Aguayo was not a conscientious objector in November 2002, when at age 30 he enlisted in the Army through the Delayed Entry Program as a "Health-care Specialist." At that time, he was experiencing financial difficulties and was looking for a way to supplement his income and broaden his academic options. Although Mr. Aguayo has "always had strong feelings about war[,]" he later explained, "it wasn't till [he] joined the army that those 'feelings' changed into full fledged objections."

Shortly after he joined the military, Mr. Aguayo began to have doubts about whether he could resolve his moral qualms in a way that would allow him to remain in the Army – as he had hoped and expected he could do when he enlisted. He initially brushed aside those doubts as normal feelings of homesickness. Although he was "very nervous handling the rifle" during basic training, and "began to feel that it was wrong for him," he "didn't say anything at the time because he was hoping that the feeling would go away. He ... wanted to 'be a man' and complete what he had begun." But as his military training progressed, the feelings did not go away; they became stronger. When he trained with live ammunition in preparation for deployment to Iraq, "shooting at life-like silhouettes brought it home to him that he might really have to kill someone and that he didn't believe that he could do that."

A naturalized United States citizen born in Mexico, Mr. Aguayo began to think about what his father (who is a Jehovah's Witness and a pacifist) had taught him, and realized that he was unable to kill

anyone. He put it this way in his application for discharge as a conscientious objector:

> Shortly after being inducted into basic training and especially after being introduced to arms I realized what the Army was truly about. My morals shouted to the very core of my conscience and soul that this was wrong. Progressively it has become overwhelming. I can NO LONGER deny myself. To remain loyal to my convictions, I cannot be part of the army (sic) whether as an active participant or a (sic) unwilling bystander. I have always had strong feelings about war. I didn't like the idea of people killing each other. However, it wasn't till I joined the army that those "feelings" changed into full fledged objections. I realized that I could not hurt, injure, or kill anyone under any circumstances. I realized that I could not participate in any war and that I could not be a part of this entity based on my objections and morals.

CA App. 83a-84a. Agustín Aguayo's deeply-held moral beliefs eventually developed to the point that they prevented him from remaining in the Army, because they prohibit him from participating in war in any form, either as a combatant or as a non-combatant.

In his application for conscientious objector discharge, Mr. Aguayo explained his beliefs in the following way:

> My moral view does not allow me to take the life of another human being. Human life and preserving it is of utmost impor-

> tance to me. I could not possibly contemplate the notion of causing personal harm to others or assisting others in doing so. This also includes participating in any organized movement in a combat zone. I believe that violence of any kind, or supporting thereof, for example being a combat medic (assisting the injured to later go back to a combat area) is not acceptable. My conscience will not allow me to continue down this path. I believe that everyone has some value and I do not believe it is my place to take anyone's life. I cannot walk into any situation and assume responsibility of judge, juror and executioner. I have come to realize that it is not my place to hurt someone or end their life under any circumstance. I believe that there are higher forces which handle these situations.

J.A. 80a. Once petitioner learned about the Army's conscientious objector regulation, he prepared his application for discharge and submitted it several days later, on February 8, 2004.

When Mr. Aguayo submitted his application, he knew that it would not prevent his then-impending deployment to Iraq. While he did not file his application to avoid hazardous duty, he did hope that his filing it would allow him to "avoid having to kill people or to help other people kill -- even if it meant going unarmed to a country where people would be trying to kill me because I am an American soldier." Although Mr.

Aguayo was required to perform guard duty and to carry a weapon in Iraq, he explained, he "purposely did not load his weapon," because he "did not want to be in a position where I could harm anyone, even though this might increase the danger to myself."

After he submitted his application for discharge, the Army investigated the claim as provided in AR 600-43.[1] As required by AR 600-43 ¶ 2-1.e, and 32 C.F.R. § 75.6(c), petitioner was interviewed by a chaplain and a psychologist. The chaplain reported that Mr. Aguayo's mother was Roman Catholic and that his father was a Jehovah's Witness, but that Mr. Aguayo's own personal beliefs did not reflect an identification with any organized religion. The chaplain also reported that while Mr. Aguayo "expressed concern about his ability to be able to take a life in combat" when he was considering enlisting, he enlisted "as a medic, thinking it would lessen his conflict," and that "he would be able to work through his conflict with taking a life in combat." The chaplain concluded that Mr. "Aguayo seems to be sincere in his beliefs although the timing of his request makes it questionable."

