No. _____

In the Supreme Court of the United States

EVAN H. NORDBY,

Applicant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Application for an Extension of Time
to File Petition for a Writ of Certiorari to the
United States Federal Circuit Court

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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

1. Pursuant to Supreme Court Rule 13.5, Applicant Evan Nordby respectfully requests a 14-day extension of time, to and including February 13, 2024, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Federal Circuit issued an opinion on May 11, 2023. A copy of that opinion is attached as Appendix 1a. The Federal Circuit then denied Applicant's timely petition for a rehearing en banc in an order issued on November 1, 2023. A copy of that order is attached as Appendix 9a. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on January 30, 2024. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case is of critical importance to hundreds of thousands of Americans who are employed as federal civilian employees and serve in the Armed Services' reserve components.

4. Congress enacted the differential pay statute, 5 U.S.C. § 5538, to alleviate the financial burden that reservists experience when they are called to active duty at pay rates lower than their federal civilian salaries. This statute mandates that the government compensate for the pay difference to ensure these reservists do not suffer financially for their service. Federal civilian employees are entitled to differential pay when performing active duty pursuant to an order under a provision of law referred to in section 101(a)(13)(B)

of title 10. This section includes various statutory authorities and a catch-all clause for service during wars or national emergencies declared by the President or Congress.

5. In a recent decision that deviated from established interpretations of this statute, the Federal Circuit ruled in *Adams* v. *DHS*, 3 F.4th 1375, 1379 (Fed. Cir. 2021), that reservists claiming differential pay under Section 101(a)(13)(B)'s catch-all clause must demonstrate they were directly called to serve in a contingency operation. This standard has led the Federal Circuit to deny claims for differential pay even for reservists, like the petitioner, whose activation orders were issued during a time of national emergency.

6. The pivotal question in this case is whether the *Adams* ruling is correct—specifically, whether a federal civilian employee called to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

7. The question in this case is of national importance to hundreds of thousands of reservists. Approximately 1,200,000 Americans hold positions in the United States Military Reserves, many of whom play a crucial role in this country's national defense. Dep't of Def., 2020 Demographics Profile of the Military Community 3 (2020). Reservists, unlike full-time active-duty servicemembers, hold civilian employment outside of the military, with many employed by the Federal government. When called to active duty, reservists must leave their current employment for an extended period, during which they often experience a significant difference between their civilian salary and the substantially lower military reserve salary. Congress passed the differential pay statute to alleviate this financial burden on reservists by compensating reservists for the difference between their military

and civilian salaries when called to active duty. *See* Brief for Members of Congress as *Amici Curiae* Supporting Petitioner, *Adams* v. *Dep't of Homeland Sec.*, 142 S. Ct. 2835 (2022) (No. 21-1134).

8. Many reservists, including Applicant, called to active duty are activated under 10 U.S.C. § 12301(d), which orders an individual to active-duty service upon the consent of the reservist. This provision is one of the most common mechanisms for calling reservists to active duty. *Id.* at 4.

9. The *Adams* holding has left reservists called to active duty under § 12301(d) in financial limbo. These reservists now have no way of knowing whether they qualify for differential pay and face a difficult choice: either engage in active-duty service and endure these financial burdens or decline the call to serve their country. This dilemma poses not only a financial burden on reservists, but also a significant threat to this country's national security because the reserve component constitutes a crucial element of our national defense. *See* Lawrence Kapp, et al., Cong. Rsch. Serv., RL30802, *Reserve Component Personal Issues: Questions and Answers* 9 (2021) (noting that reservists have been heavily relied on in the post-Cold War era). Therefore, this case involves a significant question of law that is of the utmost importance for this Court to address.

10. Additionally, this issue of law cannot be further developed in the lower courts because the Federal Circuit has exclusive jurisdiction and has squarely answered the question. Future cases will not provide additional insight into this question, as the MSPB and Federal Circuit view *Adams* as settled law. *See*, *e.g.*, *Barrett* v. *Dep't of Veteran Affs.*, No. DC-4324-21-0017-I-4, 2023 WL 2632342 (Mar. 24, 2023). This issue is ripe for this Court

to review.

