

In the Supreme Court of the United States

CHARLES FLYNN,

Applicant,

v.

DEPARTMENT OF STATE

**APPLICATION FOR AN EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and
Circuit Justice for the United States Court of Appeals for the Federal Circuit:

1. Pursuant to Supreme Court Rule 13.5, Applicant Charles Flynn respectfully requests a 14-day extension of time, to and including February 13, 2024, within which to file a petition for a writ of certiorari. The United States Court of Appeals for the Federal Circuit issued an opinion on May 15, 2023. A copy of that opinion is attached as Exhibit A. The Federal Circuit then denied Applicant's timely petition for a rehearing en banc in an order issued on November 1, 2023. A copy of that order is attached as Exhibit B. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. Absent an extension, a petition for a writ of certiorari would be due on January 30, 2024. This application is being filed more than 10 days in advance of that date, and no prior application has been made in this case.

3. This case is of critical importance to hundreds of thousands of Americans who are employed as federal civilian employees and also serve in the Armed Services' reserve components.

4. Congress enacted the differential pay statute, 5 U.S.C. § 5538, to alleviate the financial burden that reservists experience when they are called to active duty at pay rates lower than their federal civilian salaries. This statute mandates that the government compensate for the pay difference to ensure these reservists do not suffer financially for their service. Federal civilian employees are entitled to differential pay when performing active duty pursuant to an order under a provision of law referred to in section 101(a)(13)(B) of title 10. This section includes various statutory authorities and a catch-all clause for service during wars or national emergencies declared by the President or Congress.

5. In a recent decision that deviated from established interpretations of this statute, the Federal Circuit ruled in *Adams v. DHS*, 3 F.4th 1375, 1379 (Fed. Cir. 2021) that reservists claiming differential pay under Section 101(a)(13)(B)'s catch-all clause must demonstrate they were directly called to serve in a contingency operation. This rigorous, detail-oriented standard has led the Federal Circuit to deny claims for differential pay, even for reservists whose activation orders explicitly cited a presidential emergency declaration.

6. The pivotal question in this case is whether the *Adams* ruling is correct, specifically, whether a federal civilian employee called 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.

7. The question in this case is of national importance to hundreds of thousands of reservists. Approximately 1,200,000 Americans hold positions in the United States Military Reserves, many of whom play a crucial role in this country's national defense. Dep't of Def., 2020 Demographics Profile of the Military Community 3 (2020). Reservists, unlike full-time active-duty servicemembers, hold civilian employment outside of the military, with many employed by the Federal government. When called to active-duty, reservists must leave their current employment for an extended period of time where they often experience a significant difference between their civilian salary and the substantially lower military reserve salary. Congress passed the differential pay statute to alleviate this financial burden on reservists by compensating reservists for the difference between their military and civilian salaries when called to active-duty. *See* Brief for Members of Congress as *Amici Curiae* Supporting Petitioner, *Adams v. Dep't of Homeland Sec.*, 142 S. Ct. 2835 (2022) (No. 21-1134).

8. Many reservists, including Applicant, called to active duty are activated under 10 U.S.C. § 12301(d) which orders an individual to active-duty service upon the consent of the reservist. This provision is one of the most common mechanisms for calling reservists to active-duty. *Id.* at 4.

9. The *Adams* holding has left reservists called to active-duty under § 12301(d) in financial limbo. These reservists now have no way of knowing whether they qualify for differential pay and face a difficult choice: either engage in active-duty service and endure these financial burdens or decline the call to serve their country. This dilemma poses not only a financial burden on reservists, but also a significant threat to this country's national

security because the reserve component constitutes a crucial element of our national defense. *See* Lawrence Kapp, et al., Cong. Rsch. Serv., RL30802, *Reserve Component Personal Issues: Questions and Answers* 9 (2021) (noting that reservists have been heavily relied on in the post-Cold War era). Therefore, this case involves a significant question of law that is of the utmost importance for this Court to address.

10. Additionally, this issue of law cannot be further developed in the lower courts because the Federal Circuit has exclusive jurisdiction and has squarely answered the question. Future cases will not provide additional insight into this question, as the MSPB and Federal Circuit view *Adams* as settled law. *See, e.g., Barrett v. Dep't of Veteran Affs.*, No. DC-4324-21-0017-I-4, 2023 WL 2632342 (Mar. 24, 2023). This issue is ripe for this Court to review.

11. Applicant respectfully requests an extension of time to file a petition for a writ of certiorari. A 14-day extension would allow counsel sufficient time to fully examine the decision's consequences, research and analyze the issues presented, and prepare the petition for filing. Additionally, the undersigned counsel have a number of other pending matters that will interfere with counsel's ability to file the petition on or before January 30, 2024.

Wherefore, Applicant respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari to and including February 13, 2024.

Dated: January 11, 2024

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew T. Tutt", written over a horizontal line.

Andrew T. Tutt

Counsel of Record

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