

No.

In the Supreme Court of the United States

CHARLES FLYNN, PETITIONER,

v.

DEPARTMENT OF STATE

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

RELATED PROCEEDINGS

United States Merit Systems Protection Board:

Charles Flynn v. Department of State,

No. DC-4324-21-0367-I-1

(Sept. 17, 2021)

Nick Feliciano v. Department of Transportation,

No. AT-4324-18-0287-I-4

(Sept. 1, 2021)

Evan H. Nordby v. Social Security Administration,

No. DE-4324-19-0012-I-1

(May 28, 2021)

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

Charles Flynn v. Department of State,

No. 22-1220

(May 15, 2023)

Nick Feliciano v. Department of Transportation,

No. 22-1219

(May 15, 2023)

Evan H. Nordby v. Social Security Administration,

No. 21-2280

(May 11, 2023)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is available at 2023 WL 3449169. The order of the court of appeals denying rehearing (App. 22a-23a) is unreported. The decision of the Merit Systems Protection Board (App. 5a-21a) is available at 2021 WL 4247966.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. The court of appeals denied a timely petition for rehearing en banc on November 1, 2023. Chief Justice Roberts extended the time to file the petition to February 13, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 24a-44a.

STATEMENT OF THE CASE

This case presents a question of exceptional importance that warrants this Court's review: whether a federal civilian employee called or ordered to active duty in the military reserves under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

This Court's review is urgently needed to correct the Federal Circuit's flawed decision that has been disastrous for federal civilian employee reservists. This case is one of three petitioning from the Federal Circuit denying differential pay under *Adams v. DHS*, 3 F.4th 1375 (2021). See *Feliciano v. Dep't of Transp.*, No. 23A685; *Nordby v. SSA*, No. 23A685. Of these cases, *Feliciano* is the better vehicle to address the question presented. The Court

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

A. Legal Background

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

The statute requires differential pay for federal civilian employees who “perform active duty *** pursuant to a call or order to active duty under *** a provision of law referred to in section 101(a)(13)(B) of title 10.” 5 U.S.C. § 5538(a). Section 101(a)(13)(B) lists statutes that can “result[] in the call or order to, or retention on, active duty,” including “section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of [title 10], chapter 13 of [title 10], section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.” 10 U.S.C. 101(a)(13)(B).

More than two years ago in *Adams v. DHS*, 3 F.4th 1375 (2021), the Federal Circuit adopted a new requirement for reservists called to active duty under Section 12301(d). The court considered it “implausible” that Congress had intended to cover “voluntary duty that was unconnected to the emergency at hand.” *Adams*, 3 F.4th at 1379-1380. To qualify for differential pay, the court held, reservists activated under Section 12301(d) would be required to show that that they were “directly called to serve in a contingency operation.” *Id.* at 1379.

Since denying the petition for rehearing en banc in *Adams* itself, the Federal Circuit has denied three more

petitions for rehearing en banc asking it to reconsider *Adams*. App. 22a-23a; Order, *Feliciano v. Dep't of Transp.*, No. 22-1219 (Oct. 27, 2023); Order, *Nordby v. SSA*, No. 21-2280 (Nov. 1, 2023).

B. Factual and Procedural Background

1. Petitioner served as a Special Agent in the Department of State's Bureau of Diplomatic Security. App. 6a. Petitioner is also a Lieutenant Colonel in the United States Army Reserve. App. 6a. From March 2020 to March 2022, Petitioner was absent from his position at the Department of State to perform active duty at the Office of Military Commissions at the Pentagon. App. 2a.

Petitioner's initial orders called him to active duty for operational support under 10 U.S.C. § 12301(d) from March 4, 2020, through March 3, 2021. App. 6a. His activation orders stated that the purpose of his call-up was "Contingency Operation for Active Duty Operational Support (CO-ADOS) in support of [Operation Enduring Freedom-Contracting Support Brigade]." App. 6a. Petitioner's initial orders further stated that he was exempt from length-of-service limitations under 38 U.S.C. § 4312(c)(4)(B), C.A. App. 138, which applies to reservists ordered to active duty "because of a war or national emergency." These orders were subsequently extended until March 3, 2022. App. 6a.

In February 2021, Petitioner requested differential pay for his term of active duty from March 4, 2020 to the end of 2020. App. 6a. Petitioner was told that his request was denied because service under 10 U.S.C. § 12301(d) did not qualify for differential pay. App. 7a.

2. Petitioner appealed to the MSPB on the ground that the Department of State had violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by wrongly denying him differential pay. App. 5a-6a. Citing the Federal Circuit's decision in

Adams v. DHS, 3 F.4th 1375 (Fed. Cir. 2021), the MSPB denied relief. App. 9a-12a. Under *Adams*, the MSPB explained, “[section] 5538(a) does not entitle a claimant to benefits when they are activated ‘in support’ of a contingency operation, only when they are directly called to serve in a contingency operation.” App. 10a (quoting *Adams*, 3 F.4th at 1379).

3. The court of appeals affirmed. Applying *Adams*, the court stated that petitioner was ineligible for differential pay because “he ha[d] not alleged any connection between his service and an ongoing national emergency.” App. 4a. Therefore, the court held, petitioner “failed to demonstrate that his voluntary, active service under 10 U.S.C. § 12301(d) met the statutory definition of a contingency operation.” App. 4a.

The court of appeals denied rehearing en banc. App. 23a.

ARGUMENT

The Court should hold the petition in this case pending resolution of *Feliciano v. Department of Transportation*, which is being filed contemporaneously with this petition. The question presented in this case is identical to the question presented in *Feliciano* and the procedural posture of the two cases is materially indistinguishable. Like *Feliciano*, this case concerns a federal employee wrongly denied differential pay under *Adams*. Between the two cases, however, *Feliciano* is the better vehicle to address the question presented.

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

CONCLUSION

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

Respectfully submitted.

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