No. _____

In the Supreme Court of the United States

EVAN H. NORDBY,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal civilian employee called or ordered 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.

RELATED PROCEEDINGS

United States Merit Systems Protection Board:

Evan H. Nordby v. Social Security Administration,
No. DE-4324-19-0012-I-1 (May 28, 2021)

United States Court of Appeals (Fed. Cir.):

Evan H. Nordby v. Social Security Administration, No. 21-2280 (May 11, 2023)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is published at 67 F.4th 1170 (Fed. Cir. 2023). The order of the court of appeals denying rehearing (App. 49a-50a) is unreported. The decision of the Merit Systems Protection Board (App. 10a-48a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2023. The court of appeals denied a timely petition for rehearing en banc on Nov. 1, 2023. Chief Justice Roberts extended the time to file the petition to February 13, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 51a-55a.

STATEMENT OF THE CASE

This case presents a question of exceptional importance that warrants this Court's review: whether a federal civilian employee called or ordered to active duty in the military reserves 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.

This Court's review is urgently needed to correct the Federal Circuit's flawed decision that has been disastrous for federal civilian employee reservists. This case is one of three petitioning from decisions of the Federal Circuit denying differential pay under *Adams* v. *DHS*, 3 F.4th 1375 (2021). Order, *Feliciano* v. *Department of Transportation*, No. 22-1219 (Oct.

27, 2023); Order, *Flynn v. Department of State*, No. 22-1220 (Nov. 1, 2023). Of these cases, *Feliciano* is the best vehicle to address the question presented. The Court should grant the petition for a writ of certiorari in *Feliciano*, hold the petition in this case pending its disposition of *Feliciano*, and then dispose of this petition as appropriate.

A. Legal Background

To ensure financial security for the reservists who serve their country as both civilian employees and members of the armed forces, Congress enacted the differential pay statute, which requires the government to make up the pay difference when a federal civilian employee performs qualifying active duty.

The statute requires differential pay for federal civilian employees who "perform active duty * * * 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." Section 101(a)(13)(B) lists statutes that can "result[] in the call or order to, or retention on, active duty," including "section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of [title 10], chapter 13 of [title 10], 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).

Two years ago in *Adams* v. *DHS*, 3 F.4th 1375 (2021), the Federal Circuit adopted a new requirement for reservists called to active duty under Section 12301(d). The court considered it "implausible" that Congress had intended to cover "voluntary duty that was unconnected to the emergency at hand." *Adams*, 3 F.4th at 1379-1380. To qualify for differential pay, the court held,

reservists activated under Section 12301(d) would be required to show that that they were "directly called to serve in a contingency operation." *Id.* at 1379.

Since denying the petition for rehearing en banc in *Adams* itself, the Federal Circuit has denied three more petitions for rehearing en banc asking it to reconsider *Adams*. App. 49a-50a; Order, *Feliciano* v. *Department of Transportation*, No. 22-1219 (Oct. 27, 2023); Order, *Flynn v. Department of State*, No. 22-1220 (Nov. 1, 2023).

B. Factual and Procedural Background

1. In 2016 and 2017, Petitioner Evan Nordby served as an Administrative Law Judge for the Social Security Administration. During that same time period, Petitioner was a member of the U.S. Army Reserve and a commissioned First Lieutenant in the Judge Advocate General's Corps.

On January 16, 2017, Petitioner was ordered to active duty under 10 U.S.C. § 12301(d). Petitioner served on active duty at Fort Benning, Georgia, where he completed the Direct Commission Course for new Judge Advocates. Immediately following that course, Petitioner served on active duty at The Judge Advocate General's Legal Center and School in Charlottesville, VA, where he completed the Judge Advocate Officer Basic Course as an Honor Graduate. This active-duty service was Petitioner's Initial Entry Training, which is required training for any person who volunteers to serve in the United States military. Petitioner's active-duty service ended on May 12, 2017.

While Petitioner was on active duty, he earned less than he earned as a civilian employed by the SSA. While serving on active duty, he inquired about his entitlement to differential pay under 5 U.S.C. § 5538.

The SSA informed him that pursuant to the OPM policy manual, he was not entitled to differential pay because he was ordered to active duty under 10 U.S.C. § 12301(d).

2. Petitioner appealed the denial of differential pay to the MSPB on the ground that the Department of State had violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). When the MSPB issued its decision on May 28, 2021, *Adams* had not yet been decided by the Federal Circuit. But the MSPB denied relief based on an erroneous interpretation of the National Emergencies Act.

3. On appeal, the Federal Circuit affirmed the MSPB's decision to deny Petitioner's claim for differential pay based on *Adams*. The court stated that petitioner was ineligible for differential pay because he "failed to allege any connection between the training and the ongoing national emergency." 67 F.4th 1170, 1175 (Fed. Cir. 2023); *see also* App. 9a. Therefore, the court held, "[b]ecause 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. 67 F.4th 1170, 1175 (Fed. Cir. 2023); *see also* App. 9a.

The court of appeals denied rehearing en banc. *See* App. 49a-50a.

