No. 21-1134

In the Supreme Court of the United States

BRYAN ADAMS, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When a member of the uniformed services who is also a federal civilian employee is called to active-duty military service, he may be entitled to "differential pay"—that is, the difference between his military pay and the pay he would have received in his civilian role had he not been ordered to active-duty service. 5 U.S.C. 5538. A federal civilian employee is entitled to differential pay when he is "order[ed] to perform active duty in the uniformed services pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. 5538(a). Section 101(a)(13)(B) includes active-duty service under several cross-referenced provisions and under "any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. 101(a)(13)(B). The question presented is:

Whether petitioner is entitled to differential pay for his active-duty service performed under 10 U.S.C. 12301(d), which is not cross-referenced in Section 101(a)(13)(B), when his service had no connection to a war or declared national emergency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 3 F.4th 1375. The decision of the Merit Systems Protection Board (Pet. App. 10a-16a) is unreported but is available at 2020 WL 698369.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2021. A petition for rehearing was denied on December 29, 2021 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on February 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. When a member of the uniformed services who is also a federal civilian employee is called to active-duty military service, he may be entitled to the difference

between his military pay and the pay he would have received in his civilian role had he not been ordered to active-duty service. 5 U.S.C. 5538. As relevant here, a federal civilian employee is entitled to such differential pay when he is "order[ed] to perform active duty in the uniformed services pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. 5538(a). Section 101(a)(13)(B) provides:

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

10 U.S.C. 101(a)(13)(B) (emphasis added). The agency that employs the member of the uniformed services in his civilian role provides the differential pay. 5 U.S.C. 5538(c)(1).

2. Petitioner is a member of the Arizona Air National Guard and a federal civilian employee of the U.S. Customs and Border Patrol. Pet. App. 2a. In 2018, he was twice called to active duty by orders issued under 10 U.S.C. 12301(d), which provides that a "member of a reserve component" may be ordered "to active duty * * * with the consent of that member." Pet. App. 2a; see C.A. App. 199-206. Petitioner was activated under Section 12301(d) for a total of approximately five months. Pet. App. 2a. Under one set of orders petitioner supported the 12th Air Force unit in Arizona, and under the other set of orders he provided legal assistance in Arizona. *Ibid.*; C.A. App. 199, 203. Both sets

of orders repeatedly stated that petitioner's "activation" was in a "non-contingency" role. C.A. App. 199, 203 (capitalization omitted); see Pet. App. 2a.

Petitioner requested differential pay for his Section 12301(d) service from his employing agency, the Department of Homeland Security. See Pet. App. 3a. The agency determined that petitioner's service did not entitle him to differential pay. *Ibid.* Petitioner appealed to the Merit Systems Protection Board (Board), which agreed with the agency that petitioner was not entitled to differential pay. *Id.* at 10a-16a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court explained that petitioner was called to active duty under Section 12301(d), not under "any enumerated section in the definition of contingency operation" in Section 101(a)(13)(B). *Id.* at 6a. And the court rejected petitioner's argument that, because the United States has been in a continuous state of national emergency since shortly after September 11, 2001, his Section 12301(d) orders were issued pursuant to "any other provision of law during a war or during a national emergency declared by the President," 10 U.S.C. 101(a)(13)(B). Pet. App. 6a-9a; see *Continuation of the National Emergency With Respect to Certain Terrorist Attacks*, 86 Fed. Reg. 50,835 (Sept. 10, 2021); Proclamation No. 7463, *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 3 C.F.R. 263 (2001 Comp.).

The court of appeals explained that petitioner did "not allege[] any * * * connection between his service and th[at] declared national emergency" and that he relied on an "expansive reading" of the differential-pay statutes under which "every military reservist ordered to duty [would] perform[] a contingency operation so

long as the national emergency continue[d]." Pet. App. 7a-8a. The court refused to adopt that reading, finding that Section 5538(a) entitles a federal civilian employee to differential pay "only when" he is "directly called to serve in a contingency operation." *Id.* at 7a. And the court "consider[ed] the context of the enumerated provisions that qualify as a contingency operation" under Section 101(a)(13)(B) and stated that those provisions all require a connection to a particular emergency. *Id.* at 8a. The court reasoned that it was "implausible that Congress intended for the phrase 'any other provision of law during a war or national emergency,' to necessarily include [Section] 12301(d) voluntary duty that was unconnected to the emergency at hand." *Id.* at 9a.

4. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 17a-18a.

