No. 23-861

In the Supreme Court of the United States

NICK FELICIANO, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

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. See 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) (Supp. III 2022). The question presented is:

Whether a servicemember is entitled to differential pay for active-duty service performed under 10 U.S.C. 12301(d), which is not cross-referenced in Section 101(a)(13)(B), merely because there was an ongoing national emergency at the time of the service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2023 WL 3449138. The decision of the Merit Systems Protection Board (Pet. App. 7a-50a) is unreported but is available at 2021 WL 4033810.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. A petition for rehearing was denied on October 27, 2023 (Pet. App. 51a-52a). On January 17, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 8, 2024, and the petition was filed on that date. 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 be paid the difference between his military pay and the pay he otherwise would have received in his civilian role. See 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), in turn, defines the term "'contingency operation'" to include 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) (Supp. III 2022) (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 worked as an air traffic controller for the Federal Aviation Administration (FAA), an agency within the Department of Transportation. Pet. App. 2a, 9a. He simultaneously served as a reserve officer in the United States Coast Guard. *Ibid.* From 2012 to 2014, petitioner was called to active duty several times, including three times 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." See Pet. App. 2a, 14a, 33a. Under two sets of those Section 12301(d) orders, petitioner was activated "per Executive Order 13223, dated September 14, 2001," to serve "in support of a DOD contingency operation"; those orders were "supporting * * * Operation Iraqi Freedom, Operation Enduring Freedom, etc." *Id.* at 75a; C.A. App. 122, 129. Petitioner's third set of Section 12301(d) orders likewise invoked Executive Order 13223 and provided that petitioner would serve "in support of a DOD contingency operation": "Operation Iraqi Freedom." Pet. App. 76a; C.A. App. 119. Petitioner volunteered for activation under Section 12301(d) for a total of approximately 14 months. Pet. App. 33a. Petitioner was also activated a fourth time during that period; that activation was pursuant to a different provision, 10 U.S.C. 12302. Pet. App. 2a, 33a, 74a.

Petitioner requested differential pay for his activation pursuant to Section 12302, which is one of the statutory provisions specifically cross-referenced in Section 101(a)(13)(B). See Pet. App. 2a, 31a-32a. The FAA granted petitioner's request for differential pay for the period he served under Section 12302. *Ibid.* Petitioner did not, however, ask the FAA to grant him differential pay for the periods he served under Section 12301(d). *Id.* at 32a.[1]

3. In 2018, petitioner filed an appeal with the Merit Systems Protection Board (Board), asserting that be-

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[1] FAA employees generally are not covered by the provisions of Title 5, including Section 5538's differential-pay requirement. See 49 U.S.C. 40122(g)(2). But Congress directed the FAA to "prescribe procedures to ensure that the rights under" Section 5538 "apply to the employees of th[e] agency." 5 U.S.C. 5538(e)(2).

cause of his military service he was subjected to a hostile work environment at the FAA. Pet. App. 2a-3a, 14a. Petitioner later amended the appeal to include a claim that the FAA erroneously failed to provide differential pay for his Section 12301(d) service. *Id.* at 3a, 14a.

While petitioner's Board proceedings were pending, the Federal Circuit decided *Adams* v. *DHS*, 3 F.4th 1375 (2021), cert. denied, 142 S. Ct. 2835 (2022). Like petitioner, the reservist in *Adams* 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 1379. The court in *Adams* rejected the reservist'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). 3 F.4th at 1379-1380. The court explained that the reservist did "not allege[] any * * * connection between his service and [a] 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]." *Id.* at 1379. The *Adams* court refused to adopt that reading, finding it "implausible" that Congress intended Section 101(a)(13)(B)'s definition of a "contingency operation" to include service "that was unconnected to the emergency at hand." *Id.* at 1380.