ARGUMENT

The Court should hold the petition in this case pending resolution of *Feliciano* v. *Department of Transportation*, which is being filed contemporaneously with this petition. The question presented in this case is identical to the question presented in *Feliciano* and the procedural posture of the two cases is materially indistinguishable. Like

Feliciano, this case concerns a federal employee wrongly denied differential pay under *Adams*. Between the cases, however, *Feliciano* is the better vehicle to address the question presented.

The Court should grant the petition for a writ of certiorari in *Feliciano*, hold the petition in this case pending its disposition of *Feliciano*, and then dispose of this petition as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Feliciano*, and then disposed of as appropriate.

Dated: February 8, 2024

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED MAY 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2021-2280

EVAN H. NORDBY,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

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

Decided May 11, 2023

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.

Appendix A

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

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.

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 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 nonexhaustive 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*, 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

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

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.

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.

APPENDIX B — ORDER OF THE UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD, DENVER FIELD OFFICE, DATED MAY 28, 2021

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD DENVER FIELD OFFICE

EVAN H. NORDBY,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Agency.

DOCKET NUMBER
DE-4324-19-0012-I-1

DATE: May 28, 2021

BEFORE
Stephen C. Mish
Chief Administrative Judge

INITIAL DECISION

On September 28, 2018, the appellant, an Army Reservist and former Administrative Law Judge with the agency, timely filed this appeal alleging the agency had violated 38 U.S.C. § 4311(a), a provision of the

Uniformed Services Employment and Reemployment Rights Act (USERRA), in denying his claim for payment of differential pay under 5 U.S.C. § 5338 when he was called to active duty as a reservist. (Initial Appeal File (IAF), Tab 1.) He also moved for certification of a class action of similarly situated agency employees. (*Id.*) The Board has jurisdiction over the appeal pursuant to 38 U.S.C. § 4324(b).

For the reasons set forth below, the appeal is DISMISSED for failure to state a claim upon which relief may be granted.[1]

ANALYSIS AND FINDINGS

Findings of Fact

When they are taken as true, the appellant's factual allegations establish the following.[2] In or around 2016 through 2017, the appellant was employed by the agency as an Administrative Law Judge (ALJ) in Wichita, Kansas. (IAF, Tab 1, p.12.) At the same time, he was also a First Lieutenant in the Judge Advocate General's Corps of the Army Reserve. (*Id.*) Effective January 6, 2017, the Army ordered the appellant to active duty in Army Reserve for a period of 117 days, ending May 12, 2017. (*Id.* at pp. 13-14.) The authority the Army cited for calling him to active duty was 10 U.S.C. § 12301(d). (*Id.*)

1. The motion for class certification is denied in light of the disposition of the appellant's individual claim.

2. The agency essentially does not dispute the factual circumstances alleged by the appellant.

Appendix B

The appellant was paid less for his Army service upon that activation than he was in his civilian position as an ALJ. (*Id.*) On April 18, 2017, the appellant inquired of the agency whether he could receive differential pay under 5 U.S.C. § 5538 to make up the difference. (*Id.* at 36.) That same day, he received a preliminary determination from local officials that agency policy did not allow for differential pay for him because he was activated under 10 U.S.C. § 12301(d). (*Id.*) On April 27, 2017, after the local officials consulted with agency headquarters, the agency provided him a final determination that he was not entitled to differential pay for that same reason. (*Id.* at 35.) This appeal followed.

I reserve additional findings for discussion below.

The appellant has failed to state a claim under USERRA because he is not entitled to differential pay under the applicable statutes.

Upon review of the parties' authorities and arguments, both sides of which are substantial, with cannons of statutory construction pulling in both directions, the agency has the more persuasive argument. As will be explained below, ordinarily, in light of *O'Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir. 2018), the appellant would prevail. However, in light of an argument apparently not raised or addressed in *O'Farrell*, but which the agency advances here, I conclude it has the better reading as its reading does not result in partial repeal of one statute by another without an express statement of Congressional intent to do so.

To start, the improper denial of a benefit of employment only available to persons who serve in a uniformed

service is actionable under USERRA. *See Pucilowski v. Department of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007) (denial of a statutory benefit only applicable through performance of military service is actionable under USERRA.) That is the crux of the appellant's claim.

The parties do not dispute that for the period of time at issue, the Army ordered the appellant to active duty and he was absent from his ALJ position as a result. The parties also do not dispute that for the period of time at issue, the Army invoked 10 U.S.C. § 12301(d) in ordering the appellant to active duty. The parties' dispute centers on the phrase "or any other provision of law during a war or during a national emergency declared by the President or Congress" found in 10 U.S.C. § 101(a)(13)(B), a statute incorporated by reference in Section 5538, the differential pay statute.

The appellant argues that the plain language of the statutes entitle him to differential pay, as does the legislative history. He further argues that the Federal Circuit Court of Appeal's decision in *O'Farrell v. Department of Defense*, 882 F.3d 1080 (Fed. Cir 2018), which construed 10 U.S.C. § 101(a)(13)(B) when incorporated by 5 U.S.C. § 6323, should dictate the outcome here. The agency counters, *inter alia*, that there is a difference in language between Sections 5538 and 6323, that Section 5538's incorporation of 10 U.S.C. § 101(a)(13)(B) implicates and triggers the requirements of the National Emergencies Act (NEA), and that *O'Farrell* is not controlling here.[3]

3. The appellant is correct that the agency shifted its arguments, but presenting alternative arguments is permissible, and he did respond to the shift.

