No.

In the

Supreme Court of the United States

JOHN C. KLUGE,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent,

ON Application on Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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APPLICATION TO THE CHIEF JUSTICE FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAMES RENNE
Counsel of Record
4201 Wilson Blvd. Ste. 110521
Arlington, VA 22203
(703) 869-0418
Email: jrenne@rennelaw.com

Counsel for Petitioner John Kluge

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of the Appeals for the Federal Circuit:

Pursuant to Supreme Court Rule 13.5, Applicant John C. Kluge respectfully requests a sixty (60) day extension of time to file a petition for a *writ of certiorari* in this matter up to and including July 22, 2023. In support thereof, Applicant states the following:

1. The judgment from which review is sought is *Kluge v. Department of Homeland Security*, Case No. 21-1787 (Fed. Circ. Feb. 22, 2023), decided by the Federal Circuit on February 22, 2023. That decision is attached as Appendix A.

2. The current deadline for filing a petition for *writ of certiorari* is May 23, 2023. Per Supreme Court Rule 13.5, application is being filed at least 10 days prior. The Government does not oppose extension. No previous extension has been sought and jurisdiction rests on 29 U.S.C. §1254(1).

3. Petitioner just learned of yesterday's Federal Circuit decision in *Nordby v. Social Security Administration*, Case No. 21-2280 (Fed. Cir. May 11, 2023) which deals with precedential interpretation of the exact statutory language underlying this case and needs more time to fully digest and evaluate the implications of that decision.

4. This case presents important questions concerning veterans benefits under the Uniformed Services Employment and Reemployment Rights Act ("USERRA" at 38 U.S.C. §4301 et seq.) particularly focused on long-standing Office of Personnel Management (hereinafter "OPM") published Guidelines that starting in 2009 incorrectly imposed a blanket eligibility prohibition on veteran benefits under 5 U.S.C. § 5538 (hereinafter "Differential Pay") for reservist performing active duty -- even those connected to contingency operations -- if they volunteered[1] for such duty under 10 U.S.C. § 12301(d), a provision of law allowing individual reservists to fill hundreds of manning shortfalls in deploying units.[2]

[1] USERRA defines "service " as "performance of duty on a voluntary or involuntary basis…." 38 U.S.C. §4303(13).

[2] See *OPM Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538*, Original Issuance Date: December 8, 2009 Revision Date: June 23, 2015 at 18 ("*Qualifying acting duty*…does not include voluntary active duty under 10 U.S.C. 12301(d) ..." https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/reservist-differential/policyguidance.pdf#nameddest=SectionI.

Petitioner sought to correct OPM's pervasive error and obtain entry of a corrective order from MSPB, pursuant to USERRA's 38 U.S.C. § 4324(b) and (c), to clarify and compensate himself and a putative class of thousands of federal civilian reservists who have similarly been denied eligibility because of OPM's Government-wide Guidance.

5. This blanket prohibition on eligibility is contrary to repeated Federal Circuit precedential opinions interpreting the eligibility statutes in question. *O'Farrell v. Department of Defense*, 882 F.3d, (Fed. Circ. 2018) (hereinafter "O'Farrell")(repudiating the same OPM statutory interpretation arguments underpinning their blanket exclusion Guidance and holding that the Differential Pay statute was covered within the "Statutory Framework….5 U.S.C. § 5538(a)" of the opinion), *Adams v. Department of Homeland Security*, Case No. 20-1649 (Fed. Circ. 2021)(hereinafter "Adams")(affirmed *O'Farrell* while distinguishing that Differential Pay duty must have a "connection" to a contingency operation but also, inexplicably, affirming the offending OPM Guidance's blanket exclusion for all §12301(d) duty even quoting it directly in the opinion), and yesterday's *Nordby v Social Security Administration*, Case No. 21-2280 (Fed. Circ. May 11 2023)(subject to further analysis, appearing to affirm both *O'Farell* and *Adams* but failing to adequately correct or simply rescind the offending OPM Guidance language and failing, once again, to incorporate the common issue approach advocated by Petitioner -- a simple second-step analysis to examine orders for reference to a "contingency operation" or similar fund cite which would facilitate a comprehensive resolution to all these cases in one stroke).

6. The lower courts are grasping around the core facts and issues creating a significant level of confusion on Differential Pay eligibility. The eligibility issue is not affected by the voluntary or involuntary nature of service under 10 U.S.C. § 12301(d) but whether or not it was "connected to a contingency operation" as the *Adams* court held. Yet the recent opinions continue to further confuse by not adequately correcting or rescinding OPM's blanket exclusion Guidance on voluntary service.

7. Petitioner and the putative class he represents have written orders, stored in DFAS databases, that specifically cite a contingency operation or a contingency operation funding account thereby representing the one common answer for the elusive prong of connection to a contingency

operation per precedent. This is the simple solution that Petitioner has presented to the Courts in this and a parallel case in the U.S. Court of Federal Claims, *Kluge/Schwieger et al., v. U.S.A*., Case No. 21-2131C (Senior Judge Loren Smith) (Tucker Act/Back Pay Act relief sought). If Petitioner's two-step common issue approach is adopted by this Court, it would not, in fact, require further "adjudication" *per se* but simply result in ministerial accounting and calculations from database comparisons that the Government could be ordered to perform -- with oversight by class counsel – and would address once and for all the entirety of these claims. As this Court has previously held, it would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-mart Stores, Inc., v. Dukes*, 564 U.S. 338, 341 (2011).

