No. 23-861

In the Supreme Court of the United States

NICK FELICIANO, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

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

BRIEF FOR THE RESPONDENT

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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," which is part of a pre-existing definition of "contingency operation." 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 2021). 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. The petition was filed on that date and granted on June 24, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

A. Legal Background

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, is the second part of a pre-existing definition of the term "contingency operation" that applies throughout Title 10 and is incorporated into numerous provisions outside Title 10. The first part of that definition refers to an operation "designated by the Secretary of Defense" as one in which "members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." 10 U.S.C. 101(a)(13)(A). Section 101(a)(13)(B), the part of the definition incorporated into the differential-pay statute, defines a "'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 2021). "'[A]ctive duty'" is "full-time duty in the active military service of the United States" and "includes full-time training duty" and "annual training duty," but "does not include full-time National Guard duty." 10 U.S.C. 101(d)(1) (Supp. V 2023).

Congress has authorized differential pay if a servicemember engages in qualifying service and his civilian pay is higher than his military "pay and allowances." 5 U.S.C. 5538(a)(2). The agency that employs a servicemember in his civilian role provides his differential pay. 5 U.S.C. 5538(c)(1). A servicemember must supply his civilian employing agency with his military orders and his military leave and earnings statements documenting his military pay and allowances so the agency can confirm his eligibility and correctly calculate any differential pay. See 5 U.S.C. 5538(a); Office of Personnel Management (OPM), *OPM Policy Guidance Regarding Reservist Differential under 5 U.S.C. 5538*, at 12 (June 23, 2015) (*OPM Guidance*), https://perma.cc/5UMK-YUVJ; Pet. App. 32a. OPM, "in consultation with Secretary of Defense," is responsible for "prescrib[ing] any regulations necessary to carry out" the differential-pay statute. 5 U.S.C. 5538(d).

This case involves the Federal Aviation Administration (FAA), an agency within the Department of Transportation. FAA employees generally are not covered by Title 5, including Section 5538's differential-pay requirement. 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). The FAA has done so, granting differential pay in line with Section 5538. See FAA, *Human Resources Policy Manual Volume 3: Premium Pay and Allowances: Reservist Differential* §§ 2, 3 (effective June 28, 2011) (available at C.A. App. 132-143). Like employees in other agencies, FAA employees seeking differential pay must submit a request and provide the required documentation of their military orders and military pay and allowances. See *ibid.*

2. This case concerns the meaning of the final phrase in Section 101(a)(13)(B)'s definition of a "contingency operation"—that is, what constitutes a "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." 10 U.S.C. 101(a)(13)(B). Congress first adopted the definition now codified in Section 101(a)(13)(B) in 1991. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 631(a), 105 Stat. 1380. The original definition likewise referred to "any other provision of law during a war or during a national emergency declared by the President or Congress." *Ibid.* It also included some of the provisions that are expressly cross-referenced in the current version of Section 101(a)(13)(B). See *ibid.*

Since 1991, Congress has repeatedly amended Section 101(a)(13)(B) to add active-duty service under other statutes. In 2011, for example, Congress added Section 12304a, which permits certain reservists to be called to active duty "[w]hen a Governor requests Federal assistance in responding to a major disaster or emergency," 10 U.S.C. 12304a(a). See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 515(b), 125 Stat. 1395. And in 2013, Congress added a

similar provision that allows Coast Guard reservists to be called up to respond to certain disasters and emergencies. See National Defense Authorization Act for Fiscal Year 2013 (2013 NDAA), Pub. L. No. 112-239, § 681(a), 126 Stat. 1795; see also 14 U.S.C. 712 (2012) (now 14 U.S.C. 3713).

The term "contingency operation" appears in dozens of provisions in Title 10. Among other things, such an operation triggers exceptions to otherwise-applicable limits on spending and use of certain resources, see, *e.g.*, 10 U.S.C. 2229(b)(2), 2347(c), 2662(f)(1)(E), 4863(c)(1), and also may entitle servicemembers serving in such an operation to special health and educational benefits not available for other active-duty service, see, *e.g.*, 10 U.S.C. 1074m(a) (2018 & Supp. I 2019), 1145(a)(2)(C) and (D), 16163(a)(1). In addition, more than 20 statutory provisions outside Title 10 rely on the definition of "contingency operation" in Section 101(a)(13)(B). Many of those provisions do not involve military pay or benefits. For example, the definition delineates the scope of permissible waivers of certain requirements for Coast Guard contracts, 14 U.S.C. 1109(c)(3)(A); imposes necessity and sustainability requirements on some foreign assistance projects, 22 U.S.C. 2421f(e)(3); and provides the basis for triggering particular government contracting authorities, 41 U.S.C. 2312(d)(1).

3. Congress adopted Section 5538, the differential-pay provision, in 2009. See Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 751, 123 Stat. 693-695. Before it did so, Congress considered—but declined to adopt—proposals that would have granted differential pay for all or nearly all active-duty service. For example, the Equity for Reservists Pay Act of 2003, H.R. 1345, 108th Cong., 1st Sess. 2-4 (2003), cross-referenced

a definition that includes all active-duty service performed for more than 30 days. See 37 U.S.C. 101(18) and (19). Similarly, other failed proposals contemplated differential pay for "service in the uniformed services or the National Guard," Reservists Pay Security Act of 2004, S. 593, 108th Cong., 1st Sess. 4 (2003), and cross-referenced a definition that included "active duty, active duty for training, * * * inactive duty training, [and] full-time National Guard duty," 38 U.S.C. 4303(13) (Supp. II 2002). See Reservists Pay Security Act of 2001, S. 1818, 107th Cong., 1st Sess. (2001) (same in relevant parts).

When Congress enacted the differential-pay statute in 2009, it did not adopt those broader definitions of qualifying service. It instead authorized differential pay only for federal civilian employees called to active duty under a "provision of law referred to in section 101(a)(13)(B)," which is part of the pre-existing statutory definition of a contingency operation. 5 U.S.C. 5538(a). In 2018, Congress amended Section 5538 to add service pursuant to a call to active duty under "section 12304b of title 10," a provision not referenced in Section 101(a)(13)(B). John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 605, 132 Stat. 1795.