Appendix B

Starting with the question of whether *O'Farrell v. Department of Defense* directly controls the disposition here, I conclude it does not. While it was not in the context of intersection with Section 5538, the appellant is correct that in *O'Farrell*, the Federal Circuit did construe this specific provision of Section 101 before. It held that "[w]hile § 101(a)(13)(B) lists specific statutory provisions under which a service member may be ordered to active duty, the subsection'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.

O'Farrell concerned a Federally-employed reservist's claim for military leave under 5 U.S.C. § 6323(b).[4] *Id.* at 1082-83. Similar to 5 U.S.C. § 5538(a) in the instant case, Section 6323(b), incorporates and refers to 10 U.S.C. § 101(a)(13) for when its own provisions become operative. It provides that a reservist called to full-time, active duty "in support of a contingency operation as defined in section 101(a)(13) of title 10" is entitled to a certain amount of military leave from his or her regular, civilian employment. *O'Farrell*, at 1082-83. Also parallel to the instant case, the *O'Farrell* petitioner contended as follows:

Although Mr. O'Farrell acknowledged that the Order [putting him on active duty] did not cite any of the statutory provisions listed in § 101(a)(13) that qualify as support for a contingency operation, he explained that

4. The Federal Circuit did note and quote 5 U.S.C. § 5538(a), but it did not purport to construe it for purposes of deciding the appeal before it. *O'Farrell*, 882 F.3d at 1082. If it had, it would control.

he was "serving under 'any other provision of law . . . during a national emergency declared by the President or Congress,' . . . because . . . [§] 12301(d) is 'any other provision of law' and[,] on September 11, 2012[,] President Obama extended the state of emergency that has existed since September 11, 2001."

Id. at 1083.

Ultimately, the *O'Farrell* court accepted that argument, holding, as noted above, "the subsection's [101(a)(13)'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." *Id.* at 1084. Thus, it held the petitioner's call to full time active duty under 10 U.S.C. § 12301(d) was qualifying for purposes of entitlement to the requested military leave under 5 U.S.C. § 6323(b), even though 10 U.S.C. § 12301(d) was not specifically listed in Section 101(a)(13), because Section 12301(d) is a provision of law and the appellant was activated under it during a time a national emergency was (and still is) in effect. *Id.*

As the appellant maintains, the agency's reading of the statutes conflicts with *O'Farrell's* instruction that "any other provision of law" in Section 101 "should be interpreted broadly." The agency would, in effect, interpret "any" as meaning "only specifically enumerated provisions" which is not an interpretation *O'Farrell* supports.

However, the agency does rightly argue that *O'Farrell* is not directly controlling because it does not discuss Section 101's interaction with Section 5538, or the statutory scheme governing national emergencies. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 880 F.3d 1345, 1349 (Fed. Cir. 2018) ("When a prior decision does not squarely address an issue, a court remains free to address the issue on the merits in a subsequent case") (internal quotation omitted). *Cf. also Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 477 (1982) ("Because Congress must 'clearly manifest' its intent to depart from § 1738, our prior decisions construing Title VII in situations where § 1738 is inapplicable are not dispositive.") While it did mention Section 5538, the *O'Farrell* court did not address the difference in language between Sections 5538 and 6323 or whether the NEA is implicated through 10 U.S.C. § 101(a)(13) when it is incorporated by reference into other statutes. Thus, *O'Farrell* does not resolve this appeal on its own.

While *O'Farrell* is plainly instructive, because the question of whether activation under 10 U.S.C. § 12301(d) qualifies one for differential pay under 5 U.S.C. § 5538 because of 10 U.S.C. § 101(a)(13)(B) has not been definitively addressed as yet, I start with the plain language of the disputed statutes.[5] *See O'Farrell*,

5. *O'Farrell* itself counsels no less. *See O'Farrell*, 882 F.3d at 1083 (criticizing the lack of statutory analysis in the initial decision.) There have been a few decisions by individual administrative judges addressing the issue presented by this appeal which have gone in both directions, and there is a split decision by a two-member Board. They were reviewed, but they are not precedential.

882 F.3d at 1084 ("We begin our statutory interpretation with the plain language of § 6323(b)"); *Hawkins v. United States*, 469 F.3d 993, 1000 (Fed. Cir. 1996) ("In construing a statute, [one] begin[s] with its literal text, giving it its plain meaning") (internal quotation omitted). *See also Williams v. Department of the Army*, 83 M.S.P.R. 109, 114 (1999) ("The starting point for statutory interpretation is the plain language of the statute in question").

Titled "Nonreduction in pay while serving in the uniformed services or National Guard" the operative portion Section 5538 reads:

> (a) 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 section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which.--
>
> (1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)
>
> (2) the amount of pay and allowances which (as determined under subsection (d))--

> (A) is payable to such employee for that service; and
>
> (B) is allocable to such pay period.

