APPENDIX

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APPENDIX A

United States Court of Appeals for the Federal Circuit

JILLIAN LESKO,

Plaintiff-Appellant

v.

UNITED STATES,

Defendant-Appellee

2023-1823

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00715-CNL, Judge Carolyn N. Lerner.

Decided: December 12, 2025

DIMITRIOS VASILOU KOROVILAS, Wucetich & Korovilas LLP, El Segundo, CA, argued for plaintiff-appellant. Also represented by JASON MATTHEW WUCETICH; MICHAEL S. MORRISON, Alexander Morrison & Fehr LLP, Los Angeles, CA.

MATTHEW JUDE CARHART, Commercial Litigation Branch, Civil Division, United States Department of Jus-tice, Washington, DC, argued for defendant-appellee. Also represented by REGINALD THOMAS BLADES, JR., PATRICIA M. MCCARTHY, BRETT SHUMATE.

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

Opinion for the court filed by *Chief Judge* MOORE, in which *Circuit Judges* LOURIE, DYK, PROST, TARANTO, CHEN, and HUGHES join.

Dissenting Opinion filed by *Circuit Judge* STOLL, in which *Circuit Judges* REYNA, CUNNINGHAM, and STARK join.

MOORE, *Chief Judge*.

Jillian Lesko appeals a decision of the Court of Federal Claims dismissing all five counts in her Amended Com-plaint for failure to state a claim. We granted en banc review sua sponte to address a narrow issue concerning Count II—is the overtime writing requirement in 5 C.F.R. § 550.111(c) a valid exercise of the Office of Personnel Management's (OPM) rulemaking authority in light of the statutory requirement in 5 U.S.C. § 5542(a) that the Government pay overtime "officially ordered or approved"? We conclude the writing requirement is valid and affirm the Court of Federal Claims' dismissal of Count II. We refer the remainder of the appeal back to the panel for resolution.

BACKGROUND

I. Legal Background

In relevant part, the statute and regulation governing overtime pay for federal employees have existed for eighty years.

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[1] Circuit Judge Newman did not participate.

A. Statutory Scheme

On June 30, 1945, Congress enacted the Federal Employees Pay Act of 1945 (FEPA or the Act) to "improve salary and wage administration in the Federal service" and "to provide pay for overtime." Pub. L. No. 79-106, 59 Stat. 295 (1945). Included in FEPA was § 201, which provided for overtime compensation:

> Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, *officially ordered or approved*, in excess of forty hours in any administrative workweek . . . .

Id. at 296 (emphasis added).[2] In 1954, Congress amended § 201 but made no relevant changes to the "officially ordered or approved" language. Pub. L. No. 83-763, 68 Stat. 1109 (1954). In 1966, Congress recodified Title 5 but again made no relevant changes to the "officially ordered or ap-proved" language. Pub. L. No. 89-554, 80 Stat. 485 (1966). The present statutory language, now codified at 5 U.S.C. § 5542(a), has undergone additional amendments since re-codification in 1966 but, as relevant to this appeal, it contains the same operative language as the originally enacted statute:

> [H]ours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for . . . .

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[2] Unless otherwise noted hereafter, emphases are added.

5 U.S.C. § 5542(a) (hereafter, overtime statute).

In addition to providing overtime compensation, FEPA expressly delegated rulemaking authority to administer the Act to the Civil Service Commission:

> The Civil Service Commission is hereby authorized to issue such regulations, subject to the approval of the President, as may be *necessary for the administration* of the foregoing provisions of this Act . . . .

Pub. L. No. 79-106, § 605, 59 Stat. 304 (1945). Although Congress has amended this statute since it was enacted—including by changing "may be necessary" to "necessary" and substituting "Office of Personal Management" for "Civil Service Commission"—the current version of the statute delegates with similar language:

> The Office of Personnel Management may pre-scribe regulations, subject to the approval of the President, *necessary for the administration* of this subchapter . . . .

4 U.S.C. § 5548(a) (hereafter, delegation statute).

B. Regulatory Scheme

On July 4, 1945—four days after Congress enacted FEPA—the Civil Service Commission promulgated regulations, approved by the President, to implement the Act. Regulations under the Federal Employees Pay Act of 1945, 10 Fed. Reg. 8191 (July 4, 1945). Among the initial regulations was § 401(c), which included an overtime writing requirement:

> No overtime in excess of the administrative work-week shall be *ordered or approved*

> *except in writing* by an officer or employee to whom such authority has been specifically delegated by the head of the department or independent establishment or agency, or Government-owned or controlled corporation.

Id. at 8194.

In 1968, the Civil Service Commission revised the regulations implementing FEPA to conform to the recodification of Title 5 but made "no substantive changes in the regulations." Revision of Regulations, 33 Fed. Reg. 12402 (Sept. 4, 1968). The present regulatory language implementing the writing requirement, now codified at 5 C.F.R. § 550.111(c), has undergone additional amendments since recodification but, as relevant to this appeal, it contains the same operative language as the originally promulgated regulation:

> Overtime work in excess of any included in a regularly scheduled administrative workweek may be *ordered or approved only in writing* by an officer or employee to whom this authority has been specifically delegated.

5 C.F.R. § 550.111(c) (hereafter, overtime regulation).

C. Case Law

For the first decade after FEPA was enacted, the Court of Claims—one of our predecessor courts whose decisions bind this court's panels—enforced the writing requirement in the overtime regulation. *See, e.g.*, *Gaines v. United States*, 132 Ct. Cl. 408, 412–13 (1955) ("[A]ny claim must be based upon the performance of overtime services which were expressly authorized or approved in writing by an officer or employee to whom such authority has been specifically delegated."). That changed in *Anderson v. United States*, 136 Ct. Cl. 365 (1956), when the en banc Court of Claims interpreted "officially ordered or approved" in the overtime statute as including induced overtime and not requiring a writing. 136 Ct. Cl. at 368–71. For the next forty years, the Court of Claims and its successor courts applied *Anderson*'s holdings. *See, e.g.*, *Adams v. United States*, 162 Ct. Cl. 766, 768–69 (1963); *Baylor v. United States*, 198 Ct. Cl. 331, 359–60 (1972); *DeCosta v. United States*, 22 Cl. Ct. 165, 176 (1990), *aff'd on other grounds*, 987 F.2d 1556 (Fed. Cir. 1993).

In *Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004), this court first addressed the overtime statute and regulation. We held "the *Anderson* line of cases is no longer good law" in light of intervening Supreme Court precedent. *Doe*, 372 F.3d at 1354–57 (holding that, after *Schweiker v. Hansen*, 450 U.S. 785 (1981), "the written order requirement is not invalid on the ground that it imposes a procedural requirement that limits the right to overtime compensation under the statute"). Having concluded the writing requirement was not invalid, we then held the overtime regulation was entitled to *Chevron* deference and upheld it. *Id.* at 1358–63.

In *Mercier v. United States*, 786 F.3d 971 (Fed. Cir. 2015), this court again interpreted "officially ordered or approved" overtime, albeit in a different statute that had no corresponding regulation. 786 F.3d at 972 ("This case turns on the interpretation of the words 'officially ordered or approved' in 38 U.S.C. § 7453(e)(1), the statute which provides overtime pay for nurses employed by the Department of Veterans

Affairs."). We held *Doe* could not overrule *Anderson*'s interpretation of "officially ordered or approved" in FEPA as allowing for induced overtime. *Id.* at 980–82. We further held "officially ordered or approved" overtime in 38 U.S.C. § 7453(e)(1) should have the same meaning as "officially ordered or approved" overtime in the overtime statute, which includes induced overtime per *Anderson*. *Id.* at 982.

Against this backdrop, Ms. Lesko filed her appeal.

II. Procedural Background

Ms. Lesko worked as a registered nurse for the Indian Health Service (IHS) for eight months during the COVID-19 pandemic. J.A. 2.[3] During this time, she alleges nurses "were stretched to their limits" and "[s]upervisors and managers regularly and routinely required nurses to stay after hours and work without compensation to meet the patient demands." J.A. 82 ¶ 42. After resigning from IHS, Ms. Lesko filed a complaint for a class action suit, which she amended after the Government moved to dismiss it. J.A. 3. The Amended Complaint includes five counts and alleges Ms. Lesko and all other similarly situated registered nurses employed by IHS were denied pay enhancements in violation of various statutes and regulations. J.A. 91–99 ¶¶ 73–115. In Count II, Ms. Lesko alleges the Government violated the overtime statute by failing to pay registered nurses for overtime induced by their supervisors. *Id.* at 93–95 ¶¶ 81–91. The Government moved to

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[3] "J.A." refers to the parties' Joint Appendix filed at ECF No. 22.

dismiss all counts for failure to state a claim. J.A. 145–65. The Government argued dismissal was warranted, in part, because Ms. Lesko did not allege she or any potential class members had written authorization for overtime as re-quired by the overtime regulation. *Id.* at 156–60. The Court of Federal Claims granted the motion and dismissed all counts. J.A. 1–9. Ms. Lesko appeals.

A panel of this court heard oral argument on October 9, 2024. On March 18, 2025, we sua sponte granted en banc hearing and ordered briefing and argument limited to the following issues:

a. Considering *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), how should "officially ordered or approved" in 5 U.S.C. § 5542(a) be interpreted?

b. Is this a case in which "the agency is authorized to exercise a degree of discretion" such that OPM has authority to adopt its writing requirement? *Loper*, 603 U.S. at 394.

c. Is there a statutory provision (e.g., 5 U.S.C. §§ 1104, 5548) that provides such authority?

Lesko v. United States, 130 F.4th 1385, 1385–86 (Fed. Cir. 2025).[4] We heard argument on September 12, 2025. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

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[4] In addition to the parties' briefs, we received one amicus brief from the Chamber of Commerce of the United States of America. Dkt. 70.

DISCUSSION

The Government argues we should affirm the dismissal of Count II because the writing requirement in the overtime regulation reflects a valid exercise of OPM's congressionally delegated rulemaking authority. We agree.

We review de novo the Court of Federal Claims' dismissal of a complaint for failure to state a claim upon which relief may be granted. *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1328 (Fed. Cir. 2012). Statutory interpretation is a question of law we review de novo. *Bartels Tr. ex rel. Cornell Univ. v. United States*, 617 F.3d 1357, 1359 (Fed. Cir. 2010).

> "[C]ourts must exercise independent judgment in determining the meaning of statutory provisions" and may not defer to agency interpretations of ambiguous statutes. *Loper Bright*, 603 U.S. at 394, 413. The best reading of a statute, however, "may well be that the agency is authorized to exercise a degree of discretion." *Id.* at 394. The Supreme Court in *Loper Bright* provided examples of statutes that delegate discretionary authority to agencies: (1) statutes that expressly delegate to an agency the authority to define statutory terms, (2) statutes that empower an agency to prescribe rules to "fill up the details" of a statutory scheme, and (3) statutes that provide agencies with "flexibility" to regulate. *Id.* at 394–95. When a reviewing court concludes the best reading of a statute is that it delegates discretionary authority to an agency, the court should

> uphold the regulation if the delegation is constitutional, and the agency engaged in "reasoned decisionmaking" within the boundaries of its delegated authority. *Id.* at 395 (citation omitted).

I. Construction of "officially ordered or approved"

We begin our analysis with the overtime statute, which obligates the Government to pay for overtime "officially ordered or approved." 5 U.S.C. § 5542(a). FEPA does not specify what this phrase means, nor does it expressly delegate to OPM the authority to define this phrase. And the statutory text surrounding the phrase does not specify whether overtime "officially ordered or approved" must be in writing or how it should otherwise be done. We therefore look to the plain meaning of "officially ordered or approved."

The ordinary meaning of "order"[5] is to command or direct, while the ordinary meaning of "approve"[6] is

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[5] *Webster's New International Dictionary* 1716 (2d ed. 1939) (defining "order" as "direct" and "to command"); *Black's Law Dictionary* 1298 (3d ed. 1933) (defining "order" as "a command or direction authoritatively given"); *Webster's Third New International Dictionary* 1588 (2002) (defining "order" as "to issue commands"); *Black's Law Dictionary* 1319 (12 ed. 2024) (defining "order" as "[a] command, direction, or instruction").

[6] *Webster's New International Dictionary* 133 (2d ed. 1939) (defining "approve" as "[t]o sanction officially; to ratify; confirm"); *Black's Law Dictionary* 131 (3d ed. 1933) (defining "approve" as "[t]o confirm, ratify, sanction, or consent to some act or thing done by another"); *Webster's Third New International Dictionary* 106 (2002) (defining "approve" as "to express often formal[] agreement with and support of or commendation of as meeting a standard"); *Black's Law*

to confirm or ratify. Both terms connote that someone with authority gives the order or approval, as confirmed by dictionaries ranging from the time FEPA was enacted in 1945 until the present day. Regarding the form required for a valid order or approval, we agree with the panel in *Doe* that these words, standing alone, can encompass written form, oral form, or both. 372 F.3d at 1358–59. The overtime statute does not specify the required form. The statute's only guidance on this issue derives from the word "officially," which functions as an adverb describing both "ordered" and "approved."

"Officially"[7] means having proper authorization, which includes both the person providing authorization and the necessary formality (i.e., the form) needed for authorization. "Officially ordered or approved" overtime is thus overtime commanded or ratified with proper authorization.[8] The plain

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Dictionary 126 (12 ed. 2024) (defining "approve" as "[t]o give formal sanction to; to confirm authoritatively").