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to differential pay because his voluntary Section 12301(d) service was not "pursuant to a call or order to active duty under," 5 U.S.C. 5538(a), any "provision of law during a war or during a national emergency declared by the President or Congress," 10 U.S.C. 101(a)(13)(B). The court's decision does not conflict with any decision of this Court or another court of appeals, and the question presented does not otherwise warrant this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the statutory text and context demonstrate that petitioner was not entitled to differential pay for his Section 12301(d) service.

a. As relevant here, the differential-pay requirement in Section 5538(a) applies only when an individual

"is absent from" his federal civilian position "in order to perform active duty in the uniformed services pursuant to a call or order to active duty under * * * a provision of law referred to in" Section 101(a)(13)(B). 5 U.S.C. 5538(a). Section 101(a)(13)(B), in turn, is a definition of "contingency operation" that includes "military operation[s] that * * * result[] in the call or order to * * * active duty of members of the uniformed services under" a number of enumerated provisions or "any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. 101(a)(13)(B).

The term "during" can in some circumstances denote a purely temporal connection. But it can also mean "in the course of." 4 *The Oxford English Dictionary* 1134 (2d ed. 1989) (*Oxford*); see, *e.g.*, *The American Heritage Dictionary of the English Language* 572 (3d ed. 1992) ("[t]hroughout the course or duration of"); *Webster's Third New International Dictionary of the English Language* 703 (1986) ("throughout the continuance or course of"). In at least some situations, then, the term "during" connotes more than a mere temporal overlap, because "in the course of" suggests a substantive connection between the object of the prepositional phrase that begins with "during" and the term that the phrase modifies. See 3 *Oxford* 1055 (defining "in the course of" as "in the process of, during the progress of") (emphasis omitted). If, for example, a statute referred to any attorney who argues "during" a court hearing, it would naturally be read to include only attorneys who argue *in the course of* the hearing—not those who argue elsewhere while the hearing happens to be in progress.

So too here: A federal civilian employee is entitled to differential pay only if he is absent from his civilian

position because he has been "call[ed] or order[ed] to * * * active duty" under "any * * * provision of law" *in the course of* a war or "a national emergency declared by the President or Congress." 10 U.S.C. 101(a)(13)(B). The court of appeals correctly adopted that straightforward reading, concluding that an employee is entitled to differential pay under the final clause of Section 101(a)(13)(B) only when his active-duty service has some connection to a declared national emergency. Pet. App. 7a-8a.

The court of appeals also correctly determined that petitioner's active-duty service in 2018 had no connection to a national emergency. Petitioner was called up under Section 12301(d), which provides that a "member of a reserve component" may be ordered "to active duty * * * with the consent of that member" and does not require that the call be based on or connected to a national emergency. 10 U.S.C. 12301(d). In some situations, an employee may be called up under Section 12301(d) in connection with a declared national emergency, and thus may be entitled to differential pay. But petitioner has never asserted that his active-duty service had any connection to a declared national emergency, and there is no indication of any such connection in his 2018 orders. His service therefore does not fall within the final clause of Section 101(a)(13)(B) because it was not "in the course of" a declared national emergency. 4 *Oxford* 1134.

b. That natural reading of the text is supported by the context of the statutory provisions that are explicitly cross-referenced in Section 101(a)(13)(B). All of those provisions require a connection between the active-duty service rendered and a specific, identified exigency—such as responding to an emergency, dealing

with a national-security issue, or addressing a natural or manmade disaster.[*]

Section 101(a)(13)(B)'s final clause follows those specific provisions and applies to "any other provision of law during a war or during a national emergency." 10 U.S.C. 101(a)(13)(B). It is a fundamental principle of statutory interpretation that where, as here, "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (citation omitted);

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[*] See 10 U.S.C. 688(c) (retired members of the armed forces may be ordered to active duty to perform such "duties as the Secretary [of Defense] considers necessary in the interests of national defense"); 10 U.S.C. 12301(a) (certain reservists may be called to active duty "[i]n time of war or of national emergency declared by Congress"); 10 U.S.C. 12302(a) (members of the Ready Reserve may be ordered to active duty "[i]n time of national emergency declared by the President"); 10 U.S.C. 12304(a)-(b) (certain reservists may be called to active duty "when the President determines that it is necessary to augment the active forces for any named operational mission" or when there is "an emergency" involving weapons of mass destruction or terrorism); 10 U.S.C. 12304a(a) (certain reservists may be called to active duty "[w]hen a Governor requests Federal assistance in responding to a major disaster or emergency"); 10 U.S.C. 12305(a) (certain reservists may have their promotions, retirements, or separations suspended when "the President determines [it] is essential to the national security of the United States"); 10 U.S.C. 12406 (members of the National Guard may be called into active service to "repel [an] invasion, suppress [a] rebellion, or execute th[e] laws" of the United States); 14 U.S.C. 3713(a) (members of the Coast Guard Ready Reserve may be ordered to active duty "during a, or to aid in prevention of[,] an imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism * * * , or transportation security incident"); see also 10 U.S.C. Ch. 13 (provisions authorizing calls to service to respond to insurrections).

see *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1625 (2018). Like the enumerated provisions that precede it, therefore, the final clause of Section 101(a)(13)(B) should be read as limited to situations in which there is a connection between the active-duty service and the identified exigency—a "national emergency declared by the President or Congress." 10 U.S.C. 101(a)(13)(B).