5 U.S.C. § 5538(a).

In turn, the referenced 10 U.S.C. § 101(a)(13)(B) is a definitional section and provides that:

> 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 712 of title 41, 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).

The agency does not dispute that the appellant received and responded to a "call or order to, […], active duty" as an Army Reservist, a "member[] of the uniformed services[.]" Even without consideration of *O'Farrell*, or the Supreme Court precedent it cites for the broad and inclusive reading of "any" in "any other provision of law during a war or during a national emergency" in Section 101, I must agree with the appellant that the common

definition of "any" is expansive even if it is not taken to mean "all" or "every," which it can be. *See* Merriam-Webster's Collegiate Dictionary, 56 (11th ed. 2003).

The agency contends Congress did not intend that any activation under any authority be qualifying for purposes of Section 5538. It relies, in part, on a difference in statutory language between sections 6323 and 5538. It notes that Section 5538 states differential pay should be available for those who receive a "call or order to active duty under section 12304b of title 10 or a provision of law *referred to* in section 101(a)(13)(B) of title 10." 5 U.S.C. § 5538(a) (emphasis added). Section 6323, which governs granting of military leave and was construed in *O'Farrell*, states it applies where a civilian employee "performs full- time military service as a result of a call or order to active duty in support of a contingency operation as *defined in* section 101(a)(13) of title 10." 5 U.S.C. § 6323(b)(2)(B) (emphasis added). The agency contends that the choice of different language in these two statues indicates Congressional intent that they operate differently, requiring that only the specifically enumerated statutes in Section 101 qualify one for differential pay.

"Refer" can mean "to direct attention usually by clear and specific mention[.]" However, "refer" also carries less specific meanings like "to think of, regard, or classify within a general category or group" or "to have relation or connection: RELATE." *See* Merriam-Webster's Collegiate Dictionary, 1045 (11th ed. 2003). As such, Section 5538 is ambiguous, and analysis of the statute should proceed beyond plain language review. *See Hall v. U.S.*, 677 F.3d 1340, 1346 (Fed. Cir. 2012).

Appendix B

Both parties contend the legislative history of Section 5538 supports their respective positions. The appellant points to statements in the Congressional Record made by Senator Richard Durbin, a sponsor of Section 5538. He stated that:

> As the symbol of American values and ideals, the Federal Government should give these special employees of our government more than just words of support. We should not encourage Americans to protect their country and then punish those who enlist in the armed forced by taking away a large portion of their salaries. We must provide our reservist employees with financial support so they can leave their civilian lives to serve our country without the added burden of worrying about the financial well-being of their families. They are doing so much for us; we should do no less for them.

(IAF, Tab 14, p.14.) However, "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). More of the legislative history should be considered, *see id.,* and the appellant has supplied it here.

Titled the "Reservists Pay Security Act of 2003", when first introduced by Senators Durbin and Mikulski during the first session of the 108th Congress, Section 5538 read:

> An employee who is absent from a position of employment with the Federal Government

> in order to perform service in the uniformed services or the National Guard shall be entitled to receive, for each pay period described in subsection (b), an amount equal to [the amount needed to equal the basic pay from his or her civilian position.]

(IAF, Tab 15, p.131.)

That bill however did not become law. When reported out of committee, as the "Reservists Pay Security Act of 2004" in the second session, the operative portion of Section 5538 read as it reads now:

> 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 section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to [the amount needed to have military pay equal the basic pay from his or her civilian position.]

(IAF, Tab 14, p. 142-43.)

According to the Report of the Senate Committee on Governmental Affairs, the change to limit application of Section 5538 to activation under "12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of

title 10" was to "make[] the bill applicable to the level of mobilization under 10 U.S.C. 101(a)(13)(B)[.]" (IAF, Tab 14, p.65). The report does not elucidate what the Committee meant by "level of mobilization," and neither party offers specific explanation of the phrase. I take it to mean, "in the nature of the mobilizations set out in 10 U.S.C. 101(a)(13)(B)."

What is clear from the Committee Report, however, is that the overall purpose of Section 5538 is:

> to ensure that a Federal employee who takes leave without pay in order to perform active duty military service shall continue to receive pay in an amount which, when taken together with military pay and allowances, would be no less than the basic pay the individual would be receiving if no interruption in Federal employment had occurred.

(IAF, Tab 14, p.64.) It also makes clear that the Committee had the military leave statute, 5 U.S.C. § 6323, in mind when considering Section 5538. As the report states:

> Under current law, a federal employee who is a member of the National Guard or Reserve is entitled to 15 days of paid military leave each fiscal year for active duty, active duty training, or inactive duty training. When an employee is mobilized under a Presidential Reserve Call Up or a partial to full mobilization, he or she is placed in a leave without pay status from his

> or her federal job and begins drawing military pay and allowances.

(*Id.* at 64-65.)

