

No. 23-866

In the Supreme Court of the United States

EVAN H. NORDBY, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION

*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-9a) is published at 67 F.4th 1170. The decision of the Merit Systems Protection Board (Pet. App. 10a-48a) is unreported but is available at 2021 WL 2211543.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2023. A petition for rehearing was denied on November 1, 2023 (Pet. App. 49a-50a). On January 26, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 13, 2024, and the petition was filed on February 8, 2024. 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 administrative law judge with the Office of Hearings Operations at the Social Security Administration (SSA). Pet. App. 2a. He simultaneously served as an officer in the Judge Advocate General’s Corps of the Army Reserve. *Ibid.* From January to May 2017, petitioner performed active-duty service pursuant to 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. During that period of voluntary activation, petitioner underwent “basic training for new Judge Advocates at Fort Benning, Georgia and at the Judge Advocate General’s Legal Center and School in Charlottesville, Virginia.” *Ibid.*; see C.A. App. 60, 62-69.

Petitioner requested differential pay from the SSA for his Section 12301(d) activation. Pet. App. 2a. The agency denied his request, and petitioner appealed to the Merit Systems Protection Board (Board). *Ibid.* An administrative law judge agreed with the agency that petitioner is not entitled to differential pay. *Id.* at 10a-48a.¹

3. On the day that the administrative law judge’s decision became the Board’s final decision in petitioner’s case, the United States Court of Appeals for the Federal Circuit decided *Adams v. DHS*, 3 F.4th 1375 (2021), cert. denied, 142 S. Ct. 2835 (2022). See Pet. App. 5a n.1. 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). 3 F.4th 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

¹ In reaching that conclusion, the administrative law judge found that a reservist is entitled to differential pay under the final clause of Section 101(a)(13)(B) only if the relevant emergency declaration invoked the differential-pay provisions. Pet. App. 35a-36a. That conclusion was incorrect. But the judge’s decision is nonprecedential, and the court of appeals affirmed on a different basis, correctly finding that petitioner is not entitled to differential pay because there was no connection between his service and a war or national emergency. See pp. 4-5, *infra*.

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.

4. Relying on *Adams*, the court of appeals affirmed the Board’s conclusion that petitioner is not entitled to differential pay. Pet. App. 1a-9a. The court explained that, “to receive differential pay, an employee must have been called to active duty that meets the statutory definition of a ‘contingency operation.’” *Id.* at 4a. The court further explained that to satisfy Section 101(a)(13)(B)’s requirement that a contingency operation result in an order to active duty “during” a national emergency, “there must be a connection between the voluntary military service [under Section 12301(d)] and the declared national emergency.” *Id.* at 6a. The court found that petitioner was not entitled to differential pay because he “ha[d] not alleged any connection between his service and [a] declared national emergency other than a temporal overlap between his activation and [a] declared national emergency.” *Id.* at 9a. In reaching that conclusion, the court noted that petitioner “concede[d]” that *Adams* “controls the outcome of this case” and

“d[id] not purport to show how his activation under 10 U.S.C. § 12301(d) fits the *Adams* definition of a contingency operation and thus warrants a different outcome.” *Id.* at 8a-9a.

5. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 49a-50a.

ARGUMENT

Petitioner renews his contention that he is entitled to differential pay because he volunteered for Section 12301(d) service while a war or “national emergency declared by the President or Congress” was ongoing, 10 U.S.C. 101(a)(13)(B). Pet. 1-2, 4-5; see Pet. App. 5a. But petitioner does not seek plenary review by this Court. Instead, petitioner asks the Court to hold his petition for a writ of certiorari pending its disposition of the petition in *Feliciano v. Department of Transportation*, No. 23-861 (filed Feb. 8, 2024), which presents the same question. For the reasons explained in the government’s brief in opposition to the petition in *Feliciano*, a copy of which is being served on petitioner, the court of appeals correctly rejected petitioner’s argument and the question presented does not warrant further review. Br. in Opp. at 6-14, 16-18, *Feliciano, supra* (No. 23-861).²

In short, a reservist is entitled to differential pay under the final clause of Section 101(a)(13)(B) only if he is called to serve 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). In the

² A third pending petition also raises the same question and likewise seeks a hold pending the Court’s disposition of the petition in *Feliciano*. See *Flynn v. Department of State*, No. 23-868 (filed Feb. 8, 2024).

context of Section 101(a)(13)(B)'s definition of "contingency operation," the term "during" means "in the course of." 4 *The Oxford English Dictionary* 1134 (2d ed. 1989) (*Oxford*) (emphasis omitted); see Br. in Opp. at 6-8, *Feliciano, supra* (No. 23-861). "During" therefore connotes more than a mere temporal overlap, and a federal civilian 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 war or national emergency. See Br. in Opp. at 8-9, *Feliciano, supra* (No. 23-861). The statutory context confirms that reading, and contrary arguments lack merit. See *id.* at 9-14.

Here, the court of appeals correctly determined that petitioner's active-duty service in 2017 had no connection to a war or 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 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 war or national emergency, and thus may be entitled to differential pay. But petitioner has never asserted that his active-duty service had any connection to such an event, and his 2017 orders demonstrate there was no such connection. Rather, petitioner's orders provide that he was called to active duty to undergo "basic training for new Judge Advocates at Fort Benning, Georgia and at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia." Pet. App. 2a; see C.A. App. 60, 62-69. 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. *Oxford* 1134.

There is no conflict between the court of appeals’ decision and any decision of this Court or of another court of appeals, and this case does not otherwise warrant this Court’s review. See Br. in Opp. at 16-18, *Feliciano, supra* (No. 23-861). This Court recently denied a petition for a writ of certiorari raising the same question, *Adams v. DHS*, 142 S. Ct. 2835 (2022) (No. 21-1134), and it should do so again here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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