11. Applicant respectfully requests an extension of time to file a petition for a writ of certiorari. A 14-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel have a number of other pending matters that will interfere with counsel's ability to file the petition on or before January 30, 2024.

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including February 13, 2024.

Dated: January 19, 2024

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

EVAN H. NORDBY,
Petitioner

v.

SOCIAL SECURITY ADMINISTRATION,
Respondent

2021-2280

Petition for review of the Merit Systems Protection Board in No. DE-4324-19-0012-I-1.

Decided: May 11, 2023

TOBY J. MARSHALL, Terrell Marshall Law Group PLLC, Seattle, WA, argued for petitioner. Also represented by ADRIENNE D. MCENTEE.

MARGARET JANTZEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by BRIAN M. BOYNTON, CLAUDIA BURKE, PATRICIA M. MCCARTHY.

Before LOURIE, HUGHES, and STARK, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Evan Nordby appeals the final decision of the Merit Systems Protection Board denying his request for differential pay for his military service in the Judge Advocate General's Corps of the Army Reserve. Because Judge Nordby's service does not meet the statutory requirements for differential pay, we affirm.

I

Judge Nordby served as an administrative law judge with the Social Security Administration's Office of Hearings Operation (agency). During the relevant period and while employed at the agency, he was also a First Lieutenant in the Judge Advocate General's Corps of the Army Reserve. From January to May 2017, Judge Nordby was activated under 10 U.S.C. § 12301(d) to perform military service in the Army Reserve. During that period, he conducted basic training for new Judge Advocates at Fort Benning, Georgia and at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Federal employees who are absent from civilian positions due to military responsibilities and who meet the requirements listed in 5 U.S.C. § 5538(a) are entitled to differential pay to account for the difference between their military and civilian compensation. Here, Judge Nordby requested differential pay from the agency to make up the difference between his military pay and what he would have been paid as an employee of the agency during his service. The agency denied his request because it determined that those called to voluntary active duty pursuant to 10 U.S.C. § 12301(d) are not entitled to differential pay under 5 U.S.C. § 5538(a).

Judge Nordby appealed the agency's denial to the Merit Systems Protection Board, arguing that the plain language of the statute entitles him to differential pay. He contended that he satisfies the statutory requirement

listed in 5 U.S.C. § 5538(a), because he was called to duty under a provision referred to in 10 U.S.C. § 101(a)(13)(B)—"any [] provision of law during a war or during a national emergency declared by the President or Congress." He argued that 10 U.S.C. § 12301(d) qualifies as "any provision of law" and his activation was "during a national emergency" because the United States has been in a continuous state of national emergency since September 11, 2001. The administrative judge issued an initial decision denying his request for differential pay for failing to state a legally cognizable claim. Because he did not file a petition for review with the Board, that initial decision became final without further review.

Judge Nordby now appeals.

II

We set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Legal conclusions by the Board are reviewed de novo. *Wrocklage v. Dep't of Homeland Sec.*, 769 F.3d 1363, 1366 (Fed. Cir. 2014).

III

When called to active duty, federal employees are entitled to differential pay between their military and civilian compensation, if they meet the statutory requirements under § 5538(a). Section 5538(a) reads,

> An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to **a call or order to active duty under . . . a provision of law referred to in section 101(a)(13)(B) of title 10** shall be entitled [to differential pay].

5 U.S.C. § 5538(a) (emphasis added).

The provisions of law listed in 10 U.S.C. § 101(a)(13) define what qualifies as "contingency operation[s]." Section 101(a)(13)(B) states:

> (13) The term "contingency operation" means a military operation that—
>
> . . .
>
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or **any other provision of law during a war or during a national emergency declared by the President or Congress**.