Pursuant to AR 600-43 ¶ 2-4.a., and 32 C.F.R. § 75.6(d), the Army appointed Captain Sean D. Foster to investigate Mr. Aguayo's application. On March 14, 2004, Captain Foster conducted a hearing on Mr. Aguayo's application for discharge. At that hearing,

[1] A new version of AR 600-43 was issued Aug. 21, 2006, and became effective on Sept. 21, 2006. See www.ard.army.mil/pdffiles/r600_43.pdf. No material changes are evident in the newer version, as compared with the 1971 version in effect during most of these proceedings.

which was conducted in Tikrit, Iraq, Captain Foster interviewed Mr. Aguayo as well as four witnesses. Each of the witnesses testified that he believed Mr. Aguayo to sincerely hold his stated beliefs. Captain Foster noted in his summary of the testimony that Mr. Aguayo became "visibly disturbed to be talking about [the prospect of having to kill someone] and seemed close to tears."

On March 20, 2004, Captain Foster submitted a written report to the Army. In that report, Captain Foster made the following findings:

> 1 – That PFC Aguayo seems to have a legitimate moral dilemma concerning his role in the military.
>
> A – After reviewing all of the evidence presented, along with all the testimonies made during PFC Aguayo's hearing, it seemed clear to me that PFC Aguayo is absolutely sincere in his stated beliefs that he is opposed to "war in any form". In the testimony given by both PFC Aguayo and his platoon sergeant, SFC Gentry, it became clear to me that PFC Aguayo's role as a "Healthcare Provider" was probably not well-defined by his recruiter and that PFC Aguayo was led to believe he would be performing duties in a health care facility such as a hospital. After finding out what his actual job would be as a medic, PFC Aguayo began to have doubts in his mind as to whether he could truly perform those duties. Despite these doubts, he continued to try to do his job the best that he could because, in

> his own words, he did not want to disappoint his family or his fellow soldiers. His objection was one that grew over time beginning in basic training and solidifying during the Convoy Livefire Exercises during gunnery October 2003. His objection is not based on religious reasons, but rather an internal moral dilemma that, to me, became very evident during the hearing. (The soldier was on the verge of tears through a great deal of the hearing.) Testimony during the hearing, interview with Chaplain Douglas Downs, information submitted in accordance with Annex B, AR 600-43, and letters from individuals that know PFC Aguayo support PFC Aguayo's stated beliefs that he has such an internal conflict that he cannot continue on with his current duties effectively.

CA App. 58a. Captain Foster concluded his report by recommending that the Army discharge Mr. Aguayo as a conscientious objector. Cpt. Foster "believe[d]" not only that this recommendation was "strongly substantiated by the submitted evidence and hearing testimonies," but also that "PFC Aguayo's stated beliefs that he is internally incapable of participating in any form of war without being in a constant state of personal moral dilemma is absolutely sincere. I believe that to deny PFC Aguayo classification as a 1-O conscientious objector would be the incorrect decision." Because Captain Foster recommended approval of his application for discharge, Mr. Aguayo submitted no rebuttal, as would have been his right under AR 600-43 ¶ 2-5.m, and 32 C.F.R. § 75.6(d)(3)(vi).

After the officer appointed by the Army to investigate his application for discharge as a conscientious objector had recommended approval of that application, Mr. Aguayo's file was forwarded through the chain of command as required by AR 600-43 ¶ 2-6 and 32 C.F.R. § 75.6(e). Although petitioner Aguayo's company commander, the officer who knew him most directly, recommended that Mr. Aguayo's application be approved, several other officers higher in Mr. Aguayo's command eventually recommended that his application for discharge as a conscientious objector be denied. None of these officers either reviewed Mr. Aguayo's complete application or interviewed him concerning his beliefs. Nor were they privy to the full report of the investigation officer. Other than Lieutenant Colonel Sinclair, none of them even met Mr. Aguayo. Every officer who actually interviewed Mr. Aguayo concerning his conscientious objector beliefs found him to be sincere.

Although Mr. Aguayo attempted to submit rebuttals to these negative recommendations, none of his rebuttals was ever forwarded to the DACORB. On July 30, 2004, the Army officially denied Mr. Aguayo's application for discharge as a conscientious objector. The Army's denial letter reads in full:

> 1. The DA [Department of the Army] Conscientious Objector review Board (DACORB) has reviewed the application of PFC Agustin Aguayo for Conscientious Objector Status (CORB).
>
> 2. After thorough examination of the Case record, the DACORB determined that the applicant did not present convincing

evidence, IAW 600-43, that the applicant's stated beliefs warrant award of 1-O status.