B. The Present Controversy

1. Petitioner works as an air traffic controller for the FAA. Pet. App. 2a, 9a. He previously also served as a reserve petty 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 [Department of Defense (DOD)] contingency operation"; "[t]h[ose] orders [we]re supporting * * * Operation Iraqi Freedom, Operation Enduring Freedom, etc." *Id.* at 75a; C.A. App. 129; see Pet. App. 33a. Executive Order 13223 authorized DOD to use additional authorities, including calling reservists to active duty, in furtherance of the declared national emergency following the September 11 attacks. *Ordering the Ready Reserve of the Armed Forces To Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation*, 66 Fed. Reg. 48,201 (Sept. 18, 2001). 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. Petitioner volunteered for activation under Section 12301(d) for a total of approximately 14 months. *Id.* at 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, 32a-33a, 74a.

Petitioner requested differential pay for his activation pursuant to Section 12302, which is one of the provisions specifically cross-referenced in Section 101(a)(13)(B), and the FAA granted that request. See Pet. App. 2a, 31a-33a. Petitioner did not, however, request differential pay for the periods he served under Section 12301(d), and he did not submit to the FAA his military leave and earnings statements for those periods. *Id.* at 32a.

2. In 2018, petitioner filed an appeal with the Merit Systems Protection Board (Board), asserting that because 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 for the first time 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" listed in Section 101(a)(13)(B). *Id.* at 1379. The *Adams* reservist was called up to support the 12th Air Force unit in Arizona and provide legal assistance in Arizona; his orders stated that his activation was in a non-contingency role. *Id.* at 1377. The court in *Adams* rejected the reservist's argument that, because the United States has been in a continuous state of national emergency for many years, 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 instead relied on an "expansive reading" of the relevant statutes under which "every military reservist ordered to duty" would be entitled to differential pay "so long as the national emergency continue[d]." *Id.* at 1379. The court refused to adopt that reading, finding it "implausible" that Sec-

tion 101(a)(13)(B)'s definition of a "contingency operation" includes service "unconnected to the emergency at hand." *Id.* at 1380.

Applying *Adams*, one of the Board's administrative law judges found that petitioner failed to present evidence of his involvement in an operation covered by Section 101(a)(13)(B) and denied his claim for differential pay for his Section 12301(d) service. Pet. App. 7a-41a. The administrative law judge's decision became the final decision of the Board. See 5 U.S.C. 7701(e)(1).

3. The court of appeals affirmed in a nonprecedential decision. 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 (citation omitted). 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 "ha[d] not alleged any connection between his service and the ongoing national emergency," the court concluded that he "fail[ed] to demonstrate that his" Section 12301(d) service "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[ed] a different outcome from that of *Adams*." *Id.* at 3a-4a.

SUMMARY OF ARGUMENT

A. A servicemember is entitled to differential pay if he is called to active duty "during a national emergency declared by the President or Congress." 10 U.S.C.

101(a)(13)(B). Statutory text, context, and structure demonstrate that servicemembers are entitled to differential pay only if they are called to active duty in the course of a national emergency—not merely while an unrelated emergency declaration happens to be in effect.

The meaning of "during" depends on context. Sometimes it means "at the same time as," requiring nothing more than temporal overlap. But dictionary definitions and ordinary usage make clear that it also can mean "in the course of" or "in the process of." When used that way, the term requires a substantive as well as a temporal connection. An attorney who argues "during a hearing," for example, is one who argues in the hearing itself—not one who argues somewhere else while the hearing happens to be taking place.

Structure and context make clear that Section 101(a)(13)(B) uses "during" in the same way. That provision is part of an all-purpose definition of "contingency operation," a term naturally understood to depend on the nature of the operation rather than on the existence or nonexistence of an unrelated emergency. That is especially true because national emergencies are declared for many reasons having nothing to do with military operations. Indeed, dozens of declared emergencies are currently in effect, one of which has been in place since 1979. Giving "during" a wholly temporal meaning would thus suggest that *any* military operation resulting in a call to active duty is a "contingency operation" for all purposes. And, as specifically relevant here, it would require differential pay for *all* active-duty service, even training and other service unrelated to any emergency. Had Congress wished to accomplish that goal, it would have simply defined a

contingency operation to include "all active-duty service"—there would have been no need for Section 101(a)(13)(B)'s lengthy list of cross-references. And Congress's repeated amendments adding other types of active-duty service to Section 101(a)(13)(B) and Section 5538 would have been unnecessary if the statute already encompassed all such service.

The natural reading of Section 101(a)(13)(B) is readily administrable. A servicemember's orders generally will make clear whether he is being called to active duty in the course of a national emergency. DOD and the Coast Guard require that orders note whether they are in support of a contingency operation, list the name of the operation being supported, and reference the relevant executive order. And if a particular servicemember's orders are unclear on whether he is being called up in the course of a national emergency, he can request clarification.

B. Petitioner's contrary arguments do not justify giving Section 101(a)(13)(B) a purely temporal reading that would effectively redefine a "contingency operation" to mean any operation resulting in a call to active-duty service. This Court's decision in *United States* v. *Ressam*, 553 U.S. 272 (2008), did not hold that "during" invariably requires only a temporal connection; instead, the Court deemed that to be "the most natural reading of the word *as used in the statute*" at issue there. *Id.* at 274-275 (emphasis added). Petitioner's various other examples confirm that "during" *can* mean "at the same time as"—not that it has that meaning in Section 101(a)(13)(B). And petitioner's contextual and structural arguments rest on a misunderstanding of our position: As relevant here, Section 101(a)(13)(B) asks whether the servicemember was "call[ed] or order[ed]

* * * to active duty" in the course of a national emergency. 10 U.S.C. 101(a)(13)(B). The answer to that question is ordinarily apparent from the face of the relevant orders; there is no need for a "fact-intensive *post hoc* review" of the servicemember's duties (Pet. Br. 17).