Applying *Adams* here, one of the Board's administrative law judges found that petitioner failed to present evidence of his involvement in a contingency operation covered by Section 101(a)(13)(B) and denied petitioner's

claim for differential pay for his Section 12301(d) service. Pet. App. 30a-37a. The FAA had also argued that petitioner was not entitled to differential pay in any event because he admitted "he did not request differential pay or submit his military leave and earnings statement" for his Section 12301(d) service, as required by the agency's procedures implementing Section 5538. *Id.* at 32a; see C.A. App. 133-134. But the judge did not reach that question because she rejected petitioner's differential-pay claim on the merits. Pet. App. 37a.

4. The administrative law judge's decision became the final decision of the Board, and the court of appeals affirmed in a nonprecedential opinion. Pet. App. 1a-6a. Relying on its decision in *Adams*, the court explained that, "[t]o receive differential pay, an employee 'must have served pursuant to a call to active duty that meets the statutory definition of contingency operation.'" *Id.* at 4a (quoting *Adams*, 3 F.4th at 1378). The court further explained that, "for voluntary activation under [Section] 12301(d) to qualify as a contingency operation, 'there must be a connection between the voluntary military service and the declared national emergency.'" *Ibid.* (citation omitted). Because petitioner "has not alleged any connection between his service and the ongoing national emergency," the court concluded that he "fail[ed] to demonstrate that his voluntary, active service under [Section] 12301(d) met the statutory definition of a contingency operation." *Ibid.* In reaching that conclusion, the court emphasized that petitioner had argued only that *Adams* was wrongly decided and had not "purport[ed] to show how" the facts of his case "warrant[] a different outcome from that of *Adams*." *Id.* at 3a-4a.

5. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 51a-52a.

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to differential pay merely because he volunteered for Section 12301(d) service while a "national emergency declared by the President or Congress" was ongoing. 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 Court recently denied a petition for a writ of certiorari raising the same question. See *Adams* v. *DHS*, 142 S. Ct. 2835 (2022) (No. 21-1134). The same course is warranted here. Indeed, this case would be an especially poor vehicle for addressing the question presented because petitioner seeks to raise issues that were neither pressed nor passed on below and because he failed to properly request differential pay from the FAA in the first instance.[2]

1. The court of appeals correctly held that statutory text and context demonstrate that a servicemember who volunteers for duty under Section 12301(d) is not automatically entitled to differential pay merely because a national emergency is ongoing at the time.

a. As relevant here, the differential-pay requirement in Section 5538(a) applies when an individual "is absent from" his federal civilian position "in order to

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[2] The petitions for writs of certiorari in *Flynn* v. *Department of State*, No. 23-868 (filed Feb. 8, 2024), and *Nordby* v. *Social Security Administration*, No. 23-866 (filed Feb. 8, 2024), present the same question. The petitioners in those cases do not seek plenary review, but instead ask this Court to hold their petitions pending its disposition of the petition in this case.

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" several 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).

In some contexts, the term "during" can refer to a purely temporal connection. Cf. *United States* v. *Ressam*, 553 U.S. 272, 274-275 (2008) ("The term 'during' denotes a temporal link; that is surely the most natural reading of the word *as used in th[is] statute*.") (emphasis added). 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"). When used in that sense, 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.

That usage of "during" is commonplace. A reference to a government employee's speech about "information learned during [his] employment," *Lindke* v. *Freed*, 601 U.S. 187, 203 (2024) (citation omitted), includes only information learned in the course of that employment—not information he learns on his own time while he happens to be employed by the government. The observation that an agency issuing a regulation "must address concerns raised during the notice-and-comment process," *Biden* v. *Missouri*, 595 U.S. 87, 105 (2022) (Alito, J., dissenting), includes only concerns raised in the course of the notice-and-comment process—not concerns raised in other contexts while that process happens to be ongoing. And the statement that the deliberative-process privilege protects "documents generated during an agency's deliberations," *United States Fish & Wildlife Serv.* v. *Sierra Club, Inc.*, 592 U.S. 261, 263 (2021), refers only to documents generated in the course of those deliberations—not to any document created while those deliberations happen to be ongoing.