[7] *Webster's Third New International Dictionary* 1567 (2002) (defining "officially" as "with official authorization: formally" (capitalization normalized); defining "official" as "prescribed or recognized as authorized" and "a person authorized to act for a government"); *Funk & Wagnalls New Standard Dictionary of the English Language* 1714 (1940) (defining "officially" as "[b]y the proper officer; formally or properly"); *Black's Law Dictionary* 1306 (12th ed. 2024) (defining "official" as "[a]uthorized or approved by a proper authority"); *New Oxford American Dictionary* 1217 (3d ed. 2010) (defining "official" as "properly authorized"; defining "officially" as "in a formal and public way").

[8] Given that an order must occur before the act that is being ordered, an order to work overtime occurs before the employee works overtime. In contrast, because an approval confirms or ratifies some act or request, an approval to work

language of this phrase presupposes a process for authorizing overtime with sufficient formalities but pro-vides no guidance as to the mechanics of that process (i.e., who can authorize overtime and how they can do it (oral, written, or both)). *See* Oral Arg. 5:58–6:13 (Ms. Lesko agreeing the overtime statute does not specify the mechanics of the authorization process). Accordingly, the best interpretation of the overtime statute is that Congress mandated an authorization process for directing or ratifying overtime but did not determine the requisite formalities in the statutory text. To the extent the Government has argued that the plain language of the statute requires that such overtime orders or approvals must be in writing, we do not agree; nor do we give any deference to the agency interpretation of the language of the statute. We conclude that Congress contemplated formalities when it required overtime to be "officially ordered or approved," but was silent as to the requisite formalities.

II. Delegation to OPM

While the overtime statute is silent as to the formalities required to officially order or approve overtime, FEPA is not silent about *who* Congress intended to fill in those details. Congress delegated rulemaking authority to OPM to "prescribe regulations, subject to the approval of the President, *necessary for the administration* of this subchapter." 5 U.S.C. § 5548(a). Given the overtime statute is in the same subchapter as this delegation, we conclude that Congress expressly delegated rulemaking

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overtime can occur before, during, or after the employee works overtime.

authority to OPM to prescribe regulations necessary for administering the overtime statute, subject to approval by the President.[9]

A. Discretionary Delegation

This delegation falls within the type of delegations that provide agencies discretion to regulate. *Loper Bright*, 603 U.S. at 394–95. The delegation is a fill-up-the-details delegation, *id.* at 395, because the overtime statute is silent regarding the formalities required for overtime to be "officially ordered or approved," despite the plain meaning of the phrase requiring such formalities. Congress's silence on this issue, in combination with its delegation of authority to OPM to prescribe regulations necessary for administering the overtime statute, clears the path for OPM to fill up the details of the authorization process.

The delegation is also a flexible delegation. In *Loper Bright*, the Supreme Court cited a statute that directs the Environmental Protection Agency (EPA) to regulate power plants "if the Administrator finds such regulation is appropriate and *necessary*" as an example of a type of flexible delegation. 603 U.S. at 395 n.6 (quoting 42 U.S.C. § 7412(n)(1)(A)). Like the EPA statute, the delegation statute provides OPM flexibility to regulate as "necessary" for administering the overtime statute. *Compare* 5

[9] President Harry S. Truman approved the writing requirement, which the parties do not dispute has remained unchanged since the original overtime regulation was promulgated. Regulations under the Federal Employees Pay Act of 1945, 10 Fed. Reg. 8191–96 (July 4, 1945).

U.S.C. § 5548(a), *with* 42 U.S.C. § 7412(n)(1)(A). The delegation in this statute is of the type enumerated in *Loper Bright* that gives agencies discretionary authority to regulate. We conclude that under these circumstances, OPM has the discretionary authority to determine the formalities required to administer the authorization process for over-time.

B. Necessity of the Writing Requirement

Because OPM has discretionary authority to regulate the authorization process for overtime, OPM has the authority to require that such orders or approvals be in writing so long as it is necessary for administering the overtime statute. Based on the plain language of the overtime statute and the practical considerations enumerated by the Government, we conclude the writing requirement meets this necessary-for-administration requirement.

Congress required overtime be "officially" ordered or approved. In order to administer the overtime statute, OPM must determine the mechanics of the authorization process; it could not administer the statute otherwise. Congress did define, in the statute itself, the timing when overtime can be ordered (prospective) or approved (prospective, concurrent, or retrospective). But it did not define who can authorize overtime or how overtime can be authorized. Ms. Lesko admits the statute is silent regarding who can order or approve overtime and that therefore OPM has the authority to determine who can authorize overtime. Oral Arg. 1:13–40, 4:43–5:15, 5:57–6:23, 6:46–7:10, 8:05–8:25, 14:06–14:17, 19:47–20:14, 21:21–21:48. Ms. Lesko also admits OPM has the authority to require employees to submit timecards to be entitled to overtime, which goes to the issue of how overtime can be authorized. Oral Arg. 1:00:28–1:01:02. There is little reason to preclude OPM from also determining the form of authorized overtime, which like-wise addresses how overtime can be authorized. If we allowed OPM to determine the *who* but not certain aspects of the *how*, we would be arbitrarily parsing the authority delegated to OPM based on a distinction the overtime and delegation statutes never draw.

Ms. Lesko argues the writing requirement is not necessary because there is no evidence the Government was un-able to administer overtime pay without an enforceable writing requirement for the forty-eight years between *Anderson* and *Doe*. Lesko Br. 33–34. In response, the Government argues *Anderson*'s amorphous "inducement" standard was problematic for administering the overtime statute. Gov. Br. 50–51. The Government also argues the writing requirement is necessary because it (1) controls the Government's liability for overtime by limiting unexpected liabilities that may arise when an employee claims, after the fact, she was entitled to overtime; (2) provides evidence overtime was actually authorized, which reduces the likelihood of overtime disputes; (3) makes overtime easier to track for agencies, which promotes fiscal responsibility and accountability; (4) reduces conflicts over whether overtime is officially ordered or approved; and (5) provides employees with clear notice, often in advance of working overtime, that the overtime is officially ordered or approved. Gov. Br. 46–51; Oral Arg. 42:20–43:11.

Ms. Lesko does not meaningfully dispute the Government's claims as to the practical necessity of the writing requirement. Instead, she claims that, because the Government functioned in the past without an enforceable writing requirement, this shows a writing requirement is not necessary today. This fails to account for the fact that OPM and federal employees have relied on the writing requirement for the past twenty years to the benefit of both parties. This also ignores the problem in *Anderson*'s amorphous "inducement" standard. In describing the difficulty of applying the correct inducement standard, the trial court in *Doe* explained that this "court has taken almost every conceivable position with regard to overtime. Consequently, an employee seeking overtime can likely find an opinion of this court that fits his situation regardless of what it may be." *Doe v. United States*, 54 Fed. Cl. 404, 410 (2002) (quoting *Anderson v. United States*, 201 Ct. Cl. 660, 675 (1973) (Skelton, J., dissenting)). As shown by *Anderson*'s progeny of inducement cases, many disputes have arisen over whether the Government properly administered overtime pay. *See, e.g.*, *Gray v. United States*, 136 Ct. Cl. 312, 313 (1956); *Adams*, 162 Ct. Cl. at 781; *Albright v. United States*, 161 Ct. Cl. 356, 361 (1963); *Rapp v. United States*, 340 F.2d 635, 641 (Ct. Cl. 1964); *Fix v. United States*, 368 F.2d 609, 613 (Ct. Cl. 1966); *Baylor*, 198 Ct. Cl. at 359–60; *Manning v. United States*, 10 Cl. Ct. 651, 663 (1986); *DeCosta*, 22 Cl. Ct. at 176–77; *Hannon v. United States*, 29 Fed. Cl. 142, 149 (1993).

Ms. Lesko also argues the writing requirement improperly restricts a statutory right for the sake of "budgetary concerns" and "administrative ease." Lesko Reply Br. 23–24. Again, Ms. Lesko fails to meaningfully engage with the Government's specific reasons why the writing requirement is necessary. The writing requirement creates clarity for both the Government and the employees regarding when overtime will be compensated. It reduces the likelihood of overtime disputes, limits unexpected liabilities, and creates evidence substantiating that the hours worked were actually hours required by the Government. The Government justified the necessity of the writing requirement, and Ms. Lesko has not meaningfully disputed the Government's arguments regarding necessity.

We hold the best interpretation of the overtime and delegation statutes is that Congress delegated to OPM the discretionary authority to promulgate the writing requirement.[10] There is no statutory right to induced overtime, only officially ordered or approved overtime that is properly authorized. And the delegation statute provides discretionary authority to

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[10] In a separate provision, Congress imposed a writing requirement for waivers of compensatory time off applicable to border patrol agents who work more than 10 extra hours in a 14-day period. 5 U.S.C. § 5542(g)(4)(B). Since § 5542(g)(4)(B) expressly dictates the form of a valid waiver, there is no discretion for OPM to decide the form. In contrast, § 5542(a) presupposes a process with formality for proper authorization of overtime, but Congress provided no guidance as to proper formalities and delegated authority to OPM to adopt the requirements necessary for administration, subject to presidential approval. Under these circumstances, we do not agree that the writing requirement in § 5542(g)(4)(B) should be understood as Congress's silent preclusion of OPM's writing requirement for § 5542(a).

OPM to determine what constitutes proper authorization.

III. Propriety of the Writing Requirement

Having concluded the overtime and delegation statutes are properly interpreted to delegate to OPM discretionary authority to determine the form an order or approval must take to be properly authorized, we evaluate whether the delegation was constitutional and whether OPM engaged in reasoned decision making within the boundaries of its delegated authority. *Loper Bright*, 603 U.S. at 395.

A. Constitutionality

Ms. Lesko argues any delegation allowing OPM to promulgate the writing requirement is unconstitutional under the non-delegation doctrine because it allows OPM to restrict the scope of a substantive right under the overtime statute. Lesko Br. 35–37. We do not agree.

The writing requirement does not restrict the scope of a substantive right because there is no right to overtime that is not officially authorized. *See supra Discussion* § I. While the overtime statute is silent as to the form "officially ordered or approved" overtime must take to be properly authorized, Congress delegated authority to OPM to determine the proper form, which OPM did. *See supra Discussion* § II. The fact that Ms. Lesko disagrees with the form specified by OPM does not mean the writing requirement contradicts the overtime statute. It also does not mean OPM interpreted the overtime statute as mandating a writing requirement. Instead, OPM prescribed a rule necessary to implement the overtime statute on an issue FEPA gave OPM discretion to address.

There also is nothing unusual about the authority delegated to OPM in this case. Congress regularly delegates authority to agencies to prescribe regulations "necessary" to implement a statutory scheme.[11] And agencies regularly prescribe writing requirements.[12] Moreover, there is an intelligible principle in the delegation statute that authorizes

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[11] *See, e.g.*, 38 U.S.C. § 501(a) ("The Secretary [of the Department of Veterans Affairs] has authority to prescribe all rules and regulations which are *necessary* or appropriate to carry out the laws administered by the Department"); 42 U.S.C. § 7601(a)(1) ("The Administrator [of the Environmental Protection Agency] is authorized to pre-scribe such regulations as are *necessary* to carry out his functions under this chapter."); 26 U.S.C. § 7805(a) ("[T]he Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be *necessary* . . . ."); 47 U.S.C. § 154(i) ("The [Federal Communications] Commission may . . . make such rules and regulations . . . as may be *necessary* in the execution of its functions."); 16 U.S.C. § 825h ("The [Federal Energy Regulatory] Commission shall have power to prescribe, issue, make, amend, and rescind . . . regulations as it may find *necessary* or appropriate to carry out the provisions of this chapter.").

[12] *See, e.g.*, 30 C.F.R. § 20.5(f) ("No verbal report of approval or disapproval will be made to the applicant. Approval will be made *only in writing* by [the Mine Safety and Health Administration]."); 36 C.F.R. § 67.3(b)(5) ("Approval of applications and amendments to applications is conveyed *only in writing* by duly authorized officials of the [National Park Service] acting on behalf of the Secretary."); 18 C.F.R. § 35.32(a)(2) ("The utility may provide overall in-vestment policy to the Trustee or Investment Manager, but it may do so *only in writing*").

OPM to promulgate the writing requirement—OPM may only prescribe regulations necessary to implement the overtime statute. *Fed. Commc'ns Comm'n v. Consumers' Rsch.*, 606 U.S. 656, 673 (2025) ("To distinguish between the permissible and the impermissible [delegation], we have long asked whether Congress has set out an 'intelligible principle' to guide what it has given the agency to do."). We therefore conclude the delegation of authority to OPM to promulgate the writing requirement is constitutional.

B. Reasoned Decision Making

Ms. Lesko also argues the overtime regulation's writing requirement is not the product of reasoned decision making because it contradicts the overtime statute's plain language. Lesko Br. 37–44. For the reasons explained above, we do not agree. *See supra Discussion* §§ I–II, III.A. The plain language is silent as to the proper form "officially ordered or approved" overtime must take to be properly authorized. And the delegation statute provides OPM with discretion to determine the proper formalities. The writing requirement therefore does not contradict the overtime statute.