Petitioner's remaining arguments fare no better. Legislative history, the veterans' canon, and policy arguments cannot justify an interpretation that is inconsistent with the text, context, and structure of the statute. And in any event, the available legislative history actually undermines petitioner's reading of Section 101(a)(13)(B): It shows that Congress repeatedly considered and rejected broad language that would have accomplished petitioner's preferred outcome of differential pay for *all* active-duty service. Congress instead chose different text reflecting a different policy judgment by incorporating the provisions of law listed in Section 101(a)(13)(B)'s definition of "contingency operation." And petitioner has offered no evidence that Section 101(a)(13)(B) had ever been understood in the broad manner he posits.

C. In challenging the court of appeals' decision, petitioner argues only that a servicemember called to active duty is automatically entitled to differential pay any time a national emergency is in effect, even if it has nothing to do with his service. Petitioner's orders indicate that he may have been entitled to differential pay because he was called to active duty in the course of a national emergency, but he has not submitted a request for differential pay or the necessary documentation to the FAA. Petitioner also has not argued in this Court, and did not argue in the court of appeals, that his orders demonstrate the necessary connection to a national

emergency. Accordingly, if the Court agrees that Section 101(a)(13)(B) requires something more than a purely temporal overlap, it should affirm the court of appeals' decision.

ARGUMENT

The court of appeals correctly held that a servicemember is not entitled to differential pay merely because he was called to active duty while a national emergency happened to be ongoing—a condition that has been continuously satisfied for nearly half a century.

A. Section 101(a)(13)(B) Entitles Servicemembers To Differential Pay Only If They Are Called To Active Duty In The Course Of A War Or National Emergency

As relevant here, the differential-pay requirement in Section 5538(a) applies when a reservist "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), which is part of Title 10's generally applicable definition of "contingency operation." 5 U.S.C. 5538(a). Section 101(a)(13)(B) defines that term to include a military operation that "results in the call or 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). The most natural reading of that phrase in context is that it refers to an order to active duty *in the course of* or *in the process of* a war or national emergency—not to any call to active duty that occurs while an unrelated emergency happens to be ongoing. And that natural reading of the text is also readily administrable: A reservist's orders calling him to active duty generally will make clear the

statute under which he is being called up and whether he is being called up in the course of a national emergency.

1. The term "during" often means "in the course of," not merely "at the same time as"

In some contexts, the term "during" can refer to a purely temporal connection. For example, in *United States* v. *Ressam*, 553 U.S. 272 (2008), the Court considered 18 U.S.C. 844(h)(2), which makes it a crime to carry an explosive "during the commission of any felony." The Court found that "[t]he term 'during' denotes a temporal link; that is surely the most natural reading of the word *as used in th[at] statute*." *Ressam*, 553 U.S. at 274-275 (emphasis added). But "during" also is commonly used to mean "in the course of." 4 *The Oxford English Dictionary* 1134 (2d ed. 1989) (*Oxford*); see, *e.g.*, *Webster's Third New International Dictionary of the English Language* 703 (1986) ("at some point in the course of"). And "in the course of" means "in the process of, during the progress of." 3 *Oxford* 1055 (emphasis omitted).

When used in that sense, "during" requires more than a mere temporal overlap; it instead requires a substantive connection between the object of the prepositional phrase that begins with "during" and the term that the phrase modifies. 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 occurring. Similarly, if a statute imposed an obligation to be truthful "during" an application process, it would naturally be read to require truthfulness only *in the course of* that process—not to prohibit unrelated lies while the process is ongoing.

That usage of "during" is commonplace, as a review of recent volumes of the U.S. Reports demonstrates:

- Discussion of an order entered by a district court "[d]uring" a "remand" refers to an order entered as part of the remand in a particular case—not orders issued in other cases pending at the same time. *McIntosh* v. *United States*, 601 U.S. 330, 336 (2024).
- A reference to flooding "during" a "[t]ropical [s]torm" encompasses flooding that happened in the course of that storm—not unrelated flooding that happened to occur at the same time elsewhere. *DeVillier* v. *Texas*, 601 U.S. 285, 288 (2024).
- 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 information learned in the course of that employment—not information he learned on his own time.
- 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 to documents generated in the course of those deliberations—not to any document created by the agency while those deliberations were ongoing.

Congress likewise often uses "during" to mean "in the course of" or "in the process of." 3 *Oxford* 1055 (emphasis omitted); see 4 *Oxford* 1134. For example, a provision in Title 10 defines "'captured record'" to include documents "captured during combat operations from

countries, organizations, or individuals, now or once hostile to the United States." 10 U.S.C. 427(g)(1). That definition clearly refers to records acquired in the course of a combat operation—not all records acquired while a combat operation is ongoing somewhere. Another Title 10 provision allows a DOD employee to "disclose sensitive information to a litigation support contractor" if "the disclosure is for the sole purpose of providing litigation support to the Government * * * during or in anticipation of litigation." 10 U.S.C. 129d(a)(1). That provision only permits disclosures that have a connection to the specific ongoing litigation—not disclosures to support entirely unrelated litigation as long as some litigation is ongoing somewhere.

Many provisions outside Title 10 also use "during" to require a substantive connection. For example, a program that countenances the development of nuclear power plants that "reduce the radiation exposure to workers during plant operation and maintenance" refers to reducing exposure *from the plant*—not exposure that off-duty workers might experience from an entirely different source at the same time that the plant is operating. 42 U.S.C. 9703(a)(2). And the requirement that the Secretary of Agriculture immediately inform a governor "of any hazardous conditions found during an inspection" of a dam in the State requires that the hazardous condition be related to the dam—and does not require the Secretary to inform the governor of any hazardous condition that might elsewhere exist in the State at that time. 33 U.S.C. 467b.

In short, the meaning of "during," like the meaning of many other common words, "depends on the context in and purpose for which it is used." *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 318 (2006); see, *e.g.*, *Pulsifer* v.

United States, 601 U.S. 125, 140-141 (2024). Sometimes, it refers to purely temporal overlap. But in other contexts, it requires a substantive connection as well.