3. A copy of the case record will be included in the OMPF, CMIF, and MPRJ IAW AR 640-10.

BY ORDER OF THE SECRETARY OF THE ARMY

CA App. 75a. It was signed by Col. Donald W. Browne, Jr., DACORB president.

On August 5, 2005, Agustín Aguayo petitioned the United States District Court for the District of Columbia under 28 U.S.C. § 2241 for a Writ of Habeas Corpus. Following the district court's August 15, 2005, issuance of an Order to Show Cause, the parties filed a joint motion to stay the proceedings. By agreement of the parties, the Army withdrew its decision denying Mr. Aguayo's application for discharge and agreed to consider in a de novo review Mr. Aguayo's rebuttal to the adverse officer recommendations. (The failure to give such consideration, in violation of the applicable regulation, had been one of the claims in the initial habeas corpus petition.) On September 19, 2005, Mr. Aguayo submitted to the Army his rebuttal under AR 600-43 ¶ 2-5.m, and 32 C.F.R. § 75.6(d)(3)(vi).

Petitioner's rebuttal noted that the negative recommendations were by officers who had not only not read the final version of his application for discharge and the complete report of the investigation officer, but who had also never interviewed him concerning his beliefs. Following Mr. Aguayo's rebuttal, the Army never asked any of the officers who made negative recommendations either to interview Mr. Aguayo or to review the complete file to see whether it would change

their recommendations. Instead, in November 2005, the DACORB again "convened to consider [Mr. Aguayo's] request for discharge 1-O classification." One member of the DACORB -- the DACORB's lawyer-representative from the office of the Staff Judge Advocate -- voted to approve Mr. Aguayo's application for discharge. The other two members (the Chaplain member of the DACORB and the DACORB president) voted to disapprove the application. CA App. 115a.

On January 30, 2006, on the basis of this split vote, the Army once more officially denied Mr. Aguayo's application for discharge as a conscientious objector. CA App. 116a. The Army's denial letter reads in full:

> 1. The DA [Department of the Army] Conscientious Objector Review Board (DACORB) has reviewed the application of PFC Agustin Aguayo for Conscientious Objector Status.
> 2. After thorough examination of the Case Record, the DACORB determined that the applicant did not present clear and convincing evidence, IAW 600-43, that the applicant's stated beliefs warrant award of 1-O status.
> 3. A copy of the case record will be included in the OMPF, CMIF, and MPRJ IAW AR 640.10.
>
> BY ORDER OF THE SECRETARY OF THE ARMY

J.A. 116a.[2] The decision of the DACORB is the final decision of the respondent Secretary of the Army. AR 600-43 ¶2-8.a, and 32 C.F.R. § 75.6(f).

[2] This decision differs from the Board's prior order only in two minor respects.

On March 13, 2006, petitioner Aguayo filed an amended petition for writ of habeas corpus. Eleven days later, on March 24, 2006 (nearly two months after the DACORB's final decision was rendered), the DACORB President submitted to Mr. Aguayo's commanding officer a memorandum which purported to be a more detailed recitation of DACORB's reasoning, but which he claimed was "not an exhaustive or all-inclusive list of reasons for the denial of the application." The memorandum asserts that the DACORB denied Mr. Aguayo's application, at least in part, for the following reasons:

- Applicant lacks the religious foundation; the underpinning that supports Conscientious Objector beliefs
- Applicant has not provided any significant source of his beliefs; conscience or moral views that would warrant Conscientious Objector status
- Appears that applicant held beliefs prior to entry to the Army. Although these could have crystallized after entry, it still appears that these beliefs were considerable prior to entry with no significant identification of these beliefs at entry to the Army
- Questionable timing of application just prior to unit deployment

J.A. 117a. Although filed with the district court as an exhibit to the respondent's answer to the amended habeas petition, this memorandum was never made a part of the administrative record.

After the Army's denial of his discharge application was upheld in the district court, petitioner Aguayo refused to submit to a second deployment into a war

zone. For this conduct he was convicted under the Uniform Code of Military Justice at a general court martial on March 16, 2007, of "desertion to avoid hazardous duty" and of "missing movement." In light of his direct and forthright testimony at the court martial, however, the presiding judge sentenced him to only eight months' confinement and to a "bad conduct" (not a "dishonorable") discharge. He completed service of his sentence (with credit for time already served in pretrial detention) on April 25, 2007, and is presently on "appellate leave," a status which carries ongoing responsibility to obey military authorities, but no active duties. On account of his continuing formal "custody," the case is not moot and he can benefit (through upgrade of the discharge) from a ruling in his favor. See Parisi v. Davidson, 405 U.S. 34, 46 n.15 (1972).