So too here: When Congress defined a "'contingency operation'" to include an operation that results in an order to active duty "during a war or during a national emergency declared by the President or Congress," 10 U.S.C. 101(a)(13)(B), it referred to an order to active duty *in the course of* a war or national emergency—not to any order that occurs while an unrelated emergency happens to be ongoing. The court of appeals correctly adopted that straightforward reading in *Adams*, 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 war or national emergency. 3 F.4th at 1379-1380.

b. Context confirms that reading of the text: Reading the final clause of Section 101(a)(13)(B) to require only a temporal overlap with a national emergency would transform the statute from a carefully crafted list of specific forms of qualifying active-duty service into a cumbersome and roundabout way of including *all* active-duty service. See *Adams*, 3 F.4th at 1379.

There are 43 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, 2024) (*Declared National Emergencies*), https://perma.cc/F7RW-KQCJ. One of them has continuously been in effect since 1979. *Ibid.*; see *Continuation of the National Emergency With Respect to Iran*, 88 Fed. Reg. 77,489 (Nov. 9, 2023). Others have been in effect for more than 25 years. See *Declared National Emergencies* (listing five emergencies declared between 1994 and 1997). And many of those emergencies were declared as predicates for imposing economic sanctions and have no direct connection to U.S. military activities. See, *e.g.*, *Blocking Property with Respect to the Situation in Burma*, Exec. Order No. 14,014, 86 Fed. Reg. 9429 (Feb. 12, 2021); *Blocking Property of Certain Persons Contributing to the Situation in Nicaragua*, Exec. Order No. 13,851, 83 Fed. Reg. 61,505 (Nov. 29, 2018); *Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus*, Exec. Order No. 13,405, 3 C.F.R. 231 (2006 comp.).

Because petitioner's interpretation would require no relationship between the call to service and the relevant

national emergency, see, *e.g.*, Pet. 16, on his reading *any* reservist who performs active duty of *any* type is entitled to differential pay so long as *any* national emergency is ongoing. 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*, 581 U.S. 468, 477 (2017).

What is more, Congress has repeatedly amended Section 101(a)(13)(B) to include additional categories of active-duty service. See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, Div. A, Tit. VI, Subtit. I, § 681(a), 126 Stat. 1795; National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Div. A, Tit. V, Subtit. B, § 515, 125 Stat. 1395. If petitioner were correct that *all* active-duty service was already covered by Section 101(a)(13)(B)'s final clause, those amendments—and, indeed, the entire list of specific statutes—would have been unnecessary: "[T]here 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, Inc.* v. *Adams*, 532 U.S. 105, 114 (2001).

Petitioner's reading would also lead to anomalous results. For example, reservists can be called to active duty to be court-martialed for offenses they previously committed while on active duty or inactive duty for training. See 10 U.S.C. 802(d). Under petitioner's understanding of the statutory scheme, such a reservist would be entitled to differential pay because he was called to active duty under a "provision of law," 10 U.S.C. 101(a)(13)(B), and national emergencies are ongoing at the time of his court-martial. It is not plausible to maintain, as petitioner must, that Congress included such service in the definition of a "contingency operation" or intended to require federal agencies to supplement the pay of employees called to duty solely to be court-martialed.

c. The court of appeals therefore correctly rejected petitioner's argument that he was entitled to differential pay merely because he served on active duty while a national emergency was ongoing. 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 war or 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 when a reservist seeks differential pay based solely on the fact that he served at the same time as an unrelated national emergency, he has not demonstrated that his service falls within the final clause of Section 101(a)(13)(B) because his service is not "in the course of" a national emergency. 4 *Oxford* 1134.