2. Structure and context show that Section 101(a)(13)(B) uses "during" to refer to a call to active duty in the course of a war or national emergency

The context of Section 101(a)(13)(B) demonstrates that Congress used "during" to mean "in the course of" or "in the process of," not to connote purely temporal overlap.

a. To begin, Section 101(a)(13)(B) is part of Title 10's generally applicable definition of a "contingency operation." In interpreting such a definition, courts "cannot forget that [they] ultimately are determining the meaning" of the defined phrase, and thus should take account of that phrase's "ordinary meaning." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004); see, *e.g.*, *Sackett* v. *EPA*, 598 U.S. 651, 672 (2023). A "contingency operation" is necessarily an operation undertaken in response to some specific contingency—by its terms, that phrase calls for an examination of the particular operation in question, not unrelated conditions that happen to be occurring at the same time.

b. The broader statutory context further confirms that Section 101(a)(13)(B)'s final clause includes a call to active-duty service in the course of a national emergency, not merely one that coincides with an unrelated emergency. Indeed, reading the final clause of Section 101(a)(13)(B) to require a mere temporal overlap with a national emergency would implausibly transform that 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.

Congress has authorized the President to declare national emergencies in a variety of contexts, including to impose economic sanctions in response to threats "to the national security, foreign policy, or economy of the United States." 50 U.S.C. 1701(a); see 50 U.S.C. 1702. There are currently 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* (Sept. 10, 2024) (*Declared National Emergencies*), https://perma.cc/7HYK-Q5YT. 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 have no direct connection to any U.S. military activities because, for example, they were declared as predicates for imposing economic sanctions on particular individuals and entities associated with certain countries.[1]

Given that legal context, it is not plausible to interpret Section 101(a)(13)(B)'s final clause to include any military operation that results in a call to active service while an unrelated national emergency happens to be

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[1] 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.); see also *Declared National Emergencies*.

ongoing, because that would include *every* such operation that results in a call to active service. When Congress adopted Section 101(a)(13)(B) in 1991, it presumably was aware that at least one national emergency had been ongoing for many years—and that, in light of that experience, it was unlikely that there will ever be a time when no national emergency exists.[2] Had Congress meant to achieve the result petitioner posits, it would have defined a "contingency operation" to mean any military operation that "results in the call or order to, or retention on, active duty of members of the uniformed services," 10 U.S.C. 101(a)(13)(B)—and stopped there. There would have been no need to include dozens of additional words and multiple statutory cross-references.

So too with Congress's 2009 enactment of the differential-pay statute, 5 U.S.C. 5538. If, as petitioner and his amici posit (*e.g.*, Members of Cong. Amici Br. 10-12), Congress had intended to make differential pay available for all active-duty service, it would simply have said so. Indeed, Congress had previously considered just such language but declined to adopt it. See pp. 5-6, *supra*. Congress instead chose to cross-reference the list of provisions included in Section 101(a)(13)(B)'s more precise definition of a "contingency operation."

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[2] See, *e.g.*, *Continuation of Iran Emergency*, 56 Fed. Reg. 57,791 (Nov. 13, 1991) (continuing emergency in effect since 1979); *Continuation of Libyan Emergency*, 56 Fed. Reg. 477 (Jan. 4, 1991) (continuing emergency in effect since 1986); *Continuation of Emergency Regarding Export Control Regulations,* 56 Fed. Reg. 49,385, 49,385 (Sept. 27, 1991) (continuing emergency declared in 1990 "in light of the expiration of the Export Administration Act of 1979"); *Prohibiting Certain Transactions With Respect to Haiti*, 56 Fed. Reg. 50,641 (Oct. 7, 1991) (declaring emergency to impose certain sanctions on Haiti).

Petitioner offers no evidence that Section 101(a)(13)(B) had ever been understood to extend to *any* military operation that results in a call to active-duty service. And Congress's rejection of a "ready alternative"—simple language referring to all active-duty service—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).

c. Reading Section 101(a)(13)(B)'s final clause to require only a temporal overlap with a national emergency would also create superfluity problems. The rest of Section 101(a)(13)(B) defines a "contingency operation" to include a military operation that results in a call to active duty under one of nine sets of statutory provisions. On petitioner's reading, however, those references have no practical effect because the final clause sweeps in *all* calls to active-duty service. This Court's usual presumption against superfluity applies with particular force where, as here, an "interpretation of a congressional enactment" would "render[] superfluous another portion of that same law." *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (citation omitted); see *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 386 (2013).

What is more, Congress has repeatedly amended Section 101(a)(13)(B) to include additional categories of active-duty service. In 2011 and 2013—shortly after adopting the differential-pay provision in Section 5538(a)—Congress amended Section 101(a)(13)(B) to add active-duty service under provisions allowing members of the Coast Guard and other reservists to respond to certain disasters and emergencies. 14 U.S.C. 3713; 10 U.S.C. 12304a(a); see pp. 4-5, *supra*. If, as petitioner and his amici assert (*e.g.*, Members of Cong. Amici Br.

3-12), Congress believed that *all* active-duty service was already covered by Section 101(a)(13)(B)'s final clause, those amendments would have been unnecessary.

As particularly relevant here, Congress has also legislated on the understanding that Section 5538(a)'s cross-reference to Section 101(a)(13)(B) does not make all active-duty service eligible for differential pay. In 2018, Congress amended Section 5538 to add a reference to service under "section 12304b of title 10," a provision not listed in Section 101(a)(13)(B). See p. 6, *supra*. That would have been inexplicable if, as petitioner asserts (Br. 26), all service under Section 12304b was already covered.[3]

Similarly, in 2013, when Congress amended Section 101(a)(13)(B) to add the Coast Guard provision discussed above, it expressly made the change "retroactive" for one year for purposes of differential "pay" under "Section 5538 of title 5." 2013 NDAA, § 681(d), 126 Stat. 1795-1796 (capitalization omitted). That "change in [statutory] language" should "be read, if possible, to have some effect." *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 263 (1992). But petitioner's reading fails that "canon of statutory construction." *Ibid.* On his view, the retroactivity provision was entirely unnecessary because Coast Guard reservists were already entitled to differential pay for *all* active-duty service under Section 101(a)(13)(B)'s final clause, as multiple national

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[3] Because service under Section 12304b is separately included in Section 5538(a), a servicemember who is called to active duty under that provision is entitled to differential pay whether or not he is called to active duty during a war or national emergency. In assuming otherwise (Br. 26), petitioner appears to have overlooked Section 5538(a)'s specific reference to Section 12304b.