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii) The United States District Court had subject matter jurisdiction of this case under the habeas corpus statute, 28 U.S.C. § 2241(c)(1). See Schlanger v. Seamans, 401 U.S. 487 (1971). On appeal from the district court's ruling, the Court of Appeals' jurisdiction rested upon 28 U.S.C. §§ 1291 and 2253(a).

REASONS FOR GRANTING THE WRIT

1. The opinion of the court below disallowing a conscientious objector claim because the applicant's beliefs were not developed through "study or contemplation" conflicts with decisions of other Circuits, while violating the Religious Freedom Restoration Act and the First Amendment's Establishment Clause.

The decision of the court below raises important questions regarding the interpretation and application of the military's Conscientious Objector regulation against the backdrop of the First Amendment. On this same question -- the manner in which the quality and extent of a CO applicant's religious training are evaluated -- the decision below also conflicts with those of several other circuits. The precedent set by the decision in this case places at risk the religious freedom of all members of the military who are stationed overseas.

This case involves the well-established right of a member of the armed forces to an honorable discharge if, after the soldier enlists, his or her religious beliefs change or solidify to the point that they no longer allow participation in war in any form. Although this Court has held that conscientious objectors in the military have no constitutional right to be discharged on that basis, see Gillette v. United States, 401 U.S. 437, 462 (1971), the Department of Defense since 1962, in "recogni[tion of] the historic respect in this Nation for valid conscientious objection to military service," Parisi v.

Davidson, 405 U.S. 34, 45 (1972), has provided for the discharge of members who develop qualifying beliefs after entering military service. The Defense Department provides for the discharge of conscientious objectors because "the Congress ... has deemed it more essential to respect a man's religious beliefs than to force him to serve in the armed forces." DoD Directive No. 1300.6 (May 10, 1968), as quoted in Parisi, 405 U.S. at 45; see also 42 U.S.C. § 2000bb et seq. (Religious Freedom Restoration Act, expressing same Congressional judgment and policy).

The court below claimed a "basis in fact" to support the Army's second reason for denying Mr. Aguayo's CO discharge application on the fact that he did not develop his CO beliefs through "study or contemplation." Appx. A, 476 F.3d at 981. This holding authorizes the denial of conscientious objector status to applicants who did not develop their otherwise qualifying religious beliefs in the particular manner approved by the Army. The Establishment Clause cannot tolerate such preference to one form of religion over another, and the Religious Freedom Restoration Act plainly disallows it. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

Under the Army's regulation, "whether [the applicant's] ethical or moral convictions were gained through 'activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated'" is simply one of a half dozen "relevant factors" listed for "consider[ation]" by military decision-makers in assessing whether an applicant's stated scruples arise out of "religious training and belief," as required. 32 C.F.R. § 75.5(c)(2)(ii). This consideration

cannot be turned into a sine qua non without raising the serious constitutional problems that this Court's landmark decision in Welsh v. United States, 398 U.S. 333 (1970), set out to avoid.

The reason given by the Army to which the court below referred was the assertion that petitioner did not "provide any significant source of his beliefs." When an application for discharge as a conscientious objector is based on moral or ethical beliefs, the regulation provides that in judging the sincerity of the applicant, the Army is to look to whether the applicant gained his convictions "through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated." AR 600-43, ¶ 1-7.a(5)(a). Since petitioner's beliefs are not traditionally religious, the Army's conclusion that he did not "provide any significant source of his beliefs," must be read to mean that the DACORB thought he did not develop his beliefs through a process that was similar to the ways that traditionally religious people develop beliefs. This is the way the district court understood this reason. Appx. B, 445 F.Supp. 31, 32.

The decision of the D.C. Circuit is contrary the law in the other circuits. See Lobis v. Secretary of the Air Force, 519 F.2d 304, 307 (1st Cir. 1975) (nature and quality of religious training unimportant if applicant "has provided a plausible explanation" for development of beliefs); accord, United States v. Burton, 472 F.2d 757, 760 (8th Cir. 1973); United States v. Timmons, 464 F.2d 385, 387-88 (9th Cir. 1972); United States v. Stetter, 445 F.2d 472, 479 (5th Cir. 1971); see also Kemp v. Bradley, 457 F.2d 627, 628-29 (8th Cir. 1972); Peckat v. Lutz, 451 F.2d 366, 369 (4th Cir. 1971); Reiser v.