Sections 6323 and 5538 are statues which clearly pointed toward the same end, reducing financial burdens and disincentives to intermittent military service by persons otherwise employed by the Federal Government as civilians. Sections 6323 and 5538, it seems, are statutes *in pari materia*. Reading "any other provision of law during a war or during a national emergency" in Section 101 similarly when incorporated in each benefit statute more uniformly supports that legislative purpose. The *in pari materia* cannon "instructs courts to interpret statutes with similar language that generally addresses the same subject matter together, as if they were one law." *See Hall*, 677 F.3d at 1344; *Sutherland Statutory Construction* § 51:3. *See also Exxon Mobil Corporation v. Allapattah Services, Inc.* 545 U.S. 546, 557 (2005) (where "ordinary principles of statutory construction apply, [one] must examine the statute's text in light of context, structure, and related statutory provisions"); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (statutory construction should "look to the provisions of the whole law, and to its object and policy").

Essentially, the foregoing favors the appellant. However, I conclude that the agency does proffer sufficient reason for why Section 101(a)(13)(B) must be construed more narrowly when it interacts with 5 U.S.C. § 5538, although it must be construed more broadly, *per*

O'Farrell, when it interacts with 5 U.S.C. § 6323. The issue the agency raises which persuades me I must reach an admittedly unusual result and construe 10 U.S.C. § 101(a)(13)(B) somewhat differently when it works with Section 5538 than with Section 6323 as discussed in *O'Farrell* stems from the National Emergencies Act (NEA).

The agency relies on an Office of Personnel Management (OPM) Compensation and Leave Decision (Compensation Decision) and its "Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538" (Policy Guidance) as well as its own, internal policy manual which is based off of OPM's guidance.[6] (IAF, Tab 12.) In contending its denial

6. These guidance documents are light on rationale and close analysis for why activation under 10 U.S.C. § 12301(d) does not qualify one for differential payments. OPM's Guidance Document states, "Qualifying active duty means active duty by a covered employee pursuant to a call or order, as described in section 5538(a). (See Part 1 of Appendix D.) (Note: Under section 5538(a), active duty that qualifies for coverage under section 5538 is active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B)—i.e., the following specific provisions in title 10 of the United States Code: sections 688, 12301(a), 12302, 12304, 12304a, 12305, and 12406 and chapter 15 (which includes sections 331, 332, and 333). Thus, qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d) or annual training duty under 10 U.S.C. 10147 or 12301(b).)" Apparently, OPM holds the view that voluntary activations can never qualify for reservist differential. The language of Section 5538 and Section 101 do not support that notion. These are not regulations ensconced in the Code of Federal Regulations, cloaked in "the full majesty of formal rulemaking" under the Administrative Procedure Act as is authorized by Section 5538(d). *See Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1338-42 (Fed. Cir. 2003). As such, they are persuasive authority. *See id.*

of differential pay was appropriate and not violative of USERRA, the agency devotes significant argument to the OPM Compensation Decision. However, OPM's reading of the statues in that decision only does half the work, so to speak.

OPM's Compensation Decision reasoned that the language of Section 5538 stating "a provision of law referred to in section 101(a)(13)(B) of title 10" means "only the specifically enumerated provisions of section 101(a)(13)(B) are included for purposes of coverage under the reservist differential statute." (IAF, Tab 12, p.23.) Citing the all-words-must-do-work cannon, and *expressio unius*, OPM's Compensation Decision reasoned that "any other provision of law during a war or during a national emergency" must mean only the specifically enumerated provisions of section 101(a)(13)(B) because a broader reading of "any other provision of law" would swallow the specifically enumerated provisions rendering them superfluous. (*Id*. at pp. 23-24.)

What the Compensation Decision does not fully address thereafter is what work the words "any other provision of law" actually do under its interpretation which is not wholly redundant. The word "other" has a meaning of its own, and it means "not the same" or "being the one or ones distinct from that or those first mentioned or implied[.]" Merriam-Webster's Collegiate Dictionary, 878-79 (11th ed. 2003). The reading advanced by the agency, relying on OPM, reads the word "other" out of Section 101. The statutory command under OPM's reading, and by extension the agency's, would be "include A, B, and C,

and also include only A, B, and C." Quoting the Supreme Court, the Federal Circuit has flatly stated, "We 'will avoid an interpretation of a statute that renders some words altogether redundant.'" *Clark v. United States*, 322 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *United States v. Alaska*, 521 U.S. 1, 59 (1997)).

Despite this main reasoning, which is not persuasive, OPM does note in a footnote of the Compensation Decision that unspecified information it had from the Department of Defense (DOD) reflected DOD's view that the language "any other provision of law during a war or during a national emergency" implicates "the exercise of the statutory authorities for the formal declaration of war or national emergency by the President or Congress under the National Emergencies Act, codified at 50 U.S.C. §§ 1601-1651." (IAF, Tab 12, p.25.) The agency relies on and expands on that point, and the issue was not noted or discussed in *O'Farrell*.