emergencies had been ongoing throughout the one-year retroactivity period. See p. 18, *supra*.

d. Finally, petitioner's reading of "during" would yield anomalous results. Most obviously, it would suggest that *every* military operation that results in a call to active-duty service would be a "contingency operation," potentially triggering all of the dozens of provisions inside and outside Title 10 that are applicable to such an operation—including special rules governing spending, resource-use, and a variety of personnel matters. See p. 5, *supra*. For example, 10 U.S.C. 2662 provides that DOD must notify Congress before entering into real property transactions valued at more than $750,000, but makes an exception for transactions associated with a "contingency operation." 10 U.S.C. 2662(f)(1)(E). On petitioner's view, the existence of ongoing national emergencies would mean that Section 2662's notice requirement is inapplicable to transactions associated with *any* military operation that results in a call to active duty. And the same is true of restrictions on the diversion of materiel or equipment from strategically prepositioned stocks, 10 U.S.C. 2229(b)(2); limits on certain types of Coast Guard contracts, see 14 U.S.C. 1109(c)(3)(A); and prohibitions on the procurement of items not made in the United States, see 10 U.S.C. 4862(d)(1).

Petitioner's reading would also yield anomalous results in the specific context of differential pay. 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 interpretation, 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 happen to be ongoing at the time of his court-martial. It is not plausible to maintain, as petitioner must, that Congress required federal agencies to supplement the pay of employees called to duty solely to be court-martialed.

Similarly, reservists are required to complete active-duty training on an annual basis and may also be called to active-duty training on an ad hoc basis. See, *e.g.*, 10 U.S.C. 10147(a)(1) and (2). Again, under the broad understanding of "during" advocated by petitioner, all reservists would be entitled to differential pay whenever they are called to active-duty service for training because national emergencies are ongoing. Indeed, based on the expansive theory that petitioner advocates, another reservist has asked this Court to conclude that he is entitled to differential pay for attending training for new Judge Advocates at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia. See Pet. at 3-5, *Nordby* v. *SSA*, No. 23-866 (filed Feb. 8, 2024); Pet. at App. 2a, *Nordby*, *supra* (No. 23-866).

3. A servicemember's orders will generally make clear whether his call to active duty is in the course of a national emergency

The foregoing understanding of Section 101(a)(13)(B) is readily administrable. In part because the existence of a "contingency operation" has a variety of important consequences under Title 10 and other laws, orders calling a servicemember to active duty will ordinarily specify on their face whether the call is in the course of a declared national emergency and therefore a contingency operation under Section 101(a)(13)(B). DOD and Coast Guard practice provide that orders must state whether a servicemember is being called up in support

of a contingency operation and list any operation he is being called up to support. See, *e.g.*, Army Reg. 135-200, at 19-20 (effective Feb. 17, 2024), https://perma.cc/QR5S-UEC7; Dep't of Homeland Security, Coast Guard, Commandant Instruction 3061.2A, at 5-6 (Nov. 3, 2023), https://perma.cc/P7Z8-HFHT; Army Reg. 600-8-105, at 11, 26 (Dec. 20, 2022), https://perma.cc/4W4A-9BEG. Indeed, when DOD and the Coast Guard issue guidance for writing orders for missions authorized by particular emergency declarations, they require that such orders note that they are "in 'support of a contingency operation,'" list "[t]he name of the operation being supported," and reference the relevant executive order. See, *e.g.*, David S. C. Chu, Under Secretary of Defense, *Revised Mobilization/Demobilization Personnel and Pay Policy for Reserve Component Members Ordered to Active Duty in Response to the World Trade Center and Pentagon Attacks – Section 1*, at 9 (Mar. 15, 2007), https://perma.cc/YVR8-JKLJ.

If the operation listed on a servicemember's orders is part of a declared national emergency, the servicemember has been called up in the course of that national emergency. In such situations, reservists are entitled to differential pay under Section 101(a)(13)(B)'s final clause if they are called up under a provision not otherwise enumerated in that section—including Section 12301(d). For example, if in late 2020 a servicemember was called to active-duty service via orders that relied on the COVID-19 national emergency, his service would have been in the course of that national emergency and he would be entitled to differential pay under the final clause of Section 101(a)(13)(B). See *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak*, Proclamation No. 9994,

85 Fed. Reg. 15,337 (Mar. 18, 2020). In contrast, if a servicemember was called up under "'non-contingency' activation orders" to provide legal assistance in Arizona, *Adams* v. *DHS*, 3 F.4th 1375, 1377 (Fed. Cir. 2021) (citation omitted), cert. denied, 142 S. Ct. 2835 (2022), his orders would make clear that he was not called to active duty in the course of a national emergency, so he would not be entitled to differential pay.

As just discussed, it normally will be clear from the face of a reservist's orders whether he is entitled to differential pay because his service is in the course of a national emergency. But if in a particular instance a servicemember's orders are not clear, he can seek to have the orders clarified. Cf. *OPM Guidance* 23 ("If there are questions about whether the orders are specific enough or whether they cite the correct authority, the reservist or the civilian employing agency may contact the headquarters that issued the orders (listed at top of orders) for clarification.").[4]

B. Petitioner's Contrary Arguments Lack Merit

Although we raised the textual and contextual points set forth above at the certiorari stage (Br. in Opp. 6-11), petitioner largely fails to address them. And although the operative text at issue here is contained in Section

[4] OPM released its differential-pay guidance in 2009 and has not updated that guidance since 2015. See *OPM Guidance* 1. That guidance predated the Federal Circuit's decision in *Adams* and takes a more restrictive view of the availability of differential pay than the one set forth in the government's briefs in this case. We noted at the certiorari stage that OPM "intend[ed] to revise the guidance" to account for *Adams*. Br. in Opp. 18. In light of this Court's grant of certiorari, OPM plans to update the guidance based on the Court's decision in this case.

101(a)(13)(B)'s generally applicable definition of "contingency operation," petitioner all but ignores the structure and context of that provision and its many applications unrelated to differential pay. Instead, petitioner asserts that the word "during" necessarily requires only a temporal connection; advances contextual arguments that rest on a misunderstanding of our interpretation; and appeals to legislative history, the veteran's canon, and policy arguments. All of those arguments lack merit, and none of them justifies a departure from the natural reading of Section 101(a)(13)(B).