Stone, 791 F.Supp. 1072, 1075-76 (E.D.Pa. 1992) (Pollak, J.) (Army's finding of insincerity based on absence of "a development-of-convictions methodology that is comparable to the rigorous means by which traditional religious convictions are formulated" not supported by basis in fact where applicant provided logical explanation for development of beliefs).

The point of the regulation is not to prescribe a certain type of religious development, which would surely violate the First Amendment's Establishment Clause, but rather to put traditionally religious and non-religious objectors on an equal footing, as required by this Court in Welsh v. United States, 398 U.S. 333 (1970). No particular form of training is or can be required, and findings of lack of "depth" on these grounds have been routinely reversed. Caverly v. United States, 429 F.2d 92, 94 (8th Cir. 1970) ("The extent of religious training need not measure the depth of religious conviction."); United States v. Hesse, 417 F.2d 141, 146 (8th Cir. 1969) ("To hold sincere religious conviction, one does not have to be a theologian").

The regulation simply presupposes that non-religious objectors will develop their varied beliefs in ways that are similar to the range of paths by which traditionally religious people develop beliefs. Some will come to embrace a faith by study and contemplation, some by experience and reason, others by inspiration or through prayer, and some by sudden revelation. Many, of course, simple acquire their beliefs through childhood inculcation amounting to little more than family tradition, reinforced perhaps by Sunday school, with no "rigor [or] dedication" to speak of at all. There is nothing in the record, and nothing that is such common

knowledge as to be judicially noticeable, to support the Army Board's implicit conclusion, endorsed by the decision below, that the way Mr. Aguayo developed his beliefs is not readily comparable to the way that at least a substantial number of traditionally religious individuals develop theirs.

The closest anything in the record comes to addressing this issue is the comment of the chaplain that because Mr. Aguayo's claim does not grow from a faith tradition, it is "difficult to assess the depths of his beliefs." Appx. A, 476 F.3d at 973. The chaplain's statement fails to demonstrate that Mr. Aguayo did not develop his beliefs through a process that similar to that experienced by some traditionally religious people. While it is true that Mr. Aguayo did not develop his beliefs after rigorous training, study, and contemplation, that fact alone cannot be a reason to deny his application, especially when scholars of religion have concluded that faith development occurs in many ways -- including dramatically, and over a short period of time. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE, lect. 10, at 194 (Collier 1961). If it demonstrates anything it is either that it did not occur to the chaplain to make such a comparison, or that the chaplain lacks sufficient training and experience to make a wide-ranging analysis of this kind. Without such evidence, there is no basis in fact in the record to support the Army's second reason for denying Mr. Aguayo's application. In overlooking this important fact, the decision below wandered into serious error requiring this Court's correction on certiorari.

Since the standard imposed by the court below is not based on any necessary reading of the regulation,

and leads to a serious constitutional difficulty, it is a reading that any court is bound to eschew. See United States v. Lopez, 514 U.S. 549, 562 (1995); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 628-30 (1993) (compiling cases on avoidance of unnecessary constitutional issues); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

The writ of certiorari should be granted to resolve this split in the Circuits and to rein in a divergent precedent which threatens fundamental values of religious freedom for military members.

2. The decision below is contrary to this Court's precedent enforcing the "basis in fact" test.

The decision below is also contrary to this Court's precedent. The opinion contends that "the Army is entitled to require more than mere assertion of belief, and its regulations accordingly emphasize the applicant's 'outward manifestation of the beliefs asserted' as well as the judgments of those who review each application." Appx. A, 476 F.3d at 980. Not only is that claim factually unfounded (Mr. Aguayo served an entire tour in Iraq carrying an unloaded weapon, based on his refusal to bear arms), but it was contrary to binding authority.

It has been settled for more than half a century that the nature of conscientious objection often precludes an applicant's making "out a prima facie case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to partici-

pation in war in any form." Witmer v. United States, 348 U.S. 375, 381 (1955). Accordingly, and contrary to the holding of the court below, a CO applicant need only assert qualifying beliefs to establish a prima facie case, and the claim must be granted unless "objective facts cast doubt on the sincerity of his claim." Id. 382.