Because the best reading of the overtime statute is that Congress constitutionally delegated authority to OPM to prescribe the writing requirement, which OPM promulgated based on reasoned decision making within the boundaries of its delegated authority, we uphold the overtime regulation. While we are sympathetic to Ms. Lesko and others similarly situated, we note two important aspects of this opinion that will help federal employees moving forward: (1) employees now know that overtime must be authorized in writing and can demand written authorization prior to working overtime, and (2) supervisors, under appropriate circumstances, can retroactively approve overtime that was orally ordered by ratifying the overtime in writing. For example, the Department of Health and Human Services Personnel Instruction No. 550–1 requires that the overtime be "authorized both in advance and in writing," but provides that "[i]n emergencies, employees may be ordered to work overtime without prior approval, provided approval is documented the next workday." DEP'T OF HEALTH & HUM. SERVS., HUMAN RESOURCES MANUAL, PERS. INSTR. NO. 550-1-50 at 7 (revised Nov. 3, 2010), https://www.hhs.gov/sites/default/files/hr-resource-library-550-1.pdf (last accessed Nov. 14, 2025).

CONCLUSION

We have considered Ms. Lesko's remaining arguments and find them unpersuasive. For the foregoing reasons, we hold the writing requirement is valid and affirm the Court of Federal Claims' dismissal of Count II. We refer the remainder of the appeal concerning Counts I and III–V back to the panel for resolution.

AFFIRMED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

JILLIAN LESKO,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2023-1823

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00715-CNL, Judge Carolyn N. Lerner.

STOLL, *Circuit Judge*, dissenting, with whom *Circuit Judges* REYNA, CUNNINGHAM, and STARK join.

There is no dispute that the plain meaning of "officially ordered or approved" in the overtime statute is not limited to written orders or approvals. Majority Op. 11. Nonetheless, the majority determines that, between the term "officially ordered or approved" in 5 U.S.C. § 5542(a) and the grant of authority to OPM to "prescribe regulations[] . . . necessary for the administration of this subchapter" in 5 U.S.C. § 5548(a), Congress delegated to OPM "discretionary authority to determine the formalities required to administer the authorization process for overtime." Majority Op. 12–13. We see no such delegation in the statutory language. Under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), we would hold that the best meaning of the statutory phrase "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek" does not require a writing.

I

As the Supreme Court has explained, it is the responsibility of the court "to independently interpret the statute and effectuate the will of Congress." *Loper Bright*, 603 U.S. at 395; *see also id.* at 400. "[A]mbiguity is not a delegation to anybody," and courts must "use every tool at their disposal to determine the best reading of the statute." *Id.* at 400. Applying these principles to the overtime statute reveals there is a best meaning for the statutory language "officially ordered or approved": it includes orders or approvals for overtime that are not put in writing.

First, Congress knows how to prescribe a writing requirement when it wishes to do so. We presume Congress means what it says. *See Sanho Corp. v. Kaijet Tech. Int'l Ltd., Inc.*, 108 F.4th 1376, 1382 (Fed. Cir. 2024) ("We assume Congress means what it says and says what it means."). We further presume Congress does not mean what it does not say.

Indeed, Congress included "must be approved in writing" in another subsection of the very statute at issue in this case—§ 5542(g)(4)(B). This provision pertains to compensatory time off earned by Customs and Border Protection agents for time spent performing overtime work when that overtime work is not ordered or approved in advance of the workweek:

> U.S. Customs and Border Protection may, as it determines appropriate, waive the limitation under subparagraph (A) for an individual border patrol agent for hours of irregular or occasional overtime work, but such waiver must be approved *in writing* in advance of the performance of any such work for which compensatory time off is earned under paragraph (1)(B)(ii), (2)(B)(ii), or (3)(B)(ii). If a waiver request by a border patrol agent is denied, the border patrol agent may not be ordered to perform the associated overtime work.

5 U.S.C. § 5542(g)(4)(B) (emphasis added). If Congress wanted to include a writing requirement for overtime "officially ordered or approved" in § 5542(a), it would have expressly said so, just as it did in § 5542(g)(4)(B); that § 5542(a) lacks such language is telling. Because Congress directly included a writing requirement for another aspect of the overtime regime for specific Title 5 employees, but did not do so in the general provision for overtime at issue here, we should not assume Congress intended to allow OPM to impose a writing requirement. In fact, Congress's choice strongly supports the opposite conclusion: that it did not intend for a writing requirement in order for overtime to be "officially ordered or approved," since if Congress did so intend it could have—and would have—said so. If a writing requirement were truly "necessary for the administration" of the overtime statute, one would expect Congress to have written that requirement into § 5542(a), just as it did in § 5542(g)(4)(B).

While the majority discounts the use of "in writing" in § 5542(g)(4)(B), *see* Majority Op. 15–16 n.10, we routinely treat Congress's uses of different words to mean different things. *See Metro. Area EMS Auth. v. Sec'y of Veterans Affs.*, 122 F.4th 1339, 1345 (Fed. Cir. 2024) ("We under-stand this difference [in language] to mean Congress in fact intended two different things."). Indeed, that Congress chose not to say "in writing" in the general provision for overtime yet did include "in writing" in another subsection of the same statute undermines not only the majority's conclusion that Congress delegated such authority to OPM, but also undermines the majority's conclusion that a writing requirement is "necessary for the administration of th[e] subchapter." *See* Majority Op. 11–16. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Badgerow v. Walters*, 596 U.S. 1, 11 (2022) (cleaned up) (citation omitted).

Second, interpreting the best meaning of "officially ordered or approved" to include more than just orders or approvals that are made in writing accords with our court's current interpretation of the same language—"officially ordered or approved"—in 38 U.S.C. § 7453(e)(1), which authorizes overtime pay for VA nurses. In *Mercier v. United States*, 786 F.3d 971 (Fed. Cir. 2015), we held that this same precise statutory language allows for an induced theory of overtime and does not limit overtime work to that authorized in writing. When Congress uses the exact same statutory language—"officially ordered or approved"—in similar contexts, authorizing overtime pay for various executive branch employees, we should interpret the statutes consistently, as we assume Congress intends the same meaning by using the same words. *See United States v. Davis*, 588 U.S. 445, 458 (2019) ("[W]e normally presume that the same language in related statutes carries a consistent meaning.").

II

While the majority agrees that the plain text of § 5542(a) does not require a writing to order or approve overtime, it concludes that Congress in § 5548(a) delegated to OPM authority to interpret "officially ordered or approved" in a manner that does impose a writing requirement. The majority finds such a delegation in the statutory authorization given to OPM to prescribe regulations "necessary for the administration of this subchapter." Majority Op. 11–12. We disagree and would conclude that there is no delegation to the agency to change the plain meaning of "officially ordered or approved" under *Loper Bright*.

Loper Bright commands courts to exercise their independent judgment in interpreting statutes but also acknowledges that some potential deference to an agency's interpretation remains when, under the statute, "the agency is authorized to exercise a degree of discretion." 603 U.S. at 394. *Loper Bright* provides three exemplary categories of such congressional delegation to an agency: (1) "statutes [that] 'expressly delegate[ ]' to an agency the authority to give meaning to a particular statutory term," *id.* at 394–95 (second alteration in original) (quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977)); (2) "[o]thers [that] empower an agency to prescribe rules to 'fill up the details' of a statutory scheme," *id.* at 395 (quoting

Wayman v. Southard, 23 U.S. 1, 43 (1825)); and (3) still others that allow agencies "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,'" *id.* (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)). A court, however, is to keep in mind that, even if it determines such delegation occurred, it is still the court's role "to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." *Id.* (cleaned up) (citation omitted).

According to the majority, Congress's use of "officially ordered or approved" in § 5542(a) and "necessary for the administration" in § 5548(a) reveals that Congress left OPM to fill up the details of the statutory scheme and, hence, provides the agency flexibility to impose a writing requirement. *See* Majority Op. 11–12. But such purported delegation is not clear or direct, especially in comparison to the exemplary delegations identified in *Loper Bright*.

A

The majority first relies on the second type of delegation identified in *Loper Bright*: filling up the details of a statutory scheme. The majority concludes that because (1) the plain meaning of the phrase "officially ordered or approved" requires "formalities," (2) "the overtime statute is silent regarding the formalities required for overtime," and (3) § 5548(a) authorizes "OPM to prescribe regulations necessary for administering the overtime statute," Congress intended "for OPM to fill up the details of the authorization process"—i.e., to have discretion in defining what "officially ordered or approved" requires. Majority Op. 12. We disagree.

Neither the language of § 5542(a) nor of § 5548(a) is like the exemplary statute *Loper Bright* cites for filling up the details. *Loper Bright* identifies the following statutory language as "empower[ing] an agency to prescribe rules to 'fill up the details' of a statutory scheme," 603 U.S. at 395 (citation omitted): "[w]henever, in the judgment of the Administrator . . . , discharges of pollutants from a point source . . . would interfere with the attainment or maintenance of that water quality . . . , effluent limitations . . . shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality." 33 U.S.C. § 1312(a); *see Loper Bright*, 603 U.S. at 395 n.6 (quoting 33 U.S.C. § 1312(a)). There are meaningful differences between this example and what the majority relies on as the purported delegation to OPM. Unlike the clear and direct delegation Congress laid out in 33 U.S.C. § 1312(a) between "the judgment of the Administrator" and the effluent limitations he is to create to maintain water quality, there is no clear or direct connection drawn between the general provision authorizing OPM to administer the statute in § 5548(a) and the phrase at issue ("officially ordered or approved") in § 5542(a).[1]

[1] In stark contrast to the general delegation in § 5548(a) relied on by the majority here, other portions of § 5542 include language that clearly delegates to OPM discretion to make specified determinations about specified subject matter. *See* 5 U.S.C. § 5542(c) ("[T]he Office of Personnel Management shall

Indeed, § 5548(a)—authorizing the agency to prescribe regulations "necessary for the administration of this subchapter"—does not refer back to § 5542 or to the phrase "officially ordered or approved." Nor does it give OPM discretion to define or interpret statutory terms. The phrase "this subchapter" in § 5548(a) refers to "Subchapter V—Premium Pay," which contains over a dozen statutes and countless broad terms subject to multiple meanings, accompanied by congressional silence on which meaning to choose. Under *Loper Bright*, we could not reasonably read § 5548(a) as a congressional delegation allowing OPM to narrow

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by regulation prescribe what hours shall be deemed to be hours of work and what hours of work shall be deemed to be overtime hours for the purpose of such section 7 [of the Fair Labor Standards Act of 1938]." (emphasis added)); *id.* § 5542(h)(1)(B)(i) ("The Director of the Office of Personnel Management . . . shall identify the situations in which a firefighter shall be deemed to have worked hours actually worked by a substituting firefighter under a qualified trade-of-time arrangement." (emphasis added)); *id.* § 5542(h)(2)(A)(ii)(IV) (". . . in the case of an employee who is not subject to subchapter III of chapter 83 or chapter 84, holds a position that the Office of Personnel Management determines would satisfy subclause (I), (II), or (III) . . ." (emphasis added)). Other sections within the same subchapter also have language that explicitly delegates discretion to agency heads. *See*, *e.g.*, 5 U.S.C. § 5546a(a) (explaining that certain criteria an employee of the Federal Aviation Administration or the Department of Defense needs to meet to receive "premium pay at the rate of 5 per centum of the applicable rate of basic pay" include whether the employee's duties "are determined by the Administrator or the Secretary to be directly involved in or responsible for the operation and maintenance of the air traffic control system" and "are determined by the Administrator or the Secretary to be unusually taxing, physically or mentally, and to be critical to the advancement of aviation safety").

every broad term in the subchapter merely based on OPM's say so that doing so is "necessary for the administration of th[e] subchapter."

Moreover, interpreting "officially ordered or approved" as a phrase that connotes unstated formalities and allows the agency to add a writing requirement as a formality "necessary for . . . administration" displaces congressional intent. We should not ignore the plain meaning of "officially ordered or approved"; nor may we latch onto the existence of general rulemaking authority (like that provided for by § 5548(a)) to defer to an agency's interpretation of statutory silence and ambiguities. *See generally SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 363 (2018) ("Where a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer."). *Loper Bright* makes clear that we lack a sufficient basis here to abandon our judicial role and fail to use all tools at our disposal and determine the best meaning of the statute.

B

The majority also relies on the third type of delegation identified in *Loper Bright*: authority to regulate pursuant to flexible terms. The majority concludes that the term "necessary" in the phrase OPM "may prescribe regulations[] . . . necessary for the administration of this sub-chapter" is similar to the example the Supreme Court provided in *Loper Bright* of a flexible term conferring discretionary regulatory authority on an agency. *See* Majority Op. 12. *Loper Bright* identifies the following as exemplary statutory language authorizing an agency "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable,'" 603 U.S. at 395 (citation omitted): "[t]he Administrator *shall regulate* electric utility steam generating units under this section, *if* the Administrator *finds such regulation is appropriate and necessary* after considering the results of the study required by this subparagraph." 42 U.S.C. § 7412(n)(1)(A) (emphases added); *see Loper Bright*, 603 U.S. at 395 n.6 (quoting 42 U.S.C. § 7412(n)(1)(A)); *see also id.* at 395 (citing *Michigan v. EPA*, 576 U.S. at 752).[2]

Again, *Loper Bright*'s exemplary delegation is significantly clearer and more direct than the purported delegation identified by the majority. The example specifically and narrowly defines what the agency may regulate and upon what grounds it may do so. Unlike the example, there is nothing in Title 5 that specifically says that OPM may or shall explicate and interpret "officially ordered or approved" if it finds such regulation necessary for overtime administration. Nor does § 5548(a) say that OPM can redefine or narrow the meaning of Congress's choice of statutory terms. While it is true that § 5548(a) allows OPM to "prescribe regulations[] . . . necessary for the administration of this

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[2] The majority emphasizes the word "necessary" in this statute to draw an analogy to the use the of word in § 5548(a), but review of the analysis in *Michigan v. EPA* shows the Supreme Court's focus on the word "appropriate." *See* 576 U.S. at 751–57. This accords with the Court's statement in *Loper Bright* that "a term or phrase that leaves agencies with flexibility" means terms like "appropriate or reasonable." 603 U.S. at 395 (quotation marks and citation omitted).

subchapter," "officially ordered or approved" has a best meaning discernible by a court deploying its full interpretive toolkit, and Congress did not authorize OPM to change that best meaning for administrative convenience. As *Loper Bright* explained, we should view a statute as delegating authority to define terms only where it is clear that "the best reading of [the] statute is that it delegates discretionary authority to an agency." 603 U.S. at 395.[3] We see no such delegation for interpreting the meaning of "officially ordered or approved" here. And whatever delegation there is to OPM to administer the statute, it still must fall within the "fix[ed] . . . boundaries of [the] delegated authority" by Congress to the agency. *Id.* (second alteration in original) (citation omitted). But as explained above, the best meaning of the statute does not limit orders or approvals to only those made in writing. Thus, any delegation that does exist must be within this boundary of congressional intent.