1. "During" does not necessarily refer to a mere temporal overlap

Petitioner's principal argument is that "during" requires only a temporal relationship and that "[i]t would be unnatural to read 'during' as requiring any sort of substantive relationship." Pet. Br. 15; see *id.* at 14-16. But, as shown above, it is perfectly natural to use "during" to mean "in the course of," not merely "at the same time as"; indeed, this Court often uses the word in precisely that way. See pp. 14-17, *supra*. Petitioner's arguments provide no sound reason to doubt that Congress used "during" that same way in Section 101(a)(13)(B).

Petitioner primarily asserts (Br. 2-3, 11, 13-16, 21-22, 26) that this Court's decision in *Ressam* is dispositive of the meaning of "during" in all contexts. On petitioner's reading, *Ressam* "held squarely that when Congress uses the word 'during' in a statute—even in a criminal statute—the word carries only a temporal meaning." Pet. Br. 11 (citation omitted). But such a holding is nowhere to be found in *Ressam*. There, the Court considered a statute that prohibited the "carr[ying] [of] an explosive during the commission of any felony." 553 U.S. at 274 (quoting 18 U.S.C. 844(h)(2)). The Court stated

that "[t]he term 'during' denotes a temporal link; that is surely the most natural reading of the word *as used in th[at] statute*." *Id.* at 274-275 (emphasis added). And the Court went on to explain why the history and context of the statute "virtually command[ed]" that inference. *Id.* at 277. The Court's decision in *Ressam* thus does not establish that "during" always requires only a temporal link.[5]

Petitioner also identifies statutes that use language such as "during and in relation to" and cites decisions recognizing that "in relation to" requires a substantive relationship. Pet. Br. 15-16, 21; see *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998); *Smith* v. *United States*, 508 U.S. 223, 237-238 (1993). But "the fact that Congress chose to use certain language to" achieve a goal in one statute "hardly means it was 'foreclosed . . . from using different language to accomplish the same goal'" in a different statute. *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 52 (2024) (brackets and citation omitted). And, as discussed, see pp. 15-16, *supra*, Congress has used "during" alone in many other statutes—including other provisions in Title 10—to mean "in the course of." Again, determining the meaning of "during" in a particular statute always requires a context-specific inquiry. And

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[5] Petitioner also relies on (Br. 16) the government's arguments in *Ressam*. But the government analyzed the text, context, and history of Section 844(h)(2) in support of its argument that "during" in that statute required a solely temporal relationship. See Gov't Br. at 10-34, *Ressam*, *supra* (No. 07-455); Gov't Reply Br. at 2-18, *Ressam*, *supra* (No. 07-455). Like the Court's decision, the government's arguments in *Ressam* do not speak to the correct interpretation of "during" in a different statute addressing different issues in a different context.

the fact that Congress sometimes uses language in addition to "during" to require more than a temporal relationship is of little relevance in determining the best reading of that word in Section 101(a)(13)(B)'s specific context.

2. Statutory context does not support petitioner's reading

Petitioner's contextual arguments fare no better. Petitioner fails to account for the fact that at least one national emergency has been in place for the past 45 years; fails to grapple with the superfluity problem and anomalous results that his interpretation of "during" would create; and fails to recognize that, had Congress wished to cover all active-duty service, it would not have adopted a provision that cross-references nine particular categories of active-duty service. See pp. 17-23, *supra*. And the contextual arguments that petitioner does make rest on a misunderstanding of our position.

a. Petitioner asserts (Br. 17-18) that "[r]eading 'during' to limit differential pay to emergency-related service would run directly counter to the statute's focus on the 'provision of law' under which a reservist is called to active duty" because it would require an inquiry into "the nature of a reservist's service" *after* he is called to active duty. And because petitioner assumes that our interpretation would require such an after-the-fact inquiry, he asserts (Br. 18) that it would make it "all but impossible" to comply with Congress's instruction that, "to the extent practicable," differential pay shall be paid "at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted," 5 U.S.C. 5538(c)(3).

Those arguments are misplaced. We agree that Section 101(a)(13)(B) focuses on the call to duty, not the ensuing service: It defines a contingency operation to include a military operation that "results in the call or order to, or retention on, active duty" under specified statutory provisions or "any other provision of law during a war or during a national emergency." 10 U.S.C. 101(a)(13)(B). The question is thus whether a servicemember is *called to duty* under one of those cross-referenced provisions or, as relevant here, under any other provision of law in the course of a war or national emergency. And, as we have explained, that question is ordinarily answered by the face of the relevant orders. See pp. 23-25, *supra*. No "searching *post hoc* review of a reservist's service record" is required (Pet. Br. 18), and agencies generally provide differential pay promptly after receiving a valid request from an employee, see *OPM Guidance* 11-12.[6]

Relatedly, petitioner errs in asserting (Br. 17) that Section 5538(a) "forbids" two reservists who are ordered to active duty under the same provision of law from being treated differently for differential-pay purposes. To the contrary, although Congress provided that servicemembers are always entitled to differential pay when they are called up under nine specific sets of provisions, it explicitly directed that a call to duty under

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[6] Contrary to petitioner's assertion (Br. 18), the facts of this case are not illustrative of how differential-pay requests normally proceed. Petitioner did not request differential pay from the FAA while his service was ongoing; rather, he first claimed an entitlement to differential pay only years later, during what began as an unrelated appeal to the Merit Systems Protection Board. See p. 8, *supra*. And he has never submitted his military leave and earnings statements to the FAA—which are necessary to demonstrate his entitlement to and calculate the amount of differential pay. See pp. 3-4, 7, *supra*.