The purpose of the NEA is, in part, to cabin what can be the awesome powers of a President during a national emergency and to prescribe the mechanisms governing such. Congress was concerned that it had become too easy and too common for the executive to make use of emergency powers. The NEA was adopted to address that situation. *See U.S. v. Frade*, 709 F.2d 1387, 1400 (11th Cir. 1983). The NEA was meant to be a comprehensive reform. It "rescinded several existing national emergencies, repealed many statutes, and created procedural guidelines for congressional oversight over future presidents' declarations of national emergencies." *Sierra Club v. Trump*, 379 F.Supp.3d 883, 898 (N.D.Cal., 2019).

Appendix B

Under the National Emergencies Act:

> *Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective* and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) *only in accordance with this chapter.*

50 U.S.C. § 1621(b) (emphasis added).

> When the President declares a national emergency, *no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.* Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

50 U.S.C. § 1631 (emphasis added).

Accordingly, the agency's argument runs, in light of the NEA's restrictions for national emergencies, unless the employee is called to active duty under a provision of law specifically invoked by the President when declaring and publishing the national emergency in the Federal

Register, he or she is not entitled to differential pay under 5 U.S.C. § 5538 because Section 101 would not be referring by incorporation to any law invoked by the Presidential declaration of emergency. As it says, "[b]ecause no president has ever invoked 10 U.S.C. § 12301(d) as a provision of law under which he proposes to act in his declaration of national emergency, [...] activations under that section are not covered under the catch-all provision and cannot serve as the basis for Reservist Differential pay."

While that interpretation does solve the redundancy problem from the Compensation Decision, it does so by violating another cannon of statutory construction, it adds words to a statute, Section 101(a)(13)(B), which simply are not there. *See Kyocera Wireless Corp. v. International Trade Com'n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008) (quoting *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 463 (1987) ("[T]he addition of words to a statutory provision which is complete as it stands ... would require amendment rather than construction of the statute, and it must be rejected here"); *Lovshin v. Department of the Navy*, 767 F.2d 826, 840-841 (Fed. Cir. 1985) (reversing the Board where it "read into Chapter 75 a limitation which Congress expressed nowhere in the statute itself or in the legislative history"). The agency would read "any other provision of law during a war or during a national emergency" in Section 101 as "any other provision of law available for use during a war or during a national emergency." There is not a large body of interpretive precedent on the provisions of the NEA when compared to other statutes, but there is some, and along with the

tools of statutory construction, what there is supports the agency's position.

Starting with the plain language of 50 U.S.C. § 1621(b), the emphasized portions above dictate that "any" provision of law "conferring powers and authorities" to be utilized in the event of a national emergency will be operative "only in accordance" with the other provisions of Chapter 34 of title 50 of the United States Code. The five subchapters of Chapter 34 are the five titles of the NEA. *See* 50 U.S.C. §§ 1601-1651.

As the Federal Circuit held in *O'Farrell*, the common definition of the term "any" counsels a broad interpretation. *See id.* See also Merriam-Webster's Collegiate Dictionary, 56 (11th ed. 2003). Confer in this sense carries the meaning "to bestow from or as if from a position of superiority." *Id.* at 260. The terms "power" and "authority" have similar common definitions and in this context refer to "legal or official authority, capacity or right" *id.* at 973 (power), and "power to influence or command thought, opinion, or behavior[.]" *Id.* at 83 (authority). "Effective" is defined to mean "being in effect: OPERATIVE[,]" *id.* at 397, and "accordance" means "AGREEMENT, CONFORMITY[.]" *Id.* at 8. Thus, any legal capacity to command behaviors, i.e. actions or inactions, which are bestowed by statute during a national emergency will be operative only in conformity with the requirements of Chapter 34 of title 50, which is the NEA.

Similarly, 50 U.S.C. § 1631, using similar language, provides that no legal capacity to command behaviors

made available by statute for use in an emergency may be made use of unless the President "specifies the statutes under which he proposes that he, or other officers will act."

One district court has described the workings of the NEA this way in setting forth the background to a case in which the President declared a national emergency pursuant to the NEA. "To exercise any statutory emergency power, the president must first specify the power or authority under which the president or other officers will act, 'either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.' *Id.* § 1631." *Sierra Club v. Trump*, 379 F.Supp.3d 883, 898–99 (N.D.Cal., 2019) (emphasis added), *aff'd*, 963 F.3d 874 (9th Cir. 2020), *cert. granted*, 141 S.Ct. 618 (2020). *See also id.* at 894 ("The proclamation then invoked and made available to relevant Department of Defense ("DoD") personnel two statutory authorities.") The NEA was not the focus of the decision, however.

The Department of Justice's Office of Legal Counsel has concluded similarly. In a 2016 opinion, it concluded, "the NEA's coverage is not limited to statutes that expressly require the President to declare a national emergency, but rather extends to any statute 'conferring powers and authorities to be exercised during a national emergency,' unless Congress has exempted such a statute from the Act." *See OLC Opinion*, Applicability of the National Emergencies Act To Statutes That Do Not Expressly Require the President To Declare A National

Emergency, 2016 WL 10590109, at *1 (Aug. 24, 2016.) In reviewing the language of the NEA and legislative history from both political branches, the OLC concluded it should work as described above. "A subsequent passage from the House report reaffirms this intention. That passage (which again borrows nearly verbatim from Assistant Attorney General Scalia's testimony) explains that in some cases, 'changes in law automatically take effect during times of national emergency,' but that title III of the NEA would 'change this by establishing that no provision of law shall be triggered by a declaration of national emergency unless and until the President specifies that provision as one of those under which he or other officers will act.'" *Id*. at *7.