Petitioner notes (Pet. 17-18) that the court of appeals erroneously stated that the statutory provisions cross-referenced in Section 101(a)(13)(B) all "involve a connection to [a] declared national emergency." Pet. App. 8a (citation omitted). But the court's misstatement does not change the fact that all of those provisions explicitly require a connection between active-duty service and a specific, identified exigency. Reading the final clause of Section 101(a)(13)(B) as incorporating active-duty service untethered to any similar interest or activity would be inconsistent with the cross-referenced provisions' cabined approach.

c. The court of appeals also appropriately rejected petitioner's interpretation because it would expand Section 101(a)(13)(B) from a discrete list of qualifying active-duty service to cover *all* active-duty service. See Pet. App. 7a. There are currently 41 ongoing national emergencies declared under the National Emergencies Act, 50 U.S.C. 1601 *et seq.* Brennan Center For Justice, *Declared National Emergencies Under The National Emergencies Act* (May 9, 2022) (*Declared National Emergencies*), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act. One of them has continuously been in effect since 1979. See *ibid.*; see also *Continuation of the National Emergency With Respect to Iran*, 86 Fed. Reg. 62,709 (Nov. 10, 2021). Others have

been in effect for more than 25 years. See *Declared National Emergencies* (listing four emergencies declared between 1994 and 1996). And many of those emergencies were declared to impose economic sanctions and have no direct connection to U.S. military activities. See, *e.g.*, Exec. Order No. 14,014, *Blocking Property with Respect to the Situation in Burma*, 86 Fed. Reg. 9429 (Feb. 12, 2021); Exec. Order No. 13,851, *Blocking Property of Certain Persons Contributing to the Situation in Nicaragua*, 83 Fed. Reg. 61,505 (Nov. 29, 2018); Exec. Order No. 13,405, *Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus*, 3 C.F.R. 231 (2006 Comp.).

Because petitioner's interpretation would require no relationship between the service performed and a particular national emergency, on his reading *any* reservist who has performed active duty of *any* type since 1979 would be entitled to differential pay. But when Congress adopted Section 101(a)(13)(B) in 1991 and Section 5538(a) in 2009, it presumably was aware that at least one national emergency had been ongoing for decades—and that it was unlikely that there would ever be a time when no national emergency existed. Had Congress intended to adopt the regime petitioner advocates, it would have had no need to rely on a complicated definition of qualifying service using dozens of words and cross-referencing nine different statutory provisions. Instead, it could have simply made differential pay available for "all active-duty service."

Congress's rejection of that "ready alternative" is strong evidence that "Congress did not in fact want what [petitioner] claim[s]." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017). And Section 101(a)(13)(B)'s final clause should not be read to

subsume the provisions that the section explicitly cross-references because "there would be no need for Congress to" cite specific statutes if the "same" active-duty service covered by those statutes "were subsumed within the meaning of the * * * residual clause." *Circuit City Stores*, 532 U.S. at 114.

2. Petitioner's contrary arguments lack merit.

a. Petitioner relies heavily (Pet. 1, 4, 5, 12, 13, 15) on legislative history. But legislative history has no role to play here because the statutory text and its context provide the plain meaning of the differential-pay provisions. See *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'") (citations omitted).

In any event, petitioner relies solely on legislative history related to the Reservists Pay Security Act of 2004, S. 593, 108th Cong., 1st Sess. (2003)—proposed legislation that Congress never adopted. But that unenacted bill was not a "substantially identical predecessor" to Section 5538, Pet. 12, because the introduced version was not limited to active-duty service and did not incorporate Section 101(a)(13)(B)'s cabined definition. As introduced, Senate Bill 593 instead contemplated differential pay for "service in the uniformed services," Reservists Pay Security Act of 2004 at 5, and cross-referenced a broader definition in 38 U.S.C. 4303 (2000 & Supp. II 2002), which included, *inter alia*, "active duty, active duty for training, * * * inactive duty training, [and] full-time National Guard duty." 38 U.S.C. 4303(13) (Supp. II 2002).