C

The majority does not rely on the first category of delegation described in *Loper Bright*: statutes that expressly delegate the authority to give meaning to a statutory term. We agree that such express delegation does not apply here. *Loper Bright* identifies three examples of statutory language that expressly delegates to an agency the authority to interpret a particular term: (1) "has been deprived of

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[3] It is unclear if a flexible term can grant an agency the power to define terms at all, as *Loper Bright* only ap-proved such agency action where the "statute[] 'expressly delegate[s]' to an agency the authority to give meaning to a particular statutory term." *Loper Bright*, 603 U.S. at 394 (citation omitted).

parental support or care by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of his father," *Batterton*, 432 U.S. at 418 n.2 (emphasis added) (citation omitted), (2) "to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)," or (3) "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*." *Loper Bright*, 603 U.S. at 394–95 & n.5 (first quoting 29 U.S.C. § 213(a)(15); and then quoting 42 U.S.C. § 5846(a)(2)). In each example, Congress's statutory language identifies a particular term closely followed by language authorizing the agency to interpret that term. These are narrow and direct delegations. No such language is present in § 5542(a).

D

This is not to say that there is no delegation to the agency in the congressional authorization to "prescribe regulations[] necessary for the administration of th[e] subchapter." It is true that some administrative gaps need to be filled; but the statute on its face allows orders or approvals that are not in writing. Allowing the agency to reinterpret the statute to hold otherwise goes beyond the delegation to administer set forth in § 5548(a).

We do not agree with the majority's contention that the writing requirement is simply a means of administering § 5542(a) by establishing how overtime can be authorized. *See* Majority Op. 13. The writing requirement, instead, clearly redefines the scope of the overtime liability Congress has authorized. Such a requirement therefore stands far apart from others such as the timecard requirement Ms. Lesko's counsel agreed at oral argument would be permissible. The fact that regulations governing the proof required to establish entitlement to a statutory grant may be permissible does not mean that regulations redefining the scope of a statutory entitlement are also permissible. *Cf. Schweiker v. Hansen*, 450 U.S. 785 (1981) (finding a regulation merely procedural where it solely specified the manner in which one may invoke a right but did not substantively redefine the right). Having determined that the best meaning, and plain language, of the statutory phrase "officially ordered or approved" encompasses orally ordered overtime, we may not permit OPM to "rewrite clear statutory terms to suit its own sense of how the statute should operate" by declaring those same hours non-overtime absent a writing. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

Without a clear delegation of authority to interpret statutory terms, the judiciary is left to assess the reasonableness of the agency's policy rationales instead of using the proper statutory tools to interpret the meaning of "officially ordered or approved." *See* Majority Op. 14–15 (addressing "the practical necessity of the writing requirement"). But judging the reasonableness of policy is not the role of the judiciary. And while we do not discount the government's suggestion that OPM's writing regulation could further the goals of controlling costs and reducing disputes by creating a documentary record, we do not see how these goals override Congress's choice of language. For all we know, such language might well reflect other congressional goals, such as paying federal employees for overtime worked even if that overtime is ordered orally. And in a post-*Chevron* world, the agency's choice of language cannot override the best meaning of Congress's chosen language.[4]

* * *

In sum, it is up to Congress, not OPM, to impose a writing requirement. Congress chose not to limit the statutory phrase "officially ordered or approved" to "in writing," despite imposing such a limit in another subsection of the same statute. Nor did Congress give OPM the authority to give meaning to "officially ordered or approved." That should be the end of the analysis. We should not "def[y] the

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[4] Nor would we uphold the writing requirement on stare decisis principles. Indeed, our precedent is unclear. *Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004), which attempted to overturn an earlier en banc decision rejecting a writing requirement, relied on *Chevron* deference to uphold OPM's regulation requiring a writing. *See* 372 F.3d at 1358–59. And then our later opinion in *Mercier* undermined *Doe*'s reasoning to revive the earlier en banc court's interpretation that overtime "officially ordered or approved" need not be reduced to a writing. *See Mercier*, 786 F.3d at 980–82. As we have two relatively recent opinions going in different directions on whether a writing requirement is valid, the principles of stare decisis do not apply. Nor would there be any undue surprise for the Government if we interpret the plain meaning of "officially ordered or approved" to encompass more than written orders or approvals, as our most recent decision in *Mercier* held exactly that. Accordingly, this case seems to set up an exemplary situation of when there is a "special justification," as contemplated in *Loper Bright*, for a court to review a prior agency interpretation approved under *Chevron*. *See* 603 U.S. at 412 (citation omitted).

command" emphasized in *Loper Bright* "that the reviewing court—not the agency whose action it reviews—is to decide all relevant questions of law and interpret . . . statutory provisions," and we should not "ignore the reading th[is] court would have reached had it exercised its independent judgment." *Loper Bright*, 603 U.S. at 398–99 (first ellipsis in original) (quotation marks, emphasis, and citation omitted).

For the foregoing reasons, we respectfully dissent.

APPENDIX B

United States Court of Appeals for the Federal Circuit

JILLIAN LESKO,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

2023-1823

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00715-CNL, Judge Carolyn N. Lerner.

Decided: January 30, 2026

DIMITRIOS VASILOU KOROVILAS, Wucetich & Korovilas LLP, El Segundo, CA, argued for plaintiff-appellant. Also represented by JASON MATTHEW WUCETICH; MICHAEL S. MORRISON, Alexander Morrison & Fehr LLP, Los Angeles, CA.

MATTHEW JUDE CARHART, Commercial Litigation Branch, Civil Division, United States Department of Jus-tice, Washington, DC, argued for defendant-appellee. Also represented by REGINALD THOMAS BLADES, JR., PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before MOORE, *Chief Judge*, CHEN and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

Jillian Lesko appeals the decision of the Court of Federal Claims dismissing all five counts in her Amended Complaint for failure to state a claim upon which relief may be granted. Ms. Lesko, who was a registered nurse for the Indian Health Service during the COVID-19 pandemic, alleged she and all similarly situated nurses were denied various pay enhancements for overtime, nighttime, holiday, and Sunday work. In an en banc decision, this court affirmed the Court of Federal Claims' dismissal of Count II and referred the remainder of the appeal back to the panel for resolution. For the reasons discussed below, we now reverse the Court of Federal Claims' dismissal of Counts I and III–V of Ms. Lesko's Amended Complaint and remand for further proceedings consistent with this opinion.

BACKGROUND

Titles 5 and 38 of the United States Code each govern the hiring, firing, and compensation of federal employees. Title 5 covers compensation and benefits for most General Schedule federal employees while Title 38 governs employment within the Department of Veterans Affairs. Title 38 provides more competitive pay than Title 5, but Title 5 permits the discretionary application of certain provisions from Title 38 to eligible Title 5 healthcare employees. For example, registered nurses employed by the Indian Health Service (IHS)—a division of the Department of Health and Human Services (HHS)—are hired as Title 5 employees, but IHS pays them the higher base rate of pay under the special salary provisions of Title 38. IHS does not, how-ever, apply other compensation provisions from Title 38 that are available to Title 5 employees, including increased compensation rates for overtime, nighttime, Sunday, and holiday work.

From November 2020 through July 2021, Ms. Lesko served as a registered nurse for IHS. According to Ms. Lesko's Amended Complaint, to meet the needs of patients during the COVID-19 pandemic, "nurses were required to work long hours, well over their regularly scheduled tours of dut[y]," and "[t]his additional work was often not paid . . . and occurred at least weekly and often daily." J.A. 82–83 ¶ 43; *see also* J.A. 88 ¶ 61. This "work was not irregular or occasional. Rather, it was and remains continuous, consistent and regularly preformed [sic]." J.A. 82–83 ¶ 43. Twenty-four hours per day, seven days per week, the IHS electronic health record system alerted nurses with patient updates, which "often require[d] immediate responses," or at least "timely" responses pursuant to IHS policies and procedures. J.A. 83–84 ¶¶ 44, 47–48; *see also* J.A. 86–87 ¶ 54. Nurses were also required to submit or respond to patient notes and records within 48 to 72 hours. Supervisors and management were aware of this additional work, but pressured nurses to timely complete tasks, take on more responsibilities, and disciplined nurses if they failed to complete tasks in a timely fashion. This additional work also included nighttime, Sunday, and holiday work. Ms. Lesko filed her original complaint for a class action suit on June 27, 2022, which she amended on November 14, 2022, after the Government filed its first motion to dismiss.

Relevant to this appeal, Ms. Lesko's Amended Complaint included Counts I and III–V and alleged that she and all other similarly situated current and former registered nurses employed by IHS were denied various pay enhancements in violation of (1) 38 U.S.C. § 7453 (miscellaneous compensation benefits); (2) 5 C.F.R. §§ 550.121–22 (nighttime pay); (3) 5 C.F.R. §§ 550.171–72 (Sunday pay); and (4) 5 C.F.R. §§ 550.131–32 (holiday pay). For all claims, she sought backpay under 5 U.S.C. § 5596. The Government moved to dismiss under Rule 12(b)(6) of the Rules of the Court of Federal Claims (RCFC) for failure to state a claim, which the Court of Federal Claims granted.

Ms. Lesko appealed the dismissal of each count. The court sua sponte granted en banc hearing on questions related to Count II and the validity of the Office of Personnel Management's (OPM) writing requirement for overtime under 5 U.S.C. § 5542 on March 18, 2025. On December 12, 2025, the court upheld the writing requirement for 5 U.S.C. § 5542 and affirmed the Court of Federal Claims' dismissal of Count II. The court referred the remainder of the appeal back to the panel for resolution.

On December 15, 2025, we ordered party briefing on whether the court's en banc decision impacted the remaining issues on appeal. Both parties filed responsive briefing indicating that the en banc decision did not impact the other counts at issue in Ms. Lesko's appeal. *See* ECF No. 90 at 3 (the Government asserting that "[n]othing in the Court's dismissal of Count II undermines or, as best as we can tell, bears upon any arguments we have made with respect to Counts I or Counts III–V"); ECF No. 91 at 1 (Ms. Lesko asserting that "the claims asserted in the operative complaint related to (1) nighttime pay, Sunday pay, and holiday pay, and (2) entitlement to the Title 38 pay rates associated with these premium pay provisions . . . are wholly independent, and in no way impacted or altered by the en banc Court's ruling").

We thus turn to Counts I and III–V. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

A trial court's dismissal for failure to state a claim presents a question of law that we review de novo. *Boaz Hous. Auth. v. United States*, 994 F.3d 1359, 1364 (Fed. Cir. 2021). When considering whether to dismiss a plaintiff's complaint, the court must accept all factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Inter-Tribal Council of Ariz., Inc. v. United States*, 956 F.3d 1328, 1338 (Fed. Cir. 2020). A complaint should not be dismissed for failure to state a claim unless the complaint fails to state a claim that is plausible on its face. *Id.*

I

In Count I of her Amended Complaint, Ms. Lesko alleged that, just as IHS registered nurses' base pay is provided through Title 38, they should also be awarded the full panoply of higher compensation provided by the other provisions of Title 38 that Title

5 employees are eligible for, including for overtime, nighttime, Sunday, and holiday work.

The Court of Federal Claims dismissed this count, concluding that because OPM "has the authority to cherry-pick Title 38 provisions and apply them piecemeal to Title 5 employees" under 5 U.S.C. § 5371(b), its "subdelegate"—IHS—"enjoys the same discretion." *Lesko v. United States*, 164 Fed. Cl. 663, 667 (2023) (explaining that under Title 5 "[OPM] may apply '1 or more provisions of . . . [T]itle 38'" (second alteration and omission in original) (quoting 5 U.S.C. § 5371(b))). The Court of Federal Claims rejected Ms. Lesko's argument that while OPM can choose to apply certain provisions of Title 38, IHS was not delegated that same authority to selectively choose. The court determined that OPM authorized the HHS Secretary to selectively choose "certain [T]itle 38 provisions," including "premium pay," *id.* (alteration in original) (citing J.A. 101–43 (Am. Compl. Ex. A)), and the HHS Secretary in turn delegated administrative and human resources authority to the Assistant Secretary for Administration, who provides direction and guidance to HHS' Operating Divisions, including IHS, *id.* (citing J.A. 168–74 (Mtn. Dismiss Appx. Ex. 1)). And, the Court of Federal Claims concluded, "[n]othing in the memoranda [cited by the Government] tracing discretion from OPM to, ultimately, IHS cabined or changed the statutory permission to choose 'one or more' provisions from Title 38 to apply to Title 5 employees." *Id.* The Court of Federal Claims thus dismissed Count I for failure to state a claim because it determined that IHS had the discretion to pick and choose which Title 38 provisions to apply to its employees, and its registered nurses were not entitled to compensation pursuant to provisions IHS did not so choose.