Evaluating the agency's argument, there are a few necessary, preliminary questions which must be answered. One is whether or not Section 5538 is a "provision[] of law conferring powers and authorities to be exercised during a national emergency," if it is, whether payment of differential pay under it is an "exercise[]" of such power. I conclude both must be answered affirmatively. A statute is, of course, a provision of law. And again, giving the language of 5538 its common meaning, *see O'Farrell* at 1084, it confers authority to pay monies to persons under a specific set of circumstances, incorporating 10 U.S.C. § 101(a)(13)(B) to define the circumstances. Next, is that authority to pay certain people certain amounts one "to be exercised during a national emergency"? With regard to the specific portion of Section 101(a)(13)(B) the appellant relies on for his entitlement to payment, it is. While the statutory sections expressly listed in Section 101(a)(13)(B) relate to some sort of crisis or emergency circumstance,

not all of the specifically listed statutes refer to a "national emergency" or even just an "emergency." *Compare* 10 U.S.C. § 12302(a) *with* 10 U.S.C. § 12304a. The very wording of the catchall provision the appellant relies on, "any other provision of law during a war or during a national emergency," does, however, and that brings it within the ambit of the NEA.

That being the case, the exercise of that authority to pay differential pay "shall be effective" "only in accordance with [the NEA]." The NEA provides that emergency authorities are only available for use when "the President specifies the provisions of law" to be exercised pursuant to the declared emergency, either in the declaration itself or subsequent publication.

It would follow that if the President did not invoke 10 U.S.C. § 12301(d) in declaring a national emergency, then the appellant cannot claim entitlement to payment through his activation under it pursuant to Section 101 because it is not available for use by any arm of the government, including the responding agency here, pursuant to the terms of the NEA. I conclude that holding otherwise would result in an implied repeal of the NEA, albeit a small one which favors veterans, *see O'Farrell*, 882 F.3d at 1088 (noting the veterans-statute-lenity rule of construction), and which would more robustly support Section 5538's purpose. (IAF, Tab 14, p.64, Report of the Senate Committee on Governmental Affairs.)

As the Federal Circuit and many other courts have said, "The Supreme Court has frequently explained

that repeals by implication are not favored, and it has instructed that 'where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Cathedral Candle Co. v. U.S. Intern. Trade Com'n*, 400 F.3d 1352, 1365 (Fed. Cir. 2005) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984)); also citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (evidence of intention to repeal earlier statute must be "clear and manifest"; courts must read seemingly conflicting statutes "to give effect to each if we can do so while preserving their sense and purpose"); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible")).

Reading the catchall provision of 10 U.S.C. § 101(a)(13)(B) when intersecting with 5 U.S.C. § 5538 as subject to the NEA, it contains a requirement that "any other provision of law during a war or during a national emergency declared by the President or Congress" be a provision that that the President (or Congress) has noted in the declaration or subsequent notice allows both statutory schemes to be effective. This kind of implied precondition is the approach that was adopted by the Supreme Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) when confronted with seemingly clashing statutes.

In *Ruckelshaus*, the Court was confronted with a potential conflict between a statutorily created administrative compensatory scheme for intellectual property which the developers were required to submit

to the government for review, and which property was then appropriated by the government for public use under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and the compensatory scheme generally available if the government effects a Fifth Amendment taking of property, the Tucker Act. *Id.* at 1016-18. The petitioner there contended that the FIFRA scheme was exclusive, effectively displacing the background scheme of the Tucker Act and left them without remedy for the taking at issue, and therefore, it could be enjoined. *Id.* at 1017.

The Court disagreed. It noted what seems true of the statutes at issue here. "Nowhere in FIFRA or in its legislative history is there discussion of the interaction between FIFRA and the Tucker Act." *Id.* It then explained:

> Monsanto argues that FIFRA's provision that an original submitter of data who fails to participate in a procedure for reaching an agreement or in an arbitration proceeding, or fails to comply with the terms of an agreement or arbitration decision, "shall forfeit the right to compensation for the use of the data in support of the application," § 3(c)(1)(D)(ii), indicates Congress' intent that there be no Tucker Act remedy. But where two statutes are "'capable of co- existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Regional Rail Reorganization Act Cases, 419 U.S., at 133–134, quoting Morton v. Mancari,

> 417 U.S. 535, 551 (1974). Here, contrary to Monsanto's claim, it is entirely possible for the Tucker Act and FIFRA to co-exist. The better interpretation, therefore, of the FIFRA language on forfeiture, which gives force to both the Tucker Act and the FIFRA provision, is to read FIFRA as implementing an exhaustion requirement as a precondition to a Tucker Act claim. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure.

Ruckelshaus, 467 U.S. at 1018.