Other circuits have had no difficult understanding and applying this precedent. See, e.g., DeWalt v. Commanding Officer, 476 F.2d 440, 442 (5th Cir. 1973) ("The Army cannot merely disbelieve an applicant for conscientious objector discharge if his case is prima facie, see Rothfuss v. Resor, 443 F.2d 554 (5th Cir. 1971), but must have a basis in fact for denial.").

DACORB is required to articulate a reason or reasons for its decision, and that reason must have a "basis in fact" in the administrative record. A "basis in fact" analysis requires two steps. The first is whether evidence actually exists in the record to support the reason for denial stated by the DACORB. Dickinson v. United States, 346 U.S. 389, 396 (1953). The second is whether that evidence is legally sufficient. For example, take a case in which the DACORB denies an application for a CO discharge for the reason that the applicant is not opposed "to war in any form." Suppose further that the only basis in the record for this reason is a statement by the applicant that he would willingly participate in a "spiritual war" to defeat the forces of the Devil in the End Times. While having a basis in the record, the DACORB's finding would not be legally sufficient to support the denial of the CO claim. See Sicurella v. United States, 348 U.S. 385, 388 (1955) (willingness to participate in "spiritual war" not inconsistent with oppo-

sition to "war in any form," within the meaning of the Selective Service statute).[3]

Notably, neither any reviewing officer, nor the DACORB itself, ever concluded that Mr. Aguayo was anything but sincere in his profession of beliefs.[4] The suggestion that his beliefs, while sincere, do not qualify him for discharge is simply mistaken.

The decision of the court below would turn Witmer on its head. Rather than requiring the Army to establish a basis in fact for disbelieving the applicant once he has made out a prima facie case, it demands that the applicant provide an objective basis for crediting the claim. Although petitioner did provide the Army with concrete evidence to credit his claim, even if he had not, under Witmer, the Army could not deny his application absent concrete evidence to doubt his sincerity. Because the decision below directly contradicts this Court's holding in Witmer, a foundational

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[3] Similarly, an applicant would not be disqualified on account of willingness to participate as a prosecutor in the "war on drugs" or to participate as a port inspector in the "war on terror." Neither "war" is what is meant by "war in any form" under the CO discharge regulation.

[4] The chaplain did not "express doubts as to the depth and source" of Mr. Aguayo's beliefs. See 476 F.3d at 980. Rather, the chaplain reported that Mr. Aguayo "seems to be sincere" (despite the timing issue), and found the depth of his beliefs "difficult to assess." Quoted in 476 F.3d at 973. But even if the chaplain had actually "expressed doubts," this would not amount to a basis in fact unless the chaplain had supported those doubts with specific reference to something petitioner had done or had said to the chaplain during their interview.

precedent explaining the "basis in fact" test, the writ should be granted.

As this Court held long ago, denial of a prima facie valid claim "solely on the basis of suspicion and speculation" is impermissible. Dickinson, 346 U.S. at 397, quoted with approval in Hager v. Sec'y of the Air Force, 938 F.2d 1449, 1463 (1st Cir. 1991) (Breyer, J., concurring). Certiorari should also be granted on this ground.

3. The acceptance by the court below of "reasons" for denying a CO application proffered by the Army only during the litigation affords less civilian scrutiny to the military decision than is required by this Court's "basis in fact" test.

One other point in the case warrants this Court's review. By allowing the Army to revise the reasons attributed to the DACORB for denying petitioner Aguayo's application after he had filed his amended habeas corpus petition and filed his opening legal memorandum, the court below invited manipulation and abuse of this Court's prescribed limited scope of review.

None of the reasons given in the DACORB's purported supplemental memorandum corresponds to anything found in the decision notes of the individual Board members, see CA App. 115a, and they bear little if any relation to the statement of reasons that the DACORB issued in accordance with its normal procedures, either after initially reviewing Mr. Aguayo's application or after the initial voluntary remand. The potential of this irregular procedure to undermine both the applicant's due process rights and the civilian court's power of review to ensure minimally fair deci-

sionmaking by the Service Branches in their assessment of CO applications also warrants this Court's consideration and disapproval.

At this time, with the United States apparently facing another era of expanded military conflict, the Court can expect again to see more cases that raise these issues, it is did from 1969 to 1973. While there has never been a large number of conscientious objectors, all those stationed overseas whose claims are denied, but which are strong enough to warrant presentation for judicial review on habeas corpus, must file in the District of Columbia. Guidance from this Court correcting the erroneous decision of the court below is therefore particularly important in setting precedent for all military CO cases arising while on deployment.

Certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner AGUSTÍN AGUAYO prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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November 4, 2007.