Turning to the pertinent statutory language, 5 U.S.C. § 5371(b) states: "The Office of Personnel Management may, with respect to any employee described in subsection (c), provide that 1 or more provisions of chapter 74 of title 38 shall apply—(1) in lieu of any provision of chapter 51 or 61, subchapter V of chapter 55, or any other provision of this chapter; . . . ." Based on this language, we agree that Title 5 gives OPM statutory authority to selectively apply Title 38 provisions concerning pay rates and systems, hours of work, and premium pay to certain Title 5 healthcare workers outside of the VA, including to IHS registered nurses. OPM has the authority to pick which of these provisions to extend to eligible Title 5 employees, with the Title 38 provision displacing the analogous Title 5 provision, but OPM need not apply all provisions to eligible employees.

OPM may also delegate this authority to other federal agencies. In this case, Ms. Lesko pled that OPM had executed such a delegation agreement with HHS, which she attached to her Amended Complaint as an exhibit, incorporating it therein. *See* J.A. 75–76 ¶ 10; J.A. 101–43. The delegation agreement between OPM and HHS thus became part of Ms. Lesko's pleadings. *See, e.g.*, *McCutchen v. United States*, 14 F.4th 1355, 1363 (Fed. Cir. 2021) (explaining that when analyzing whether to dismiss a complaint, "[w]e may consider 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice'" (citation omitted)).

Ms. Lesko further pled that, pursuant to this delegation agreement, "IHS, a division of HHS, utilizes Title 38 provisions for [registered nurses] . . . . More specifically, Plaintiff and other class members were and/or are employed as [registered nurses] as defined by 38 U.S.C. §§ 7401(1) and 7453 and are hired and compensated pursuant to Title 38 instead of Title 5." J.A. 76 ¶ 13. Ms. Lesko pled that, based on this, she and other IHS registered nurses receive increased rates in their basic pay pursuant to 38 U.S.C. § 7451; however, she alleged that they were "not paid in compliance with the additional pay provisions outlined in [38] U.S.C. § 7453(b)–(e)." J.A. 76–78 ¶¶ 14–23. Ms. Lesko pled that, "[p]ursuant to the OPM's delegation of authority, IHS has specifically hired and categorized Plaintiff and class members as Title 38 employees, yet, IHS has failed to pay them pursuant to the Title 38 increased pay provisions," and IHS has thus "miscalculated all payments provided to Plaintiff and the Class for any and all additional pay earned pursuant to 38 U.S.C. §§ 7453(b)–(e)," including for any overtime, nighttime, Sunday, or holiday work. J.A. 77–78 ¶¶ 23–24; *see also* J.A. 78–80 ¶¶ 25–30.

To support dismissal of Count I, the Government argued below and on appeal that the delegation chain from OPM to HHS continued, with HHS having delegated its authority to pick and choose which provisions of Title 38 to apply to eligible Title 5 employees to IHS. Thus, the Government contends, IHS is free under 5 U.S.C. § 5371(b) to decide whether or not to pay its registered nurses premium pay for any and all additional pay earned pursuant to 38 U.S.C. § 7453(b)–(e). To support this argument, however, the Government relies on a document it attached to its motion to dismiss. *See* Appellee's Br. 11 (citing J.A. 170). And the Court of Federal Claims relied on this document in accepting the Government's argument that the HHS Secretary delegated "administrative and human resources authorit[y]" to Operating Divisions like IHS. *Lesko*, 164 Fed. Cl. at 667 (alteration in original) (quoting J.A. 170). Indeed, the Court of Federal Claims concluded that "nothing in the memoranda tracing discretion from OPM to, ultimately, IHS cabined or changed the statutory permission to choose 'one or more' provisions from Title 38 to apply to Title 5 employees," leading the court to dismiss Count I. *Id.*

Reliance on a document outside the pleadings was inappropriate at this stage of the proceeding. In considering whether a plaintiff has plausibly stated a claim, a court considers the well-pled facts and documents attached and incorporated into the complaint. *See*, *e.g.*, *Am. Contractors Indem. Co. v. United States*, 570 F.3d 1373, 1376 (Fed. Cir. 2009) ("On a motion to dismiss, the court generally may not consider materials outside the pleadings."); *McCutchen*, 14 F.4th at 1363. Should the Court of Federal Claims wish to consider evidence outside the pleadings, it must convert the motion to dismiss to a motion for summary judgment. *See Sharifi v. United States*, 987 F.3d 1063, 1067 (Fed. Cir. 2021) ("If, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." (quoting

RCFC 12(d))). Not only did that conversion not occur in this case, but the court also did not acknowledge that it was relying on evidence outside of Ms. Lesko's pleadings to dismiss her allegations. The Court of Federal Claims was obligated to take all factual allegations in Ms. Lesko's Amended Complaint as true and construe them in the light most favorable to her. In relying on evidence outside of the pleadings—evidence that Ms. Lesko had no opportunity to vet in discovery—the Court of Federal Claims did not do so.

On appeal, both parties focus their arguments on whether HHS did, in fact, further delegate its authority from OPM under 5 U.S.C. § 5371(b) to IHS, centering their dispute on the language in the government's proffered document. For her part, Ms. Lesko contends that such authority remained with HHS because the document states that the "HHS Deputy Assistant Secretary - Human Resources is delegated '[a]ll authorities relating to administrative responsibilities for human resources' including 'pay and benefits administration.'" Appellant's Br. 22 (alteration in original) (quoting J.A. 168). The Government responds that such authority was delegated to IHS by HHS because the document states that HHS Operating Divisions like IHS were delegated "[a]ll human resources line management authority." Appellee's Br. 11 (alteration in original) (quoting J.A. 170). While both parties present feasible arguments, we note that they do so without the benefit of discovery, which may produce testimony or other evidence that is relevant to resolving this dispute.[1, 2]

We thus reverse the Court of Federal Claims' dismissal of Count I in Ms. Lesko's Amended Complaint.

II

In Counts III–V of her Amended Complaint, Ms. Lesko alleged that IHS registered nurses were not compensated correctly for work performed at nighttime, on Sundays, and on holidays. The Court of Federal Claims considered these counts together.

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[1] That additional evidence may be relevant to this issue is further supported by both parties' reliance on sources outside of the record in their briefing on appeal.

[2] The Government further contends on appeal that, if Ms. Lesko is correct and IHS was never delegated the authority to apply any provisions of Title 38 to its registered nurses, her allegation is self-defeating because then (1) IHS registered nurses should not have had access to any compensation provisions of Title 38, including for their base pay, and (2) she would no longer have a cause of action under the Tucker Act, as she can only obtain Title 38 benefits through the discretionary application of 5 U.S.C. § 5371. Both arguments are unpersuasive. Ms. Lesko alleged OPM properly delegated authority to HHS to elect which benefits from Title 38 to apply to IHS registered nurses, HHS elected in its discretion to provide those nurses with all available provisions of Title 38, and IHS—without authority to make this election for itself—failed to compensate its nurses accordingly. If this is borne out, nothing about it undermines that IHS registered nurses were entitled to the base pay rates of Title 38 or that they would be entitled to backpay for the compensation that the authorized Government agency elected to provide them, but they were not in fact paid.

The regulations implementing Title 5 premium pay for nighttime, Sunday, and holiday work require that such work be "regularly scheduled." *See* 5 C.F.R. § 550.121; 5 C.F.R. § 550.103. Also relevant is 5 C.F.R. § 610.121(b)(3), which states that:

> If it is determined that the head of an agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so . . . , the employee shall be entitled to the payment of premium pay for that period of work as regularly scheduled work under subpart A of part 550 of this chapter. In this regard, it must be determined that the head of the agency: (i) Had knowledge of the specific days and hours of the work requirement in advance of the administrative workweek, and (ii) had the opportunity to determine which employee had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement.

5 C.F.R. § 610.121(b)(3). This regulation essentially codified our predecessor court's holding in *Aviles v. United States*, 151 Ct. Cl. 1 (1960). *See Pay Administration* (General) and *Hours of Duty*, 48 Fed. Reg. 3931, 3932 (Jan. 28, 1983) ("[T]he Court of Claims in Aviles . . . had previously expressed another principle that: '[T]he mere fact of omitting regular overtime from the scheduled tours of duty does not make such overtime occasional or irregular.' Under the *Aviles* principle, this overtime work could have been scheduled under the regulations; therefore, it should have been scheduled. . . . OPM concurs and

we have included this requirement in § 610.121(b) to fill a gap in the proposed regulations." (second alteration in original) (quoting *Aviles*, 151 Ct. Cl. at 8)).

In *Aviles*, the Court of Claims determined that "tours of duty which the [Agricultural Research Service] regularly scheduled for [meat inspectors] were not 40 hour, five day weeks but weeks consisting of five days each, each day lasting for eight hours *or until the processing plant completed its recurring overtime*." 151 Ct. Cl. at 8. The Court of Claims further determined that the Government "could have formally scheduled workweeks or tours of duty which included the overtime which it knew would be required," but "declined to do so because it feared that payment might have to be made for overtime hours scheduled but not actually worked." *Id.* The Court of Claims reasoned that "it seem[ed] inequitable and unfair . . . for the Government to hold that plaintiffs have not regularly worked the overtime which they were expected to work simply because it chose to adhere to guide lines which have no bearing on the realities of the situation," and that "mere[ly] . . . omitting regular overtime from the scheduled tours of duty does not make such overtime occasional or irregular." *Id.* Thus, the Court of Claims held that where "overtime worked by plaintiffs was part of regularly scheduled tours of duty," they "should be paid the [premium pay] differential for any overtime hours worked." *Id.* at 9.

In *Burich v. United States*, 177 Ct. Cl. 139 (1966), the Court of Claims cabined its holding in *Aviles*. The court emphasized that, unlike the meat inspectors in *Aviles*, the plaintiff in *Burich* experienced "erratic and irregular periods of overtime," as "neither the nature of the work nor the length of time required in its performance could be ascertained beforehand." *Burich*, 177 Ct. Cl. at 145. The Court of Claims thus held that the plaintiff was not entitled to relief because his overtime work was not "amenable to administrative control." *Id.* at 147.

In dismissing Counts III–V of Ms. Lesko's Amended Complaint, the Court of Federal Claims found that, according to Ms. Lesko's pleadings, not only was her work "unscheduled," it "was impossible to schedule in advance." *Lesko*, 164 Fed. Cl. at 670 (citation omitted). The Court of Federal Claims explained that the type of additional work alleged in Ms. Lesko's Amended Complaint is not like the unscheduled work in *Aviles*, which had "followed an 'actual, controllable' pattern." *Id.* at 670–71 (citation omitted). Further, the Court of Federal Claims held that the OPM regulation codifying *Aviles* only "license[d]retroactively schedul[ing] unscheduled work [if] . . . the agency[has] 'knowledge of the specific days and hours of the work requirement in advance.'" *Id.* at 671 (quoting 5 C.F.R. § 610.121(b)(3)). Mere "knowledge of recurrent off-the-clock work is insufficient." *Id.* At the motion to dismiss stage, the court must take the allegations in the complaint as true and construe them in the light most favorable to Ms. Lesko. We conclude that the Court of Federal Claims did not follow this standard.

Here, Ms. Lesko pled that IHS registered nurses "regularly and routinely were forced to fill the coverage gaps" in healthcare facilities that were often short staffed, and "[s]upervisors and managers regularly and routinely required nurses to stay after hours and work without compensation." J.A. 82 ¶ 42; *see also* J.A. 86 ¶ 53 ("When Plaintiff and class member shifts were set to end, hospitals and clinics were often short staffed and unable to meet patient demand[, thus] Plaintiff and class members were often required to stay after tours of duty ended."). Indeed, "nurses were required to work long hours, well over their regularly scheduled tours of dut[y]," and "[t]his additional work was often not paid . . . and occurred at least weekly and often daily." J.A. 82–83 ¶ 43. "This critical and required related patient work was not irregular or occasional. Rather, it was and remains continuous, consistent and regularly preformed [sic] work completed daily and/or weekly." J.A. 82–83 ¶ 43.

Ms. Lesko further pled that IHS uses systems that include individual logins that "track[] and monitor[] the exact time [nurses] are in the system . . . . The IHS is [thus] in possession, custody and/or control of all current and historical time data related to how long Plaintiffs [sic] and class members were utilizing these systems after their tours of duty." J.A. 83 ¶ 45; *see also* J.A. 83 ¶ 44. Additionally, Ms. Lesko pled that nurses transmitted patient related work via fax and email that will "evidenc[e] the time and date such work is completed." J.A. 83 ¶ 46. Ms. Lesko also pled that, twenty-four hours per day, seven days per week, the IHS electronic record system alerted nurses with patient updates, which "often require[d] immediate responses," or at least "timely" responses pursuant to IHS policies and procedures. J.A. 83–84 ¶¶ 44, 47–48. Nurses also needed to respond to certain patient notes and records within 48 to 72 hours. J.A. 84 ¶ 50. And because "[f]ace to face appointments and/or telephone or remote patient interactions take priority," Ms. Lesko pled that "it [was] often impossible to complete all required work and paperwork during normally scheduled tours," despite said paperwork also "often [being] required to be completed within a set number of hours." J.A. 86–87 ¶ 54. Ms. Lesko further pled that supervisors and management were aware of this work, pressured nurses to timely complete tasks and take on more responsibilities, and disciplined them if they failed to timely complete tasks. J.A. 84–85 ¶ 51; *see also* J.A. 86–87 ¶ 54 ("Supervisors, managers and other IHS employees have direct knowledge of this off-the-clock work, do not stop Plaintiff and class members from completing these tasks, and in fact directly and/or indirectly require the completion of this necessary work on a regular and ongoing basis."). Ms. Lesko pled that uncompensated for time also included nighttime, Sunday, and holiday work. *See* J.A. 87–88, ¶¶ 57–60.