Likewise here, the NEA is the background, general rule for how national emergency powers become operative and are to be exercised. Section 5538(a), when operating pursuant to the national emergency catchall language in Section 101(a)(13)(B) it incorporates, does not work a limited repeal of the background NEA rule by allowing undeclared emergency authorities to become operative. Rather, they work together through incorporation. Thus, differential pay is not available to a reservist called to active duty under absolutely any provision of law during a national emergency declared by the President because only those provisions of law cited by the president in the emergency declaration are available to be "any other law[.]" In short, Section 5538, when operating through Section 101, presupposes the workings of the NEA and incorporates them, as well.

I recognize that this reading effectively adds the words "available for use" to the phrase "any other provision of law [available for use] during a war or during a national emergency declared by the President or Congress." However, as in *Ruckelshaus*, where FIFRA did not expressly state its compensatory provisions were an administrative requirement that must be exhausted before resorting to suit under the Tucker Act, and the Tucker Act did not mention FIFRA as a precondition to suit, the harmonized reading which did effectively add words to a statue was held to be the proper outcome as it allowed both laws to more fully function. That seems the appropriate resolution of the statutory conflict here.

With the implied precondition from the NEA in mind, that emergency statutory authorities are not available for use unless they are explicitly invoked in the declaration of emergency or subsequent publication, the appellant cannot prevail on his claim to differential pay. *See, generally, Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-30 (1990) (pursuant to the Appropriations Clause, payment of money from the national treasury must conform to the statutory conditions Congress sets for payment). He was activated under the authority of 10 U.S.C. § 12301(d). That authority is not one listed in the then-President's September 14, 2001 declaration of an emergency, 66 Fed. Reg. 48,199, 2001 WL 34773744 (Proclamation 7463), or in subsequent renewals. *See* 67 Fed. Reg. 58,317, 2002 WL 32817654 (Sept. 12, 2002); 68 Fed. Reg. 53,665, 2003 WL 24028113 (Sept. 10, 2003); 69 Fed. Reg. 55,313, 2004 WL 3247345 (Sept. 10, 2004); 70 Fed. Reg. 54,229, 2005 WL 2204871 (Sept. 8, 2005); 71

Fed. Reg. 52,733, 2006 WL 2559770 (Sept. 5, 2006); 72 Fed. Reg. 52,465, 2007 WL 2667458 (Sept. 12, 2007); 73 Fed. Reg. 51,211, 2008 WL 4000815 (Aug. 28, 2008); 74 Fed. Reg. 46,883, 2009 WL 2900284 (Sept. 10, 2009); 75 Fed. Reg. 55,661, 2010 WL 3525839 (Sept. 10, 2010); 76 Fed. Reg. 56,633, 2011 WL 4017867 (Sep. 9, 2011); 77 Fed. Reg. 56,517, 2012 WL 3960450 (Sept. 11, 2012); 78 Fed. Reg. 56581, 2013 WL 4830911 (Sept. 10, 2013); 79 Fed. Reg. 53,279, 2014 WL 4386292 (Sept. 4, 2014); 80 Fed. Reg. 55,013, 2015 WL 5265318 (Sep. 10, 2015); 81 Fed. Reg. 60,579, 2016 WL 4538113 (Aug. 30, 2016); 82 Fed. Reg. 43,153, 2017 WL 4005828 (Sept. 11, 2017). Therefore, it cannot be "any other provision of law during…a national emergency" for purposes of 10 U.S.C. § 101(a)(13)(B) and 5 U.S.C. § 5538. That being the case, the appellant has failed to state a claim upon which relief may be granted, and the appeal is dismissed on that basis. *See Roy v. Department of Treasury*, 103 M.S.P.R. 638, 641 (2006).

DECISION

The appellant's request for corrective action under USERRA is DENIED.

FOR THE BOARD: /S/
Stephen C. Mish
Chief Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the parties may file

a settlement agreement, but the administrative judge may vacate the initial decision in order to accept such an agreement into the record after that date. *See* 5 C.F.R. § 1201.112(a)(4).

NOTICE TO APPELLANT

This initial decision will become final on ***July 2, 2021***, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or

cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous

application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are

granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the *earlier* date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on

the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Appendix B

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be *received* by the court within **60 calendar days** of *the date this decision becomes final*. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at

http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you *only* if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—*including a disposition of your discrimination claims*—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** *after this decision becomes final* under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of *your discrimination claims only, excluding all other issues*. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** *after this decision becomes final* as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you *only* if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for

review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must *receive* your petition for review within **60 days** of *the date this decision becomes final* under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place,
N.W. Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding

pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED NOVEMBER 1, 2023

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.

ORDER

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

1. Circuit Judge Newman did not participate.

filed 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
/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

November 1, 2023
Date

APPENDIX D — RELEVANT STATUTES

5 U.S.C. § 5538 - Nonreduction in pay while serving in the uniformed services or National Guard

(a) 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 section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to reemployment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304.

Appendix D

10 U.S.C. § 101 - Definitions

(a) IN GENERAL.—The following definitions apply in this title:

* * * *

(13) The term "contingency operation" means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(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.

Appendix D

10 U.S.C. § 12301 - Reserve components generally

* * * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.