The statements from Senators Durbin and Mikulski and the estimate from the Congressional Budget Office

that petitioner cites (Pet. 1, 5, 13) were all premised on the introduced version of Senate Bill 593, see 149 Cong. Rec. 5764 (2003); Congressional Budget Office, *Cost Estimate, S. 593: Reservist Pay Security Act of 2003*, at 1 (May 1, 2003), https://go.usa.gov/xu6HS. It is thus unsurprising that those statements and estimate read the bill to include more categories of service than the limited statute that Congress ultimately enacted. And although the Senate Report petitioner cites (Pet. 4-5, 12-13) discussed a later version of Senate Bill 593 that more closely tracked the language ultimately adopted in Section 5538, it still confirmed that the relevant language should be read according to its text. See S. Rep. No. 409, 108th Cong., 2d Sess. 3 (2004) (providing that the "[n]ew section * * * states that an employee who is absent from a position with the Federal Government in order to perform active duty in the uniformed services *pursuant to a call to order in accordance with section 101(a)(13)(B) of title 10*" would be entitled to differential pay) (emphasis added).

b. As petitioner recognizes (Pet. 16), the pro-veteran canon of statutory interpretation only comes into play where there is statutory ambiguity. See *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); see also *Henderson* v. *Shinseki*, 562 U.S. 428, 438-441 (2011) (referencing the pro-veteran canon only after considering the statutory text and context). Here, there is no ambiguity. And to the extent that petitioner suggests (Pet. 15-16) that Section 101(a)(13)(B) should be read broadly because a separate criminal provision references Section 101(a)(13), see 18 U.S.C. 209(a) and (h), that argument fails for the same reason. See *Shular* v. *United States*, 140 S. Ct. 779, 787 (2020) (explaining that the "rule of

lenity" is inapplicable where there is "no ambiguity * * * to resolve").

c. The Department of Labor (DOL) regulation on which petitioner relies (Pet. 14-15) likewise does not support his reading of Section 101(a)(13)(B). The Family and Medical Leave Act of 1993 (FMLA), 5 U.S.C. 6381 *et seq.*; 29 U.S.C. 2601 *et seq.*, permits employees to take leave under that Act for a qualifying exigency arising out of the fact that certain family members of the employee are on covered active duty. See 5 U.S.C. 6382(a)(1)(E) (applying to most federal employees); 29 U.S.C. 2612(a)(1)(E) (applying to most private-sector and some other employees). The FMLA defines covered active duty by reference to Section 101(a)(13)(B), although it includes additional limitations on the type of service that triggers coverage under that Act. See 5 U.S.C. 6381(7)(B) (defining "covered active duty" to include "duty during the deployment of the [reserve] member with the Armed Forces *to a foreign country* under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of Title 10") (emphasis added); 29 U.S.C. 2611(14)(B) (same).

Petitioner cites (Pet. 14-15) a DOL regulation implementing the FMLA's provisions regarding leave for private-sector and some other employees based on a family member's active-duty service. But that regulation merely duplicates Section 101(a)(13)(B)'s language and does not otherwise suggest that the final clause in that section should be read more broadly than its text provides. See 29 C.F.R. 825.102 (referring to military operations that "[r]esult[] in the call or order to * * * active duty * * * under * * * any other provision of law during a war or during a national emergency declared by the President or Congress"); see also *The*

Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,954-67,956, 68,084, 68,111 (Nov. 17, 2008) (all similar or same). That regulation therefore does not suggest that DOL has "settled" on petitioner's "interpretation" of Section 101(a)(13)(B). Pet. 14. And the government has not otherwise adopted an approach to Section 101(a)(13)(B) that conflicts with the court of appeals' decision here. Cf. 5 C.F.R. 630.1201(b)(1)(ii)(F); 29 C.F.R. 825.126(a)(2)(ii).

3. Petitioner identifies no conflict between the court of appeals' decision and any decision of this Court or of another court of appeals. And the court of appeals' decision was unanimous, with no judge noting a dissent from the denial of en banc rehearing. Pet. App. 17a-18a.

Petitioner is wrong to assert (Pet. 22.) that there is "little possibility of further percolation" of the issues this case presents. As petitioner notes (Pet. 14), numerous other statutory provisions incorporate Section 101(a)(13)(B). And the Federal Circuit does not have exclusive jurisdiction over all of the other categories of cases in which the interpretation of that provision may arise. As discussed, for example, covered employment under the FMLA is defined by reference to Section 101(a)(13)(B). See 29 U.S.C. 2611(14)(B). A private-sector employer therefore might deny an employee FMLA leave if the employee's family member engaged in active-duty service that did not fall within a provision enumerated in Section 101(a)(13)(B) and had no connection to declared national emergency. Such an employee could bring suit challenging that interpretation of the final clause of Section 101(a)(13)(B) "in any Federal or State court of competent jurisdiction," 29 U.S.C. 2617(a)(2), and—if he brought suit in federal district court and lost—appeal to the appropriate regional

circuit, see 28 U.S.C. 1294(1). The courts of appeals therefore *could* disagree about the meaning of the final clause in Section 101(a)(13)(B). But petitioner has identified no decision from any other court in any context adopting an interpretation that conflicts with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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