Construing these allegations in the light most favorable to Ms. Lesko, we cannot agree with the Court of Federal Claims' findings that "Ms. Lesko's off-the-clock work was impossible to schedule in advance"; that "IHS could not have 'formally scheduled workweeks . . . which included the overtime . . . it knew would be required,'" as "much of the additional work revolved around 'patient emergencies' 'at any time'"; that Ms. Lesko "does not allege that her off-the-clock work followed an 'actual, controllable' pattern"; and that "[n]othing in [the] Amended Complaint suggests her additional work could be formally scheduled." *Lesko*, 164 Fed. Cl. at 670–71 (omissions in original) (citations omitted).

With discovery it may turn out that certain of this alleged uncompensated for work—like having to respond to patient emergencies—is indeed not of a "habitual and recurrent nature," such that it followed an "actual, controllable" pattern. However, Ms. Lesko pled that the additional work "occurred at least weekly and often daily"; "was not irregular or occasional," but in fact was "continuous, consistent and regularly preformed [sic]"; was trackable by IHS with such data remaining in the agency's custody and control; and was related to more than just patient emergencies or alerts and notifications, but also included routine paperwork and instances when hospitals and clinics were short staffed such that nurses had to remain on shift after their scheduled tour ended. Construing Ms. Lesko's pleadings in the light most favorable to her, she states a plausible claim that IHS registered nurses were "called upon regularly to perform night[, Sunday, and holiday] work and that, by virtue of its habitual and recurrent nature, such work could have and indeed should have been formally scheduled," *Burich*, 177 Ct. Cl. at 147, as part of their "regularly scheduled" tours of duty. 5 C.F.R. § 550.103. Having thus cleared the bar of plausibly stating a claim at the motion to dismiss stage, whether IHS registered nurses' nighttime, Sunday, and holiday work was such that it could have been "regularly scheduled" is an is-sue for resolution on the facts.

On appeal, the Government argues that Ms. Lesko has "implicitly" admitted that her claims for uncompensated work at nighttime, on Sundays, and on holidays were not so consistent that the precise hours were known in advance and should have been part of her regular schedule. Appellee's Br. 16, 19.[3] The Government further contends that Ms. Lesko's pleadings "suggest[] . . . *ad hoc* work that the agency could not have predicted with such specificity." Appellee's Br. 19. We are not persuaded. First, it is not clear to us that Ms. Lesko conceded that all alleged nighttime, Sunday, and holiday work was irregular such that authorized personnel would not have "[h]ad knowledge of the specific days and hours of the work requirement in advance of the administrative workweek." 5 C.F.R. § 610.121(b)(3). The Government only relies on Ms. Lesko's statement that "the law does not require such precision," to support its proposition, which falls short of a concession. Appellee's Br. 19 (quoting Appellant's Br. 18). Furthermore, Ms. Lesko, as part of her argument that the Court of Federal Claims erred by not allowing her to further amend her complaint, asserted that she could more specifically allege that such work should have been scheduled by someone with authority to do so, *see* Appellant's Br. 24, further supporting that she was not making any such concession in her opening brief.

Second, as we have already noted, construing all well-pled facts in the light most favorable to her, Ms. Lesko's pleadings include more than just emergency

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[3] The Government also seems to imply that *Aviles* is no longer good law because it "was decided before OPM promulgated th[e] regulatory language" in 5 C.F.R. § 610.121(b)(3). Appellee's Br. 18. But the Government also concedes that this regulation codified *Aviles* and goes on to cite positively the Court of Federal Claims' use of *Aviles* and *Burich*. Appellee's Br. 18–19. This argument is thus both underdeveloped and unpersuasive.

or *ad hoc* work, instead she alleged that uncompensated, routine tasks and work "was not irregular or occasional." J.A. 82–83 ¶ 43. She also alleged that much of this work was trackable, with IHS possessing the data.

We thus reverse the Court of Federal Claims' dismissal of Counts III–V in Ms. Lesko's Amended Complaint.

III

Ms. Lesko alternatively argues that the Court of Federal Claims abused its discretion by dismissing her Amended Complaint instead of granting her leave to amend to more specifically allege that IHS registered nurses' overtime work could have and should have been scheduled and to further allege facts and claims related to the recovery of basic pay. In her responsive briefing to the panel order following the court's en banc decision, Ms. Lesko argued that, related to Count II, the Court of Federal Claims should have given her leave to amend to assert claims for straight time pay for off the clock work that does not derive from Title 5. ECF No. 91 at 4–5. However, Ms. Lesko never moved to amend her complaint a second time in front of the Court of Federal Claims, and instead only requested leave to amend as an alternative form of relief incorporated into her response to the Government's motion to dismiss. A trial court does not abuse its discretion by not allowing a party to amend a complaint where the party fails to move to amend. *See, e.g.*, *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913–14 (8th Cir. 2002); *see also Refaei v. United*

States, 725 F. App'x 945, 951–52 (Fed. Cir. 2018) (non-precedential) (citing *Meehan* approvingly).

CONCLUSION

We have considered the Government's remaining arguments and find them unpersuasive. For the foregoing rea-sons, we reverse the decision of the Court of Federal Claims dismissing Counts I and III–V of Ms. Lesko's Amended Complaint and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

COSTS

Costs to Appellant.

APPENDIX C

In the United States Court of Federal Claims

JILLIAN LESKO, *Plaintiff,* v. THE UNITED STATES, *Defendant.*	No. 22-715C (Filed: March 21, 2023) Employment; Title 5; Title 38; Office of Personnel Management; Inducement; Overtime

Michael Morrison, Alexander, Morrison, and Fehr LLP, Los Angeles, CA, for Plaintiff.

Kelly Geddes, Civil Division, United States Department of Justice, Washington, DC, for Defendant.

OPINION AND ORDER

LERNER, *Judge*.

Plaintiff, Ms. Jillian Lesko, served her country as a nurse practitioner for the Indian Health Service ("IHS") during eight months of the COVID-19 pandemic. Am. Compl. ¶¶ 1, 4, ECF No. 9. She brings this case on behalf of herself and all those similarly situated. *Id.* at ¶ 1.

Ms. Lesko alleges that she was denied various pay enhancements in violation of (1) 38 U.S.C. § 7453 (miscellaneous compensation benefits); (2) 5 U.S.C. §§ 5542–43 and 5 C.F.R. §§ 550.111–14 (overtime pay); (3) 5 C.F.R. §§ 550.121–22 (nighttime pay); (4) 5

C.F.R. §§ 550.171–72 (Sunday pay); and (5) 5 C.F.R. §§ 550.131–32 (holiday pay). For all of her claims, she seeks backpay under 5 U.S.C. § 5596 if she is "found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1).

Before the Court is Defendant's Second Motion to Dismiss ("Mot."), ECF No. 15. For the reasons stated below, Defendant's Motion is **GRANTED**, and Ms. Lesko's Amended Complaint is **DISMISSED** for failure to state a claim upon which relief may be granted. Ms. Lesko was not a Title 38 employee and, therefore, was ineligible to receive additional pay pursuant to 38 U.S.C. § 7453. Her argument under 5 U.S.C. §§ 5542–43 also fails because the statute does not provide for recovery under an inducement theory. Lastly, Ms. Lesko cannot recover for nighttime, Sunday, and holiday pay because she does not allege that this work was scheduled in advance as required by Office of Personnel Management ("OPM") regulations.

I. Background

Between November 9, 2020, and July 21, 2021, Ms. Lesko worked as a Supervisory Advanced Practice Registered Nurse for the IHS—a division of the Department of Health and Human Services ("HHS"). Am. Compl. ¶¶ 1, 4, ECF No. 9; Mot. at 2. Ms. Lesko performed both clinical and administrative duties to assist Native American youth experiencing issues with alcohol and substance abuse. Def.'s App. to Mot. to Dismiss ("Def.'s App.") at Appx 27–37. She worked at two IHS hospitals located in Phoenix, Arizona, and Wadsworth, Nevada. Am. Compl. ¶ 4. IHS hired and paid Ms. Lesko at a GS-13, step 10 level. *Id.* at Appx 8. When she started this position with IHS, Ms. Lesko had "over 18 years of experience in healthcare [and] over 10 years of experience as a nurse." *Id.* at Appx 10. She was board certified by both the American Nurses Credentialing Center and the American Academy of Nurse Practitioners as a Family Nurse Practitioner from January 2016 through January 2021. *Id.* at Appx 15–16. She holds a Master of Science degree in Nursing from the University of Southern Alabama. *Id.* at Appx 13–16.

As public-sector nurses during the height of the COVID-19 pandemic, Ms. Lesko and her peers bore the brunt of the crisis. Am. Compl. ¶ 43. To meet the exigencies of that unique moment, Ms. Lesko frequently worked long hours. *See id.* at ¶¶ 26–27. Twenty-four hours per day, seven days per week, the IHS electronic health record system alerted her with patient updates. *Id.* at ¶¶ 44, 45, 47. Often, those updates "require[d] immediate responses," *id.* at ¶ 44, or at least "timely" responses pursuant to IHS policies and procedures, *id.* at ¶ 48. Ms. Lesko and other nurses were also required to transmit patient related information on paper and via fax and email. *Id.* at ¶ 46. She claims that she often needed to respond to patient notes and records within 48 to 72 hours. *Id.* at ¶ 50. Ignoring these alerts could have risked the health and well-being of patients and compromised her compliance with the standard of care required of nurses. *Id.* at ¶¶ 48, 50. Ms. Lesko alleges that the work she was unable to complete during the workday occupied much of her nights, Sundays, and holidays. *Id.* at ¶¶ 57–60.

Ms. Lesko states that her supervisors knew about her overtime and off-the-clock work. *Id.* at ¶¶ 50–51,

54. She describes a work environment wherein she and her coworkers felt compelled to complete unfinished work outside scheduled work hours. *Id.* This pressure was only exacerbated by the pandemic. *Id.* at ¶ 53. After eight months as an IHS nurse, Ms. Lesko resigned on July 21, 2021. Def.'s App. at Appx 54.

II. Statutory Background

The parties invoke two different employment statutes—Titles 5 and 38 of the United States Code. *See* 5 U.S.C. § 5301; 38 U.S.C. § 7401. Each govern the hiring, firing, and compensation of federal employees. Title 5 covers compensation and benefits for most General Schedule federal employees. *See* 5 U.S.C. § 5301. In comparison, Chapter 74 of Title 38 ("Title 38") governs employment within the Department of Veterans Affairs ("VA"). *See* 38 U.S.C. § 7401. Title 38 provides greater flexibility over personnel decisions to VA leadership and, simultaneously, more competitive pay than Title 5. *See generally* 38 U.S.C. § 7451 (stating the purpose of this provision is to ensure hiring remains "competitive, on the basis of pay and other employee benefits, with non-Department health-care facilities in the same labor-market").

Both Title 5 and Title 38 increase compensation for overtime, nightwork, holidays, and Sundays. *See* 5 U.S.C. § 5542; 5 C.F.R. §§ 550.111–114, 550.121–125, 550.131–132, 550.171–172. However, Titles 5 and 38 calculate—and label—this increased compensation differently. Under Title 5, the annual rate of basic pay is divided by 2,087 hours of annual work to calculate a "premium pay" rate. *See* 5 U.S.C. § 5504(b)(1). Under Title 38, the annual rate of basic pay is divided by 2,080 hours of annual work to calculate an "additional pay" rate. 38 U.S.C. §§ 7453(a)–(e). This numerical difference informs much of Plaintiff's Amended Complaint and the analysis in Defendant's Motion to Dismiss.

III. Procedural Background

On June 27, 2022, Plaintiff filed a Complaint for violation of 38 U.S.C. § 7453. Compl. at ¶ 1, ECF No. 1. On October 24, 2022, Defendant moved to dismiss for failure to state a claim. Def.'s First Mot. Dismiss, ECF No. 7. On November 14, 2022, Plaintiff amended her Complaint as a matter of course pursuant to Rule of the Court of Federal Claims ("RCFC") 15(a)(1)(B), thereby mooting Defendant's First Motion to Dismiss. *See* Am. Compl.; Order Dismissing Def.'s First Mot. to Dismiss as Moot, ECF No. 10. Defendant's Second Motion to Dismiss—alongside Plaintiff's Response, ECF No. 18, and Defendant's Reply, ECF No. 19—is currently before this Court.

IV. Jurisdiction

Plaintiff asserts claims for overtime and off-the-clock pay pursuant to 38 U.S.C. § 7453 and the Tucker Act, 28 U.S.C. § 1491(a). Am. Compl. ¶ 1. If this Court finds Plaintiff ineligible under 38 U.S.C. § 7453, she seeks alternative relief under 5 U.S.C. §§ 5542 and 5543. *Id.* This Court has jurisdiction over claims arising under 38 U.S.C. § 7453 and 5 U.S.C. § 5542. *See Mercier v. United States*, 114 Fed. Cl. 795, 799 (2014) (finding jurisdiction over 38 U.S.C. § 7453); *Oztimurlenk v. United States*, 162 Fed. Cl. 658, 666 (2022) (same); *Austin v. United States*, 124 Fed. Cl. 410 (2015) (same); *Doe v. United States*, 372 F.3d 1347, 1362 (Fed. Cir. 2004) (proceeding with claims under 5 U.S.C. § 5542); *Bishop v. United States*, 77 Fed. Cl. 470, 474 (2007) (same).

