

No. 23-868

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*

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-4a) is not published in the Federal Reporter but is available at 2023 WL 3449169. The decision of the Merit Systems Protection Board (Pet. App. 5a-21a) is unreported but is available at 2021 WL 4247966.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. A petition for rehearing was denied on November 1, 2023 (Pet. App. 22a-23a). On January 22, 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 a special agent in the Department of State’s Bureau of Diplomatic Security. Pet. App. 2a. He simultaneously served as an officer in the United States Army Reserve. *Ibid.* From March 2020 to March 2022, 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. Petitioner’s orders

provided that he was being activated for “Contingency Operation for Active Duty Operational Support (CO-ADOS) in support of [Operation Enduring Freedom-Contracting Support Brigade].” *Id.* at 6a & n.1 (citation omitted). Petitioner performed his voluntary active-duty service at the Office of Military Commissions at the Pentagon, where he “provid[ed] support on a variety of legal issues.” *Id.* at 2a.

Petitioner requested differential pay from the Department of State 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.*

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 emer-

gency 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*, the Board’s administrative law judge hearing petitioner’s case found that he had failed to present evidence that he was called to serve in a contingency operation covered by Section 101(a)(13)(B) and denied petitioner’s claim for differential pay. Pet. App. 5a-21a. The State Department had also argued that petitioner is not entitled to differential pay because “his military pay is higher than his civilian pay and therefore there is no differential to be paid.” C.A. App. 59 (emphasis omitted); see *id.* at 59-65. But the judge did not reach that question because she had concluded that petitioner was ineligible for differential pay in any event. Pet. App. 8a n.2.

3. 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-4a. 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 3a (citations omitted). The court further explained that “for voluntary activation under 10 U.S.C. § 12301(d) to qualify as a contingency operation, ‘there must be a connection between the voluntary military service and the declared national emergency.’” *Id.* at 3a-4a. The court found that petitioner was not entitled to differential pay because he “ha[d] not alleged any connection between his service and an ongoing national emergency.” *Id.* at 4a. In reaching

that conclusion, the court noted that petitioner “concede[d] that our holding in *Adams* affects the outcome of this case,” “dedicate[d] all of his argument to challenging *Adams*[,] and d[id] not purport to show how his activation * * * warrants a different outcome from that of *Adams*.” *Id.* at 3a.

4. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 22a-23a.

ARGUMENT

Petitioner renews his contention that he is entitled to differential pay solely 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. 1-4; see Pet. App. 8a. 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).¹

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

¹ A third pending petition also raises the same question and likewise seeks a hold pending this Court’s disposition of the petition in *Feliciano*. See *Nordby v. Social Security Administration*, No. 23-866 (filed Feb. 8, 2024).

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 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.

2. Here, the court of appeals correctly rejected petitioner’s argument that he was entitled to differential pay merely because he served in active duty while a war or 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 war or 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 ongoing war or 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 declared national emergency. *Oxford* 1134.

3. To the extent petitioner separately suggests that he was entitled to differential pay because “[h]is 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,’” Pet. 3 (brackets and citation omitted), petitioner has forfeited that argument.

In the court of appeals, petitioner did not properly raise any argument that his orders entitled him to differential pay because they indicated a sufficient connection to a national emergency. Rather, he attacked that court’s recent decision in *Adams* and argued that he is entitled to differential pay because “there has been a national emergency declared by the President” “[s]ince September 11, 2001” and he “performed military service obligations for contingency operations during what the President has declared as an ongoing national emergency.” Pet. C.A. Br. 10; see *id.* at 8-24; see also Pet. C.A. Reply Br. 6 (similar). Indeed, his opening brief did not even excerpt or discuss the text of his orders. Pet. C.A. Br. 1-24. 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. 6-7; 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.”). The court thus did not address any argument based on petitioner’s orders. To the contrary, it emphasized that petitioner “ha[d] not alleged any connection between his service and an ongoing national emergency.” Pet. App. 4a; see *id.* at 3a (noting that petitioner “d[id] not purport to show how his activation

* * * warrants a different outcome from that of *Adams*”).

4. Finally, 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. Indeed, this case would be a poor vehicle in which to address the question presented even if that question otherwise warranted this Court’s review.

As discussed, petitioner has forfeited any arguments about the specific nature of his service. This Court should follow its usual practice of declining to review claims that were “not pressed or passed upon” in the court of appeals below. *United States v. Williams*, 504 U.S. 36, 41 (1992) (citation omitted). And petitioner’s request for differential pay fails for an independent reason: As the State Department explained to the Board, C.A. App. 59-65, petitioner was not entitled to differential pay because his military pay was higher than his civilian pay.² This Court should not grant review of a

² Differential pay is measured by the difference between “the amount of *basic pay* which would otherwise have been payable to” the reservist for his civilian work and his military pay and allowances. 5 U.S.C. 5538(a)(1) (emphasis added). Petitioner’s claim that his civilian pay was higher than his military pay is premised on the assumption that law enforcement availability payments—which are “premium pay” provided “to criminal investigators to ensure” their “availability * * * for unscheduled duty,” 5 U.S.C. 5545a(b)—were part of his basic pay. See C.A. App. 59-61. But Congress did not include such payments within the applicable definition of basic pay. See 5 U.S.C. 5545a(h)(2); C.A. App. 173.

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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MAY 2024