2. Petitioner's contrary arguments lack merit.

a. Petitioner asserts that Congress's use of the word "any" when referring to "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), "reinforces" his reading of the statute, Pet. 16. But the word "any" modifies the phrase "other provision of law"; it does not modify "during a war or during a national emergency." 10 U.S.C. 101(a)(13)(B). Assuming that "any" in this context has an expansive meaning, see Pet. 16, that would only mean that "other provision of law" should be read broadly—not that "during a war or during a national emergency" should be read broadly, 10 U.S.C. 101(a)(13)(B). And there is no dispute that the phrase "other provision of law," *ibid.*, can in some situations include Section 12301(d) service performed in connection with a declared war or national emergency, see p. 11, *supra*.

b. Petitioner relies heavily (Pet. 5-6, 21-22) on legislative history. But legislative history has no role to play here because the statutory text and context provide the plain meaning of the differential-pay provisions. See *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 436 (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.' ") (citation omitted).

In any event, petitioner relies primarily 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 "nearly identical" "precursor" to Section 5538, Pet. 21, 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 4, and cross-referenced a broader definition in 38 U.S.C. 4303, 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 Senator Mikulski and the 2003 estimate from the Congressional Budget Office (CBO) that petitioner cites (Pet. 5-6) were premised on the introduced version of Senate Bill 593, see 149 Cong. Rec. 5764 (2003); CBO, *Cost Estimate, S. 593: Reservist Pay Security Act of 2003*, at 1 (May 1, 2003), https://perma.cc/WT3G-6XVD. It is thus unsurprising that Senator Mikulski's statement and the CBO 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. 21) 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).[3]

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[3] The 2004 CBO estimate that petitioner cites (Pet. 6, 21) discussed that later version of Senate Bill 593 and suggested that the

c. As petitioner recognizes (Pet. 22-23), this Court has applied the pro-veteran canon of statutory interpretation only when a statute is "ambiguous." *Rudisill* v. *McDonough*, 144 S. Ct. 945, 958 (2024). Here, there is no ambiguity. And to the extent that petitioner invokes the rule of lenity to suggest (Pet. 12) 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*, 589 U.S. 154, 165 (2020) (explaining that the "rule of lenity" is inapplicable where there is "no ambiguity").

d. Petitioner primarily asserts that, so long as *any* "presidential national emergency declaration is in effect, a reservist activated under 'any other provision of law'—including Section 12301(d)—is entitled to differential pay," even if the activation has no connection to the ongoing emergency. Pet. 16; see Pet. 15-23. But petitioner also asserts that even if some connection to a national emergency is required, he was entitled to differential pay because his "activation orders expressly invoked a presidential emergency declaration." Pet. 19 (emphasis omitted). And he further asserts that the court of appeals erred by looking to the "nature of [his] service, rather than the face of the 'call or order to active duty'" to determine whether his service had the requisite connection to an emergency. Pet. 19-20. In

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costs would be the same as the prior version, but the CBO appears to have overlooked the intervening changes in text of the bill: It simply assumed that all "federal employees called to active duty in the uniformed services or National Guard" would be entitled to differential pay. CBO, *Cost Estimate, S. 593: Reservist Pay Security Act of 2004*, at 1 (Aug. 4, 2004), https://perma.cc/XPK5-8BL5.

fact, the court did not consider those case-specific issues because petitioner failed to raise them.

The court of appeals began its brief analysis of the differential-pay issue by noting that petitioner had "dedicate[d] most of his argument to challenging *Adams*" and had "not purport[ed] to show how his activation under 10 U.S.C. § 12301(d) qualifies as a contingency operation." Pet. App. 3a. And the court emphasized that, like the servicemember in *Adams*, petitioner had "not alleged any connection between his service and the ongoing national emergency." *Id.* at 4a. The court thus did not consider what degree of connection to a national emergency is required to qualify for differential pay, or whether petitioner's orders satisfied the requisite standard.

The court of appeals did not err in declining to consider the language of petitioner's orders because petitioner did not properly raise any argument based on those orders. Petitioner's opening brief did not argue that his orders entitled him to differential pay because they established a sufficient connection to a national emergency. Rather, he attacked the court's recent decision in *Adams* and argued that he was entitled to differential pay simply because "there has been a national emergency declared by the President" "[s]ince September 11, 2001." Pet. C.A. Br. 11; see *id.* at 10-26. Not until his reply brief did petitioner belatedly and briefly rely on the fact that his orders identified particular contingency operations. See Pet. C.A. Reply Br. 5-6; cf. *Advanced Magnetic Closures, Inc.* v. *Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) ("This court has consistently held that a party" forfeits "an argument not raised in its opening brief.").