10 U.S.C. § 101(a)(13)(B) (emphasis added). Thus, to receive differential pay, an employee must have been called to active duty that meets the statutory definition of a "contingency operation." Contingency operation means activation under the enumerated provisions listed in 10 U.S.C. § 101(a)(13)(B) or activation by "any other provision of law during a war or during a national emergency declared by the President or Congress."

Judge Nordby was called to duty under 10 U.S.C. § 12301(d), which provides for the *voluntary* activation of a reservist to active duty. 10 U.S.C. § 12301(d) (giving authority to "order a member of a reserve component under [the jurisdiction of competent authority] to active duty . . . with the consent of that member"). Because § 12301(d) is not one of the enumerated sections in § 101(a)(13)(B), the only way Judge Nordby could qualify for differential pay is if § 12301(d) is a "provision of law during a war or during a national emergency declared by the President or Congress." Judge Nordby argues that his military service satisfies that statutory requirement because he was called to

duty under a provision of law, § 12301(d), and the United States has been in a continuous state of national emergency since September 11, 2001. *See, e.g.,* 86 Fed. Reg. 50,835 (Sept. 10, 2021) (declaration of the President continuing the national emergency for one year).

We considered and rejected the same argument in *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021).[1] There, the federal employee was also activated under § 12301(d) and raised the same argument now before us: that he was serving in a contingency operation because "any other provision of law" encompasses § 12301(d) when the timing of activation coincides with a national emergency. *Id.* at 1379. We specifically rejected such an expansive reading of § 5538, which would have entitled differential pay to every federal employee ordered to duty since September 11, 2001, regardless of the nature of their service. *Id.* Instead, we held that "any other provision of law" does not "necessarily include § 12301(d) voluntary duty" if that voluntary duty "was unconnected to the emergency at hand." *Id.* at 1380. In other words, to satisfy as "any other provision of law" under 10 U.S.C. § 101(a)(13)(B) and qualify as a contingency operation, there must be a connection between the voluntary military service and the declared national emergency.

Even though Judge Nordby acknowledges that we are bound by *Adams*, he still urges us to overturn *Adams* because the holding in *Adams*, he argues, conflicts with our earlier precedent, *O'Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir. 2018); Appellant's Br. 22–24 (citing cases from our sister circuits holding that the earlier

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[1] We note that the administrative judge's decision became final the same day we issued the decision in *Adams*. While the administrative judge could not have relied on *Adams* to decide the case, we are still bound by our precedent on appeal.

decision controls when there is a split of authority within a circuit). He points to the language in *O'Farrell* where we stated that "[10 U.S.C. § 101(a)(13)(B)]'s use of the word 'any' indicates that this list of statutory provisions is non-exhaustive and that 'other provision[s] of law' should be interpreted broadly." *O'Farrell*, 882 F.3d at 1084 (second alteration in original). He alleges that *Adams* created an intra-circuit split by narrowing the scope of "any other provision of law" and requiring a connection between the military service under § 12301(d) and the declared national emergency. Appellant's Br. 23.

As we previously explained in *Adams*, we find no inconsistency between *O'Farrell* and *Adams*. *Adams*, 3 F.4th at 1379. In *O'Farrell*, the petitioner indirectly supported a contingency operation by replacing a member of the Navy who had been deployed to Afghanistan to support the declared national emergency. *O'Farrell*, 882 F.3d at 1087–88. There was no dispute that his activation was connected to the declared national emergency, albeit indirectly. The issue in *O'Farrell* was not whether there was a connection, but the degree of connection required to meet statutory requirements for differential pay.[2] By contrast, in *Adams*,