8. MSPB's dismissal of Petitioner's claim under 38 U.S.C. §4324(b) granting a private right of action to service members directly against OPM is also an important question of law presented. §4324(c)(1) states that MSPB "shall adjudicate" such claims. USERRA further states that after adjudication "if the [MSPB] determines that …OPM has not complied with [USERRA] the Board shall enter an order requiring…OPM to comply…" and for compensation to be made by the Government as a whole not necessarily OPM. *Id* at §4324(c)(2). MSPB summarily dismissed Petitioner's claim and OPM as a party without consideration or comment. The Federal Circuit wrongly affirmed concluding that USERRA's §4324 only applies in cases of OPM being the direct employer of the service member or in situations where USERRA directs OPM to assist in finding a suitable job for returning service members. While the second reason is covered in an entirely separate section found at USERRA §4314(b)(1), the former results in a redundancy since OPM is already included in "Federal agencies" and would render the statutory language superfluous and without meaning or effect. The results of the opinion also run counter to this Court's precedent regarding interpretation of veteran benefits.[3]

[3] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."

9. This case also concerns the important issue of a persistent bureaucratic nullification and refusal to give effect to Judicial Branch precedential decisions that, unfortunately, has been perpetuated by the Federal Circuit's decision to affirm the MSPB's denial of class certification. The MSPB found that the "fairest and most efficient way" (5 C.F.R. § 1201.27(a)) to adjudicate potentially thousands of claims that have arisen from OPM published error regarding eligibility is to force thousands of mostly enlisted service personnel to separately retain attorneys and litigate against the U.S. Department of Justice in hard fought legal maneuvering after deciphering a mind-numbing jurisdictional landscape before a jungle of different federal tribunals and district courts -- including "adjudications" before potentially hundreds of different offices of Inspectors General. *See* USERRA §4325(b). This finding is not convincing especially knowing many putative class members are enlisted and do not have the resources or ability to readily take on the Government. The fact that some class members could very well be next of kin of KIA or WIA personnel who volunteered and were deemed ineligible as a class also places that reasoning in its proper perspective. While we have settled law after over a decade of effort on the underlying interpretation of Differential Pay eligibility statutes for the putative class, what is sorely needed is 'settled compliance' by OPM and the Federal agencies hiding behind its Guidance**.**

10. There also exists a "split" of sorts in the circuit. Petitioner highlighted in briefing to the Federal Circuit an inherent contradiction among the panel decisions in *O'Farrell* and *Adams*, not addressed in the present opinion. While *O'Farrell* is controlling on the underlying interpretation of the operative language overturning OPM and Federal agencies' exclusion of voluntary active duty under 10 U.S.C. §12301(d) under its "Statutory Scheme," *Adams* included highly questionable contradictory OPM Guidelines, even quoting the offending language in the opinion. *See O'Farrell* at 3-4. This is impossible to reconcile with Adams' earlier central holding that some voluntary active duty is eligible if connected to a contingency operation. Yesterday's *Nordby* opinion purports to address this issue but still fails to do so. The *Nordby* Court's treatment only adds to the continued confusion by being defensive of the *Adams* panel without adequately and affirmatively correcting the underlying error or rescinding it altogether. Nonetheless, *O'Farrell's* prior precedence holding controls concerning voluntary duty related to veteran

benefits. Petitioner sought immediate clarification in lower courts. None came at the lower court level. This Court can clarify the law to avoid further over-litigate or confusion.

11. The Applicant states that a 60-day extension of time to file a petitioner for writ of certiorari is necessary and appropriate for the following reasons: An extension will provide needed time to ensure that the critical and complex issues in this matter are organized and presented in a succinct, thorough, and clear manner. Petitioner and current counsel are in discussions to retain experienced Supreme Court practitioners and need more time to conclude that effort. An extension will be necessary for new counsel to become familiar with the issues.

12. In addition, Applicant's current counsel, has been otherwise engaged in pressing professional and personal matters and will continue to be likewise engaged in such matters in the coming weeks. Similarly, Petitioner Kluge himself is participating in the legal briefing while he maintains full-time GS15 employment as a federal civilian attorney limiting the time he can dedicate to this petition.

13. Applicant believes that the extension poses little prejudice to the Government nor would result in undue delay in the Court's consideration of the petition and that good cause exists to grant it.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that an order be entered extending the time for filing a petition for *writ of certiorari* to July 22, 2023.

Dated: May 12, 2023

Respectfully submitted,

/s/James Renne

James Renne
U.S. Supreme Court Bar No. 274368
4201 Wilson Blvd.
Suite 110521
Arlington, VA 22203
(703) 869-0418