However, this Court does not have jurisdiction over 5 U.S.C. § 5543. The Federal Circuit held in *Horvath v. United States* that 5 U.S.C. § 5543 is "discretionary, . . . not money-mandating and [does] not confer jurisdiction" on the Court of Federal Claims. 896 F.3d 1317, 1320 (2018).

V. Standard of Review

To survive a motion to dismiss for failure to state a claim pursuant to RCFC 12(b)(6), a complaint must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts grant a RCFC 12(b)(6) motion to dismiss when "the facts asserted by the claimant do not entitle [plaintiff] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When reviewing a motion to dismiss, the Court of Federal Claims accepts "all well-pleaded factual allegations as true and draws all reasonable inferences" in favor of the plaintiff. *Id.*

VI. Discussion

A. Count I Is Dismissed.

This Count boils down to one central dispute: Was Ms. Lesko a Title 38 employee? In short, she was not. Only the VA can hire nurses under Title 38. 38 U.S.C. § 7401 (granting sole authority to hire pursuant to Title 38 to the Secretary of Veterans Affairs). Ms. Lesko, by contrast, was a nurse for IHS and, therefore, was not a Title 38 employee.

Title 5—the statute which enables IHS to hire nurses—permits discretionary application of certain provisions from Title 38. 5 U.S.C. § 5371. Therein lies the confusion. Plaintiff makes a one-for-all and all-for-one argument. She claims that IHS's decision to apply one Title 38 provision (base pay, 38 U.S.C. § 7455) necessitates the application of Title 38 in its entirety (including premium pay, 38 U.S.C. § 7453). Am. Compl. ¶ 1.

Title 5 says otherwise. The Office of Personnel Management may apply "1 or more provisions of . . . [T]itle 38." 5 U.S.C. § 5371(b). The answer to the operative question—whether Ms. Lesko was a Title 38 employee—is found in the plain language of the statute. OPM has the authority to cherry-pick Title 38 provisions and apply them piecemeal to Title 5 employees. However, the choice to apply one Title 38 provision did not, and could not, transform IHS nurses into Title 38 employees. IHS, as OPM's subdelegate, enjoys the same discretion. Plaintiff proposes a structure by which delegation somehow dilutes this discretion. Resp. at 3. In other words, she acknowledges that OPM can choose to apply provisions of Title 38 but argues IHS does not have that same discretion. Neither case law, statute, nor regulation support this argument.

OPM authorizes the HHS Secretary to choose "certain [T]itle 38 provisions," including "premium pay." Am. Compl. at Ex. A (Delegation Agreement between U.S. Office of Personnel Management and Department of Health and Human Services (June 28, 2022)). The delegation agreement does not permit (nor would the law allow) the HHS Secretary to hire nurses under Title 38. *Id.* ("OPM is delegating to

HHS discretionary use of certain [T]itle 38 provisions that are primarily available to the Department of Veterans Affairs. If HHS uses one of the authorities in this delegation agreement, the comparable authority in [T]itle 5 is waived. The provisions listed are . . . provided in 5 U.S.C. [§] 5371.").

The Secretary delegates the "administrative and human resources authorit[y]" to the Assistant Secretary for Administration. Def.'s App. at Appx 3. The delegation expressly authorizes the Assistant Secretary to provide direction and issue guidance to Operating Divisions—including IHS. *Id.* Pursuant to this authorization, the Assistant Secretary delegates "[a]ll human resources line management authority" to IHS. *Id.* at Appx 1. Nothing in the memoranda tracing discretion from OPM to, ultimately, IHS cabined or changed the statutory permission to choose "one or more" provisions from Title 38 to apply to Title 5 employees.

Simply put, Ms. Lesko was a Title 5 employee benefiting from certain Title 38 provisions. IHS chose to apply one Title 38 provision and forgo the rest. *See* Indian Health Service, Pay Systems and Tables, Pay Systems Authorized Under Title 38 of the United States Code, Title 38 Special Salary Rates (Oct. 17, 2022) ("IHS has authorized higher rates of basic pay than regular GS locality rates for certain health care occupations based on documented recruitment and retention issues and in compliance with Title 38 statutory criteria."). There is no statutory provision or other authority preventing IHS from doing so. For these reasons, Count I of the Amended Complaint is dismissed.

B. Count II Is Dismissed.

For reasons similar to Count I, Count II must also be dismissed. Count II alleges that Plaintiff is entitled to premium pay for overtime induced by her supervisors. Am. Compl. ¶¶ 81–91; Resp. at 10–14. However, her argument rests on the supposition that she was a Title 38 employee. Am. Compl. ¶¶ 12–25 ("The statutory requirements outlined in 38 U.S.C. § 7451 provide for increases in the rates of basic pay for [nurses] when compared to Title 5 employees." *Id.* at ¶ 14.). Having held that Ms. Lesko was not a Title 38 employee, the Court dismisses Count II for failure to state a claim.

In the alternative, Ms. Lesko argues she is entitled to relief under Title 5. However, Title 5 requires written authorization for overtime. *Doe v. United States*, 372 F.3d 1347, 1362 (Fed. Cir. 2004). Plaintiff contends she can recover despite this requirement and cites *Mercier v. United States*, 786 F.3d 971, 982 (Fed. Cir. 2015), to support her claim. Resp. at 10. But *Mercier* is inapposite. In *Mercier*, the plaintiffs successfully recovered for after-hours work under an inducement theory of overtime. 786 F.3d at 982. Under inducement theory, employees may still recover for overtime work expected, required, or induced by other means, even when an employer has not approved the overtime in writing. *See, e.g.*, *Anderson v. United States*, 136 Ct. Cl. 365, 370 (1956). Unlike Ms. Lesko, however, the *Mercier* plaintiffs were VA employees hired under Title 38. *Id.* at 972. As such, *Mercier* only applies in the context of Title 38. *See Mercier*, 786 F.3d at 982. Because Ms. Lesko was a Title 5 employee, resolution of this issue turns on whether Title 5—not Title 38—permits recovery under inducement theory. It does not.

To begin, Plaintiff reads *Mercier* too broadly. Resp. at 10–14. Because the language "officially ordered or approved" is identical in Titles 5 and 38, *Mercier* conformed to the precedent in *Anderson* that induced overtime is "officially ordered or approved." *See Mercier*, 786 F.3d at 982 ("We therefore hold that *Anderson*'s interpretation of 5 U.S.C. § 5542, namely that overtime is 'officially ordered or approved' where it is induced by one with the authority to order or approve overtime but not expressly directed, remains good law.").

However, *Mercier* and *Anderson* have limited applicability. They apply only when the agency has not yet issued a regulation interpreting "officially ordered or approved." *Id.* ("Thus, our current clarification of *Doe* does not in any way undermine its holding that the regulation was entitled to *Chevron* deference."). When an agency issues regulations implementing Title 5, courts afford *Chevron* deference to the agency's interpretation. *E.g.*, *Doe*, 372 F.3d at 1362.

In *Anderson*, the Federal Circuit invalidated the relevant regulation and interpreted the statute as though no regulation were in effect. *Mercier*, 786 F.3d at 981 (interpreting *Anderson*) ("*Anderson* held the regulation invalid and accordingly considered the full scope of the statutory right."). It applied general principles of statutory interpretation and read Title 5 to "encompass[] forms of order or approval that might by their nature never be put in writing," i.e., inducement theory. *Mercier*, 786 F.3d at 981 (describing *Anderson*); *see Anderson*, 136 Ct. Cl. at

371 ("The withholding of written orders or approval reflected observance of the letter of the regulation but denial of the substance of the statute."). *Anderson*'s interpretation of Title 5 controls only in the narrow circumstance where an agency's implementing regulation has not yet interpreted Title 5.

Similarly, in *Mercier*, "no procedural regulations [had] interpret[ed] the Title 38 overtime provision," so the Federal Circuit held "that *Anderson*'s interpretation of [Title 5] that overtime is 'officially ordered or approved' where it is induced . . . remains good law." *Mercier*, 786 F.3d at 979, then at 982 (citing *Anderson*, 136 Ct. Cl. at 370). *Anderson* and its progeny "remain good law" in the narrow scenario where an agency has not yet interpreted the statute. When an agency has, *Chevron*—not *Anderson*—governs.

In one such case, the Federal Circuit had occasion to review OPM's construction of Title 5's overtime provision. At *Chevron* Step Two, the court in *Doe* deferred to "OPM's view that [Title 5's] 'ordered or approved' language can reasonably be interpreted to require a more formal means of authorization," i.e., written approval. 372 F.3d at 1361–62 (holding that OPM permissibly constructed Title 5 to proscribe inducement theory). The same regulation in *Doe* is now in question and, as in *Doe*, the same result prevails.

The Court follows *Doe*'s lead and restates its holding that OPM regulation 5 C.F.R. § 550.111 is a permissible construction of Title 5's overtime provision. *Id.* at 1362 ("[T]he OPM regulation interprets an ambiguous statute that it was expressly authorized to administer. OPM's construction of the phrase 'ordered or approved,' as requiring written authorization, is reasonable and entitled to *Chevron* deference because it comports with, and indeed furthers, the language and purpose of [Title 5]."). *Doe* itself did not interpret Title 5, nor did it have cause to. *See Mercier*, 786 F.3d at 981 (explaining the limited holding in *Doe*). It stands for the limited proposition that *Anderson* does not apply—and *Chevron* does—when an agency has already interpreted Title 5 and regulated pursuant to that interpretation. *Id.* ("Where *Anderson* . . . considered the full scope of the statutory right, *Doe* enforced the writing regulation and had no cause to consider whether the phrase . . . encompassed forms of order or approval that might by their nature never be put 'in writing.' The question before us today—whether overtime may be 'ordered or approved' by inducement, albeit under a different statute—was simply never considered by the *Doe* court.").

In that regard, *Doe* controls when a court reviews OPM's interpretation of Title 5. *See, e.g.*, *Aletta v. United States*, 70 Fed. Cl. 600, 604 (2006) (applying *Doe*) ("OPM, and before it the Civil Service Commission, have had substantially the same regulation since 1945 regarding . . . 5 C.F.R. § 550.111(c). The Federal Circuit has found this regulation to be a valid and enforceable exercise of OPM's authority to implement [Title 5]."); *Bishop v. United States*, 77 Fed. Cl. 470, 474 (2007) (same) ("[P]laintiffs were not entitled to overtime compensation because, with the exception of certain post orders, they could not present evidence showing that the overtime was ordered or approved in writing.").

If Plaintiff were a Title 38 employee, then *Mercier* would control. *See*, *e.g.*, *Oztimurlenk v. United States*, 162 Fed. Cl. 658, 666–67 (2022) (invoking *Mercier* in a Title 38 action); *Coyner v. United States*, 161 Fed. Cl. 677, 684 (2022) (same). But she is not. So, *Mercier* and its interpretation of "officially ordered or approved" are of no moment. Instead, the instant case turns on the same regulation in *Doe*—5 C.F.R. § 550.111. The Court is thus obligated to reject Plaintiff's inducement theory. Unless Plaintiff can allege that her overtime work was approved in writing, no remedy is available.

Plaintiff also includes an argument about compensatory time. When employees work hours in excess of their "scheduled tour of duty," they may be granted "compensatory time off" instead of payment for that work. 5 U.S.C. § 5543(a)(2). Specifically, Ms. Lesko claims that she was "routinely required to take compensatory time in lieu of overtime pay without [her] consent and without [her] having voluntarily requested such comp[ensatory] time credit in writing." Am. Compl. ¶ 63. That requirement, however, is found only in Title 38 and nowhere in Title 5. 38 U.S.C. § 7453(e)(3).

Instead, Title 5 gives the agency discretion whether to grant compensatory time without the procedural hurdles included in Title 38. 5 U.S.C. § 5543(a)(2); *see also Doe*, 372 F.3d at 1351 (Fed. Cir. 2004) ("[Title 5] allows the head of an agency to 'grant [an] employee compensatory time off from his scheduled tour of duty instead of payment under section 5542.'"). This discretion precludes this Court's review entirely. The Federal Circuit held in *Horvath* that 5 U.S.C. § 5543 is "discretionary, . . . not money mandating, and could not confer jurisdiction" on the Court of Federal Claims. 896 F.3d at 1320.

For the aforementioned reasons, Count II of the Amended Complaint is dismissed.

C. Counts III–V Are Dismissed.

Having found that Plaintiff was a Title 5 employee without the ability to recover under inducement theory, the Court dismisses Counts III through V for failure to state a claim.

Plaintiff's argument is split into two contentions. First, Ms. Lesko asserts she was not compensated correctly for nighttime, Sunday, and holiday work. Am. Compl. ¶¶ 58–61. However, Plaintiff seemingly concedes that IHS calculated her pay correctly under Title 5. *Id.* at ¶ 23 ("Plaintiff's . . . hourly rate of basic pay would be proper if the workers were being paid according to Title 5."), ¶ 25 ("IHS calculated a lower hourly rate of basic pay for all [nurses] and then applied that lower hourly rate when calculating additional pay."). Her sole complaint is that IHS miscalculated her pay under Title 38, which she maintains as part of her bid for Title 38 status. *Id.* For the same reasons Count I must be dismissed, this claim also fails.