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[2] In *O'Farrell*, the attorney was activated under 5 U.S.C. § 6323(b), which entitles a military reservist to military leave benefits if called to active duty "*in support of* a contingency operation." 5 U.S.C. § 6323(b) (emphasis added). As we noted in *Adams*, the requirements under § 5538 are stricter than those under § 6323. *Adams*, 3 F.4th at 1379. Judge Nordby notes that unlike § 6323, § 5538 does not contain the words "contingency operation," and the *Adams* court erred by assuming a connection between § 5538 and a contingency operation. Although the term "contingency operation" does not appear on the face of § 5538, it is incorporated by its reference to § 101(a)(13),

the only connection the appellant alleged between his service and the national emergency was a temporal overlap; in other words, his service was not directly or indirectly related to the national emergency. *Adams*, 3 F.4th at 1379. Therefore, *Adams* is distinguishable from *O'Farrell*, and *Adams* did not create an intra-circuit split with *O'Farrell*.

Judge Nordby also argues that the *Adams* court and the agency erred by giving deference to the policy guidance from the Office of Personnel Management (OPM). The OPM guidance instructs that "qualifying active duty does not include voluntary active duty under 10 U.S.C. § 12301(d)." OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538 at 18 (available at https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/reservist-differential/policyguidance.pdf). The agency pointed to the OPM guidance when denying his request for differential pay. He notes that the OPM guidance was not subject to the formal rulemaking process and conflicts with his reading of the statute. But neither the administrative judge nor the court in *Adams* deferred to the OPM guidance when affirming the agency's decision to deny petitioners differential pay. The administrative judge conducted his own statutory analysis including looking at the National Emergencies Act, 50 U.S.C. §§ 1601-1651. J.A. 11–13. *Adams* did not defer, but merely observed that its reading of § 5538 and definition of "contingency operation" are consistent with the OPM's guidance. *Adams*, 3. F.4th at 1380 ("Our reading of § 5538 is consistent with the policy guidance from [OPM] on the matter."). *Adams* relied on its own statutory construction in reaching that conclusion.

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which defines "contingency operation." 10 U.S.C. § 101(a)(13) ("The term 'contingency operation' means a military operation that . . . .").

As Judge Nordby concedes, our holding in *Adams* controls the outcome of this case unless we hear the case *en banc*. Appellant's Br. 31 (requesting the panel to refer the case for *en banc* consideration); *Preminger v. Sec'y of Veterans Affs.*, 517 F.3d 1299, 1309 (Fed. Cir. 2008) ("A prior precedential decision on a point of law by a panel of this court is binding precedent and cannot be overruled or avoided unless or until the court sits *en banc*."). Here, as in *Adams*, Judge Nordby has not alleged any connection between his service and the declared national emergency other than a temporal overlap between his activation and the declared national emergency. But as demonstrated in *Adams*, a mere temporal overlap with the national emergency is not enough to satisfy the statutory definition of a "contingency operation." Judge Nordby only alleges that *Adams* erred in its interpretations of 5 U.S.C. § 5538(a); he does not purport to show how his activation under 10 U.S.C. § 12301(d) fits the *Adams* definition of a contingency operation and thus warrants a different outcome. Accordingly, we are bound by this court's precedent in *Adams*.

Because Judge Nordby failed to allege any connection between the training and the ongoing national emergency that resulted from the September 11 attack, Judge Nordby is not entitled to differential pay.

IV

We have considered Judge Nordby's remaining arguments and find them unpersuasive. Because Judge Nordby's service does not qualify as an active duty contingency operation, as required by 5 U.S.C. § 5538(a), the agency properly denied differential pay. We affirm the decision of the Board.

AFFIRMED

COSTS

No costs.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

EVAN H. NORDBY,
Petitioner

v.

SOCIAL SECURITY ADMINISTRATION,
Respondent

2021-2280

Petition for review of the Merit Systems Protection Board in No. DE-4324-19-0012-I-1.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM.

O R D E R

Evan H. Nordby filed a petition for rehearing en banc. A response to the petition was invited by the court and filed

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[1] Circuit Judge Newman did not participate.

by the Social Security Administration. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue November 8, 2023.

FOR THE COURT

November 1, 2023
Date

Jarrett B. Perlow
Clerk of Court