When seeking en banc rehearing, petitioner likewise asked the court of appeals to "overturn the *Adams* rule" and broadly argued "that because the United States has been in a state of national emergency since 1979" any "call or order to active duty under *any* provision of law triggers an entitlement to differential pay." C.A. Pet. for Reh'g 9; see, *e.g.*, *id.* at 10 ("[T]he triggering condition for differential pay w[ill] virtually always be satisfied for calls to active duty by federal employees."). Again, he did not argue that *if* some connection between a call to duty and a war or national emergency was required, his particular orders satisfied that requirement. See *id.* at 1, 8-19.

Had petitioner argued below that his orders demonstrated a sufficient connection between his call to active duty and a national emergency under *Adams*, the government and the court of appeals could have addressed that issue, and may well have concluded that some or all of petitioner's orders established the connection that was lacking in *Adams*. But petitioner forfeited any such argument, and the court did not err in declining to address an argument that petitioner had not properly raised.

3. Petitioner identifies no conflict between the court of appeals' decision and any decision of this Court or of another court of appeals. And petitioner is wrong to assert (Pet. 3, 14) that the Federal Circuit's exclusive jurisdiction over differential-pay issues means that "[n]o further percolation is possible." As petitioner elsewhere acknowledges (Pet. 12) numerous other statutory provisions incorporate Section 101(a)(13)(B). And the Federal Circuit does not have exclusive jurisdiction over all the other categories of cases in which the correct interpretation of that provision may arise. For example, 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 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), 29 U.S.C. 2612(a)(1)(E). 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. See 5 U.S.C. 6381(7)(B), 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 a 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).

Petitioner also argues (Pet. 6-7) that some decisions by the Merit Systems Protection Board's administrative law judges have appeared to adopt his interpretation of the statute. But those decisions do not suggest any need for this Court's review because they all predated the court of appeals' decision in *Adams*, which clarified the law in this area. And for similar reasons, petitioner errs in invoking (Pet. 13) guidance issued by the Office of Personnel Management (OPM). That guidance was issued in 2009 and has not yet been updated in light of the court of appeals' decision in *Adams*. See OPM, *Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538*, at 18 (rev. June 23, 2015),

https://perma.cc/DJ8P-B7HG. OPM has informed this Office that it intends to revise the guidance to be consistent with *Adams* and the position set forth in this brief.

4. Finally, even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it. As discussed, see pp. 14-16, *supra*, petitioner failed to raise arguments about the specific nature of his service in the court of appeals. That court therefore did not address "whether an express invocation of an emergency declaration in a reservist's activation orders suffices" to trigger the differential-pay requirement, Pet. 15—and the court's nonprecedential decision certainly did not adopt any holding resolving that question going forward. This Court should decline to grant review in a case where key legal issues were "not pressed or passed upon" in the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted).

Petitioner also has never requested differential pay from the FAA or submitted to the FAA his military orders and leave and earnings statements for the service periods at issue in this case. Pet. App. 32a; see pp. 3, 5, *supra*. Such information is required by the FAA's differential-pay procedures and is necessary for the FAA to calculate the amount of differential pay that an employee is entitled to for a given period of service. As the government argued before the Board, because the FAA requires an employee to timely submit such documentation to receive differential pay and petitioner never did so, he is not entitled to differential pay for that independent reason. See Pet. App. 32a, 37a; C.A. App. 133-134. This Court should not grant review of a

question whose resolution will not ultimately affect petitioner's entitlement to differential pay. Cf. *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari) (explaining that review generally is not warranted where the effect of resolving the question presented "would be hypothetical").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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