"any other provision of law" will give rise to such an entitlement only if made "during a war or during a national emergency." 10 U.S.C. 101(a)(13)(B). That directive explicitly contemplates that servicemembers called up under one of those other provisions—including 10 U.S.C. 12301(d), the provision at issue here—may or may not receive differential pay. A servicemember called to active duty under Section 12301(d) to serve in the course of a declared national emergency is entitled to differential pay, but another servicemember called up under the same provision at the same time to attend training is not.

b. Petitioner next asserts (Br. 18-19) that our interpretation would treat Section 101(a)(13)(B)'s reference to a call to active duty "during a war" differently from "during a national emergency." That is incorrect. We agree that the word "during" has the same meaning in both phrases, and the interpretation we advocate here would apply equally if a war were declared. Servicemembers called to active duty in the course of that war would be entitled to differential pay under 10 U.S.C. 101(a)(13)(B)'s final clause, but those called to active duty for unrelated purposes while a war happened to be ongoing would not.

c. Finally, petitioner errs in invoking (Br. 19-21) other statutes that he contends use the word "during" to require only a temporal connection to a national emergency. We do not dispute that the phrase "during a national emergency" may, in some instances, require only a temporal overlap—for example, when Congress makes a statute effective "during a national emergency" and "for six months after the termination thereof." 50 U.S.C. 1435; see Pet. Br. 19. Our point is simply that

the phrase does not *invariably* carry that meaning; instead, like other phrases that use "during," its meaning depends on context. For example, when federal law authorizes the award of "a decoration or medal to" a member of the merchant marines "for service during a * * * national emergency," it presumably authorizes such awards only for service performed in the course of a national emergency—not any service while a national emergency is ongoing elsewhere. 46 U.S.C. 51901(b)(3).

The Office of Legal Counsel opinion that petitioner cites (Br. 20-21) does not suggest otherwise. Indeed, it does not address whether the meaning of "during" in any statute is wholly temporal. The opinion merely concluded that the National Emergencies Act's "coverage is not limited to statutes that expressly require the President to declare a national emergency, but rather extends to any statute 'conferring powers and authorities to be exercised during a national emergency,' unless Congress has exempted such a statute from the Act." *Emergency Statutes That Do Not Expressly Require a National Emergency Declaration*, 40 Op. O.L.C. 54, 55 (2016) (citation and emphasis omitted). Neither the reasoning of the opinion nor its conclusion rested on a determination that "during" in such statutes only imposes a temporal requirement.

3. Petitioner's remaining arguments are unpersuasive

a. Petitioner relies heavily (Br. 22-25) on legislative history. But legislative history has no role to play here because the statutory text and context provide a clear answer. 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). And the legislative history does not support petitioner in any event.

As an initial matter, petitioner solely discusses the legislative history of Section 5538, the differential-pay provision. But there is no dispute that Section 5538 defines qualifying service by cross-referencing the provisions listed in Section 101(a)(13)(B)'s definition of "contingency operation"; the disputed question in this case is the meaning of that definition, which applies throughout Title 10 (and in various other provisions outside Title 10). Petitioner identifies nothing in the legislative history of Section 101(a)(13)(B) that supports his interpretation. See Pet. Br. 22-25. And the legislative history of Section 5538 provides little insight into Congress's thinking 18 years before, when it adopted Section 101(a)(13)(B).

In any event, the legislative history that petitioner identifies actually undermines his contention that Congress authorized differential pay for all active-duty service. Petitioner relies primarily on legislative history related to the Reservists Pay Security Act of 2001 and the introduced version of the Reservists Pay Security Act of 2004—proposed legislation that Congress never adopted. Those unenacted bills are irrelevant because they were not limited to active-duty service and did not incorporate Section 101(a)(13)(B)'s cabined definition; they instead incorporated a broader definition that included "active duty, active duty for training, * * * inactive duty training, [and] full-time National Guard duty," 38 U.S.C. 4303(13) (Supp. II 2002). See Reservists Pay Security Act of 2001, S. 1818, at 5; Reservists Pay Security Act of 2004, S. 593, at 5; see also p. 6, *supra*. Because the Court "ordinarily will not assume that

Congress intended 'to enact statutory language that it has earlier discarded in favor of other language,'" the Court should decline to "read back into" Section 5538 a cross-reference to Section 4303(13) that Congress "deleted" from earlier legislative proposals—and replaced with a cross-reference to the more limited Section 101(a)(13)(B). *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001) (citation omitted).

The 2001 and 2003 statements from Senator Mikulski that petitioner cites (Br. 5, 23) were premised on the language proposed in the Reservists Pay Security Act of 2001 and the introduced version of the Reservists Pay Security Act of 2004. See 147 Cong. Rec. 26,275 (2001); 149 Cong. Rec. 5764 (2003). It is thus unsurprising that she read those bills to include more categories of service than the limited statute that Congress ultimately enacted. And although the Senate Report petitioner cites (Br. 23) discussed a later version of the Reservists Pay Security Act of 2004 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.[7]

The Congressional Budget Office (CBO) initially considered the introduced version of the Reservists Pay Security Act of 2004, which swept more broadly than the text Congress later enacted in Section 5538. CBO,

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[7] 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); *id.* at 2 (confirming that the amendments to the as-introduced version "*ma[de] the bill applicable to the level of mobilization under 10 U.S.C. 101(a)(13)(B)*") (emphasis added).

Cost Estimate, S. 593: Reservist Pay Security Act of 2003, at 1 (May 1, 2003), https://perma.cc/362A-NLPC. So the CBO considered the costs of differential pay for all "members of the uniformed services or National Guard" who "were called to active-duty military service." *Ibid.* The CBO estimates that petitioner cites (Br. 5, 23-24) discussed the later version of the Reservists Pay Security Act of 2004 and a similar bill—both of which more closely tracked the language Congress enacted in 2009. In those estimates, the CBO appears to have calculated the likely amount of differential pay based on the assumption 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/G9LY-G33S; see CBO, *Cost Estimate, S. 2400: Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, at 8 (July 21, 2004) (similar), https://perma.cc/QU48-X4C3. But the CBO did not explain the basis for that assumption, much less attempt to ground it in the text of the bill. And an unexplained assumption in a CBO report that no Member of Congress voted for cannot justify a departure from the natural reading of the statute Congress enacted five years later.