Ms. Lesko next contends that she did not receive premium pay for work performed at night, on Sundays, and on holidays. *See* Am. Compl. ¶¶ 95–98, 101–106, 109–13. To qualify for premium pay, OPM regulations require that all nighttime, Sunday, and holiday work be scheduled in advance. *See* 5 C.F.R. § 550.121 ("[N]ightwork is *regularly scheduled* work performed by an employee." (emphasis added)); 5 C.F.R. § 550.131 ("Sunday work means nonovertime work performed by an employee during a *regularly scheduled* daily tour." (emphasis added)); 5 C.F.R. § 550.131 ("Holiday work means nonovertime work performed by an employee during a *regularly scheduled* daily tour." (emphasis added)). Plaintiff does not claim this work was scheduled in advance. Rather, she suggests that her work was induced by supervisors: "Defendant wrongfully, willfully, regularly and routinely informed Plaintiff[] . . . that work alleged herein was required, necessary and critical to satisfactory patient care." *Id.* at ¶¶ 97, 105, 113. Plaintiff again relies on an inducement theory of recovery. Resp. at 17 ("[S]uch work was . . . induced."). But applicable regulations do not support this argument.

Definitionally, Ms. Lesko did not complete nightwork, Sunday work, or holiday work. The regulation defines all three categories as "regularly scheduled work." 5 C.F.R. § 550.121. Ms. Lesko explicitly acknowledges that her work was unscheduled. *See* Am. Compl. ¶ 43 ("[N]urses were required to work long hours, well over their regularly scheduled tours of duties."), ¶ 45 (alleging that nurses utilized electronic health record systems to manage patient care "after their tours of duty"), ¶ 49 ("Managing, responding to and/or otherwise working after tours of duty constitutes compensable work."), ¶ 51 ("[S]upervisors and management know that employees are working after tours of duty are completed."), ¶ 53 ("Plaintiffs and class members have not been able to . . . complete all necessary and required patient work during their regularly scheduled tours of duty" and "were often required to stay after tours of duty ended."), ¶ 54 ("[I]t is often impossible to complete all required work and paperwork during normally scheduled tours of duty.”).

Though the result of this narrow requirement may have unfairly impacted healthcare workers who worked irregular hours, this Court cannot grant the relief requested either at law or in equity. In *Aviles v. United States*, the Federal Circuit’s predecessor court—the Court of Claims—treated unscheduled work as though it had been scheduled. *See* 151 Ct. Cl. 1, 8 (1960). There, the Agricultural Research Service paid its meat inspectors for forty-hour, five-day weeks. *Id.* In actuality, the employees regularly worked days “lasting . . . until the processing plant completed its recurring overtime” well beyond forty-hours. *Id.* (emphasis omitted). The meat inspectors stayed at the plant on a daily basis beyond the scheduled eight-hour workday, as a group. *Id.* The employer refused to schedule this regular overtime for fear that “payment might have to be made for overtime hours scheduled but not actually worked.” *Id.* So, the Court of Claims treated recurrent, daily, but unscheduled overtime as regularly scheduled. *Id.* at 9.

Unlike in *Aviles,* much of Ms. Lesko’s off-the-clock work was impossible to schedule in advance. Plaintiff alleges, for instance, that “alerts and notifications . . . [could] be sent at any time during a 24 hour period, 7 days a week.” Am. Compl. ¶¶ 44–51. This type of overtime was not present in *Aviles*. The Court of Claims later explained that the *Aviles* plaintiff “was called upon regularly to perform night work [which] . . . could have and indeed should have been formally scheduled.” *Burich v. United States*, 177 Ct. Cl. 139, 147 (1966) (describing *Aviles*). IHS could not have "formally scheduled workweeks . . . which included the overtime . . . it knew would be required," *Aviles*, 151 Ct. Cl. at 8, when much of the additional work revolved around "patient emergencies" "at any time," Am. Compl. ¶ 47. Plaintiff does not allege that her off-the-clock work followed an "actual, controllable" pattern as in *Aviles* and *Burich*. Nothing in her Amended Complaint suggests her additional work could be formally scheduled. *See Medrano v. United States*, 161 Fed. Cl. 207, 209 (2022) (denying motion to dismiss because plaintiffs alleged that their off-the-clock work could be scheduled).

Eventually, OPM codified *Aviles*' equitable holding in 5 C.F.R. § 610.121(b)(3). *Id.* at 208–09 (stating that OPM "in effect codif[ied] *Aviles*"). "If . . . an agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so . . . the employee shall be entitled to . . . premium pay for that period of work as regularly scheduled work." 5 C.F.R. § 610.121(b)(3). However, license to retroactively schedule unscheduled work is restricted by the agency's "knowledge of the specific days and hours of the work requirement in advance." *Id.*

Here, the alleged facts belie "knowledge of the specific days and hours." *Id.* Plaintiff contends that supervisors "had knowledge that off-the-clock work was occurring on a recurrent and continuous basis." Resp. at 17. But knowledge of recurrent off-the-clock work is insufficient. The regulation requires advanced knowledge of "specific days and hours" that such work is occurring, 5 C.F.R. § 610.121(b)(3), as in

Aviles where employees remained at work en masse for predictable hours, 151 Ct. Cl. at 8. There are no allegations of such knowledge in the Amended Complaint. Accordingly, Counts III through V are dismissed.

VII. Conclusion

Ms. Lesko worked for eight months as a government nurse during a global pandemic. Despite irregular and excessive overtime and off-the-clock work, binding precedent precludes relief. Previously, the Federal Circuit explained that its deference to OPM and its interpretation of Title 5 are designed to protect the public treasury from unanticipated spending. *See Doe*, 372 F.3d at 1356. While fiscal responsibility is certainly an important consideration, it should not be the only consideration. OPM may benefit from weighing guardrails on spending against (1) the demands of healthcare work in the twenty-first century (particularly during a pandemic); (2) hiring and retaining competitive workers; and above all (3) fairness for healthcare workers regardless of the statute under which they are hired.

Plaintiff's Amended Complaint is **DISMISSED** without prejudice. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ Carolyn N. Lerner
CAROLYN N. LERNER
Judge

APPENDIX D

United States Court of Appeals for the Federal Circuit

JILLIAN LESKO,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2023-1823

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00715-CNL, Judge Carolyn N. Lerner.

SUA SPONTE HEARING EN BANC

DIMITRIOS VASILOU KOROVILAS, Wucetich & Korovilas LLP, El Segundo, CA, argued for plaintiff-appellant. Also represented by JASON MATTHEW WUCETICH; MICHAEL S. MORRISON, Alexander Morrison & Fehr LLP, Los Angeles, CA.

MATTHEW JUDE CARHART, Commercial Litigation Branch, Civil Division, United States Department of Jus-tice, Washington, DC, argued for defendant-appellee. Also represented by REGINALD THOMAS BLADES, JR., PATRICIA M. MCCARTHY, BRETT SHUMATE.

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

PER CURIAM.

ORDER

This case was argued before a panel of three judges on October 9, 2024. A sua sponte request for a poll on whether to consider this case was made. A poll was conducted, and a majority of the judges who are in regular active service voted for sua sponte en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) This case will be heard en banc under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 40(c). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified in accordance with the provisions of 28 U.S.C. § 46(c).

(2) The parties are requested to file new briefs, which shall be limited to addressing the following questions:

a. Considering *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), how should "officially ordered or approved" in 5 U.S.C. § 5542(a) be interpreted?

b. Is this a case in which "the agency is authorized to exercise a degree of

[1] Circuit Judge Newman did not participate.

discretion" such that OPM has authority to adopt its writing requirement? *Loper*, 603 U.S. at 394.

c. Is there a statutory provision (e.g., 5 U.S.C. §§ 1104, 5548) that provides such authority?

(3) Ms. Lesko's en banc opening brief is due 60 days from the date of this order. The United States' en banc response is due within 45 days of service of Ms. Lesko's en banc opening brief, and Ms. Lesko's reply brief within 30 days of service of the response brief. The parties may file a supplemental appendix, if necessary to cite additional material, within 7 days after service of the reply brief. The court requires 26 paper copies of all briefs and any appendices provided by the filer within 5 business days from the date of electronic filing of the document. The parties' briefs must comply with Fed. Cir. R. 32(b)(1).

(4) Any briefs of amicus curiae may be filed without con-sent and leave of the court. Any amicus brief supporting Ms. Lesko's position or supporting neither position must be filed within 14 days after service of Ms. Lesko's en banc opening brief. Any amicus brief supporting the United States' position must be filed within 14 days after service of the United States' response brief. Amicus briefs must comply with Fed. Cir. R. 29(b).

(5) Oral argument will be held on September 12, 2025, at 10 a.m. in Courtroom 201.

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

March 18, 2025
Date

APPENDIX E

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

JILLIAN LESKO,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2023-1823

Appeal from the United States Court of Federal Claims in No. 1:22-cv-00715-CNL, Judge Carolyn N. Lerner.

ON PETITION FOR PANEL REHEARING

Before MOORE, *Chief Judge*, CHEN, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Jillian Lesko filed a petition for panel rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

FOR THE COURT

Jarrett B. Perlow
Clerk of Court

<u>May 28, 2026</u>
Date

APPENDIX F

Title 5 United States Code

5 U.S.C. § 5542. Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

* * *

APPENDIX G

Title 5 United States Code

5 U.S.C. § 5548. Regulations

(a) The Office of Personnel Management may prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter, except section 5545(d), insofar as this subchapter affects employees in or under an Executive agency.

* * *

APPENDIX H

Code of Federal Regulations

Title 5—Administrative Personnel

5 C.F.R. § 550.103. Definitions

In this subpart:

* * *

Overtime work has the meaning given that term in § 550.111 and includes irregular or occasional overtime work and regular overtime work.

* * *

APPENDIX I

Code of Federal Regulations

Title 5—Administrative Personnel

§ 550.111 Authorization of overtime pay.

(a) Except as provided in paragraphs (d), (f), and (g) of this section, overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is—

(1) Officially ordered or approved; and

(2) Performed by an employee. Hours of work in excess of 8 in a day are not included in computing hours of work in excess of 40 hours in an administrative workweek.

(b) Except as otherwise provided in this subpart, a department shall pay for overtime work at the rates provided in § 550.113.

(c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

(d) For an employee for whom the first 40 hours of duty in an administrative workweek is his basic workweek under § 610.111(b) of this chapter, overtime work means work in excess of 40 hours in an administrative workweek that is:

(1) Officially ordered or approved, and

(2) Performed by an employee, when the employee's basic pay exceeds the minimum rate

for GS–10 (including any applicable special rate of pay for law enforcement officers or special pay adjustment for law enforcement officers under section 403 or 404 of the Federal Employees Pay Comparability Act of 1990 (Pub.L. 101–509), respectively; a locality-based comparability payment under 5 U.S.C. 5304; and any applicable special rate of pay under 5 U.S.C. 5305 or similar provision of law) or when the employee is engaged in professional or technical, engineering or scientific activities. For purposes of this section and section 5542(a) of title 5, United States Code, an employee is engaged in professional or technical engineering or scientific activities when he or she is assigned to perform the duties of a professional or support technician position in the physical, mathematical, natural, medical, or social sciences or engineering or architecture.

(e) Notwithstanding paragraphs (a) and (d) of this section, when an employee's basic workweek includes a daily tour of duty of more than 8 hours and his hourly rate of basic pay exceeds the hourly rate of overtime pay provided by § 550.113, the department shall pay him at his basic rate of pay for each hour of his daily tour of duty within his basic workweek.

(f)(1) Except as provided in paragraph (f)(2) of this section, for any criminal investigator receiving availability pay under § 550.181, overtime work means actual work that is scheduled in advance of the administrative workweek—

(i) In excess of 10 hours on a day containing hours that are part of such investigator's basic 40–hour workweek; or

(ii) On a day not containing hours that are part of such investigator's basic 40–hour workweek.

(2) Notwithstanding paragraph (f)(1) of this section, all overtime work scheduled in advance of the administrative workweek on a day containing part of a criminal investigator's basic 40–hour workweek must be compensated under this section if both of the following conditions are met:

(i) The overtime work involves protective duties authorized by section 3056(a) of title 18, United States Code, or section 2709(a)(3) of title 22, United States Code; and

(ii) The investigator performs on that same day at least 2 consecutive hours of overtime work that are not scheduled in advance of the administrative workweek and are compensated by availability pay.

(3) Any work that would be overtime work under this section but for paragraphs (f)(1) and (f)(2) of this section will be compensated by availability pay under § 550.181.

(g) For firefighters compensated under subpart M of this part, overtime work means officially ordered or approved work in excess of 106 hours in a biweekly pay period, or, if the agency establishes a weekly basis for overtime pay computations, in excess of 53 hours in an administrative workweek.

(h) Availability hours, as described in § 550.182(c), are not hours of work for the purpose of determining overtime pay under this section.

(i) An employee is not entitled to overtime pay under this subpart for time spent in training, except as provided in § 410.402 of this chapter.

(j) For Border Patrol agents covered by 5 U.S.C. 5550 and subpart P of this part, overtime work means hours of work in excess of applicable thresholds, as specified in § 550.1623, excluding hours that are—

(1) Compensated by payment of an overtime supplement for regularly scheduled overtime within the agent's regular tour of duty under § 550.1621;

(2) Compensated by the earning of compensatory time off under § 550.1625; or

(3) Used in substitution or application under § 550.1626.

* * *