b. For similar reasons, petitioner errs in invoking (Br. 13, 25-27) the "veterans canon"—that is, the presumption that Congress usually legislates with "solicitude" for veterans, *Henderson* v. *Shinseki*, 562 U.S. 428, 440 (2011). As petitioner acknowledges, that principle applies only when a statute is "ambiguous." *Rudisill* v. *McDonough*, 601 U.S. 294, 314 (2024). Here, there is no "interpretive doubt," *Brown* v. *Gardner*, 513

U.S. 115, 118 (1994), that could trigger the canon because the meaning of the relevant statutory provisions is clear. Accordingly, just as the canon has "apparently * * * not affected the result * * * in any of this Court's past decisions in veterans cases," *Rudisill*, 601 U.S. at 316 (Kavanaugh, J., concurring), it should have no effect here. Indeed, applying the canon to Section 101(a)(13)(B) would be particularly inappropriate because that provision defines "contingency operation" throughout Title 10 and has many applications inside and outside Title 10 that have nothing to do with veterans' benefits. See pp. 5, 22, *supra*.

c. Finally, petitioner contends (Br. 26-27) that his reading of the law yields a better policy result because it would entitle more reservists to differential pay. But Congress is entrusted with determining the scope of federal benefits. Here, it declined to adopt language that would have provided differential pay for all active-duty service. This Court's "task" is to merely "apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989). Adherence to the text is especially appropriate here because the Appropriations Clause entrusts Congress, not the courts, with the power of the purse. See U.S. Const. Art. I, § 9, Cl. 7. If "hardships are to be remedied by payment of Government funds, it must be at the instance of Congress." *OPM* v. *Richmond*, 496 U.S. 414, 434 (1990).

Petitioner also repeats his assertion that our interpretation will create unpredictability for servicemembers because they will be "subject[ed]" to an "uncertain fact-intensive *post-hoc* test for differential pay." Pet. Br. 26; see *id.* at 26-29. But, as we have explained, see pp. 23-25, *supra*, whether a servicemember's call to

duty is in the course of a national emergency is generally clear from the face of the orders calling him into service. Accordingly, a servicemember should know from the outset of his deployment whether he is entitled to differential pay.

C. This Court Should Affirm The Court Of Appeals' Judgment

If this Court agrees that Section 101(a)(13)(B) requires more than mere temporal overlap with an ongoing national emergency, it should affirm the court of appeals' decision. Petitioner notes that "his activation orders expressly invok[ed] a presidential national emergency declaration." Pet. Br. 18; see *id.* at 8. We agree that those orders indicate that petitioner would have been entitled to differential pay had he submitted a request to the FAA and provided documentation demonstrating that his military pay and allowances during the relevant periods were less than his civilian pay. But petitioner never submitted such a request, and any argument that he is eligible for differential pay because his orders establish the requisite connection to a national emergency is both forfeited and outside the scope of the question presented.

1. Between 2012 and 2014, petitioner was called to active duty with his consent under Section 12301(d) three times. Section 12301(d) is not enumerated in Section 101(a)(13)(B), so petitioner was potentially eligible for differential pay only if he was called to active duty in the course of a national emergency. Petitioner's orders indicate that he satisfied that standard: They specify that he was being called to active duty to support a "contingency operation" in furtherance of an Executive Order implementing a declared emergency. Pet. App. 75a-76a; C.A. App. 129; see pp. 6-7, *supra*. Petitioner

did not, however, submit a request for differential pay or provide the FAA with the necessary documentation; to the contrary, he first raised the differential-pay issue several years later in 2018, as part of what began as an unrelated proceeding before the Merit Systems Protection Board. Pet. App. 3a, 14a.

2. In the court of appeals, moreover, petitioner's opening brief did not argue that his orders entitled him to differential pay because they established that he was called up in the course of a national emergency. Instead, 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" and he had served while that emergency was ongoing. Pet. C.A. Br. 11; see *id.* at 10-26.

Consistent with petitioner's framing, 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*"; had "not purport[ed] to show how his activation under [Section] 12301(d) qualifies as a contingency operation"; and had "not alleged any connection between his service and the ongoing national emergency." Pet. App. 3a-4a. The court thus rejected petitioner's broad argument that he was entitled to differential pay solely because he served while a national emergency was ongoing and did not consider petitioner's specific orders.

3. In opposing certiorari, we acknowledged (Br. in Opp. 16) that petitioner's orders "may well" have entitled him to differential pay had he submitted a request to the FAA. We also suggested (*id.* at 18) that petitioner's failure to preserve that argument made this case a poor vehicle for considering the proper scope of

the differential-pay statute. In response, petitioner disclaimed any such case-specific argument, emphasizing that he "argued below—and argues here—that the specific nature of his service should be irrelevant to his entitlement to differential pay" and that "[w]hether [he] pressed other arguments below is irrelevant to whether the Court should grant review of the question * * * presented." Pet. Cert. Reply Br. 10-11. The Court should not consider an argument that petitioner forfeited below and affirmatively disclaimed in seeking this Court's review. See *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 173 (2016) (explaining that the Court "normally decline[s] to entertain" arguments that were "forfeited" "in the courts below").

Any argument based on the text of petitioner's orders also is not "fairly included" in the question on which this Court granted certiorari. Sup. Ct. R. 14.1(a). This Court granted review to consider "[w]hether 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*." Pet. I (emphasis added). The Court should thus limit its review to that question, answer it in the negative, and affirm the court of appeals' decision.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 5 U.S.C. 5538 provides:

Nonreduction in pay while serving in the uniformed services or National Guard

(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to reemployment rights under chapter 43 of title 38 with

respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304.

2. 10 U.S.C. 101(a)(13) (2018 & Supp. III 2021) provides:

Definitions

(a) IN GENERAL.—The following definitions apply in this title:

(13) The term "contingency operation" means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) 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.

3. 10 U.S.C. 12301(d) provides:

Reserve components generally

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.

4. 37 U.S.C. 101(18), (19) provides:

Definitions

In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

(18) The term "active duty" means full-time duty in the active service of a uniformed service, and includes full-time training duty, annual training duty, full-time National Guard duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary concerned.

(19) The term "active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

5. 38 U.S.C. 4303(13) (Supp. II 2002) provides:

Definitions

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

6. 50 U.S.C. 1701(a) provides:

Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.