No. 21-1134

In the Supreme Court of the United States

BRYAN ADAMS, PETITIONER

v.

DEPARTMENT OF HOMELAND SECURITY

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

REPLY BRIEF FOR THE PETITIONER

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The government does not dispute that this case is important. After all, the Federal Circuit held that "activation pursuant to 10 U.S.C. § 12301(d), one of the most common laws used to activate members of the National Guard and Reserve, [i]s insufficient to qualify [petitioner] for differential pay," Mem. Cong. Br. 4-5; *id.* at 7, the federal government is the largest employer of reservists, and without differential income, potentially thousands of reservists—including many with claims now pending—will suffer significant "loss of income during mobilization." *Id.* at 5. Nor does the government dispute that the Federal Circuit's interpretation makes it a federal crime for corporations to provide differential pay to employees activated under § 12301(d), barring a documented connection to a national emergency. See Br. in Opp. ("Opp.") 11; Pet. 15-16. Nor does the government dispute that statements in the legislative history uniformly indicate Congress expected *every* reservist to receive differential pay, or that petitioner would prevail under the veterans canon. Opp. 10-11. Those are all reasons why the Reserve Organization of America ("ROA") submitted an *amicus* brief supporting rehearing en banc, see ROA C.A. Br., and why the sponsor of the differential pay law, Senator Richard Durbin, with other members and former members of Congress, filed an *amicus* brief here urging review, see Mem. Cong. Br.

At bottom, the government's *only* argument to justify its shabby treatment of reservists is that the statutory text leaves "no ambiguity * * * to resolve." Opp. 12. According to the government, the "straightforward," "natural," and "plain meaning," Opp. 6, 10, of the phrase "perform[ing] active duty" under "any other provision of law during a war or * * * national emergency" encom-

passes *only* service "in the course of" or "in connection with" (Opp. 5, 6) a war or national emergency. The government's current reading cannot be squared with its previous position that "'[d]uring' suggests only a temporal connection; it means 'at the same time as,' not 'at the same time and in connection with.'" U.S. Br. at 8, *United States* v. *Ressam*, No. 07-455 (2008). And its claim that "there is no ambiguity" (Opp. 11) is complicated by the fact that the government's current reading differs from both its own position below, U.S.C.A. Br. 12-16, from the Federal Circuit's reading, Opp. 8, and from the conclusion of numerous administrative bodies, Pet. 10-11, including the office that administers USERRA for *legislative branch* employees, which concluded that "Congress's intent is clear" the statute *categorically* covers activation under § 12301(d). Pet. 10-11.

Our Guard and Reserve should not be forced to make severe financial sacrifices based on such a flimsy and counter-textual reading of a statute that plainly was meant to cover all reservists performing active duty during national emergencies. That is particularly so because at bottom, *all* reservists called to active duty during a national emergency contribute to the Nation's response, if only by performing ordinary duties that otherwise might have to be sacrificed to free manpower to address the emergency. This Court's review is urgently needed.

A. The Federal Circuit's Decision Is Wrong

The differential pay statute could not be clearer. In sweeping terms, it provides differential pay to federal employees "perform[ing] active duty" under "any * * * provision of law during a war or during a national emergency declared by the President or Congress." 5 U.S.C. § 5538(a); 10 U.S.C. § 101(a)(13)(B).

The government concedes that petitioner was "called to active duty 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,'" Opp. 2, and that his activation was at the time of a declared national emergency. Yet scarcely two pages later, the government assures this Court that petitioner was *not* "call[ed] or order[ed] to active duty under any provision of law during a war or during a national emergency declared by the President." Opp. 4 (quotation marks and citation omitted).

To justify that facial contradiction, the government relies on three interpretive claims that range from incorrect to unbelievable. *First*, it ventures a novel interpretation of "during" that it has never before asserted in this litigation and that no English speaker would recognize. *Second*, it claims that its counter-textual reading is so unambiguously clear that the legislative history and the veterans canon are irrelevant. *Third*, it claims there are too many national emergencies for the statute to mean what it literally says.

None of those claims withstand scrutiny.

Text. This Court has refused to read a relationship requirement into "during," explaining that "[t]he term 'during' denotes a temporal link; that is surely the most natural reading of the word * * *." *United States* v. *Ressam*, 553 U.S. 272, 274-275 (2008). The government once agreed: "The plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.'" U.S. *Ressam* Br. 13-14 (citation omitted). Dictionaries confirm the word's meaning is overwhelmingly temporal:

> *Black's Law Dictionary* 456 (6th ed. 1990) (defining "during" as "[t]hroughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of"); *The American Heritage Dictionary of the English*

> *Language* 572 (3d ed. 1992) ("[t]hroughout the course or duration of" or "[a]t some time in"); *The Random House Dictionary of the English Language* 608 (2d ed. 1987) ("throughout the duration, continuance, or existence of" or "at some time or point in the course of"); *Webster's Third New International Dictionary of the English Language* 703 (1993) (when used as a preposition, "during" means "throughout the continuance or course of" or "at some point in the course of").

U.S. *Ressam* Br. 14; accord *During*, Webster's Second New International Dictionary of the English Language (1957) ("[i]n the time of; throughout the continuance or course of"); *During*, Ballentine's Law Dictionary (2010) ("Throughout a period of time.").

Nothing in the differential pay statute's text suggests departing from this "most natural" temporal meaning. *Ressam*, 553 U.S. at 274. An ordinary English speaker watching reservist neighbors receive letters, don uniforms, and report to an Army base after a national emergency declaration would know that they were "order[ed] to perform active duty" "during a national emergency" without having to inquire into the details of their duties.[1]

Context. The government's justification for giving "during" a "not normal[]" relational meaning (U.S. *Ressam* Br. 14) is *ejusdem generis*: Because, it says, the provisions listed in Section 101(a)(13)(B) share a

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[1] To avoid this natural reading, the government hypothesizes a specialized statute regulating conduct of "any attorney who argues 'during' a court hearing." Opp. 5. There, numerous factors imply a specialized meaning for "during": the government's limited regulatory interest over hearings (focused on in-court events), and its limitation to persons present (attorneys) and activities occurring (arguing) in court. The government identifies no similar contextual clues in the actual statute here.

single characteristic, the catchall "any other provision of law" is presumptively similarly limited. Opp. 7. The government concedes that the Federal Circuit erred in stating that "the statutory provisions cross referenced in Section 101(a)(13)(B) all 'involve a connection to [a] declared national emergency.'" Opp. 8. The government attempts to salvage the Federal Circuit's mistaken reading by arguing, for the first time in any court, that the provisions share a *different* unifying theme: all "explicitly require a connection between active duty service and a specific, identified exigency." Opp. 8.

But *ejusdem generis* means general *words* in a series take their meaning from preceding specific *words*. The government cites no authority for applying that canon to the expansive phrase "*any* other provision of law," Pet. 10, based not on preceding words but citations to eight statutory provisions and a full chapter of title 10. There is no reason to believe that Congress intended readers of the differential pay statute to construe its words by looking up 13 *other* provisions, teasing out a unifying theme, and then reading general terms in light of that meaning. Stranger still, the government says that hypothesized limitation operates not on the general term "any other provision of law," but on the term that follows it: "during." And the government maintains Congress *did all that* rather than simply use "in connection with" instead of "during." But "[f]undamental changes in the scope of a statute are not typically accomplished with so subtle a move." *Kellogg Brown & Root Servs.* v. *U.S. ex rel. Carter*, 135 S. Ct. 1970, 1977 (2015).

Moreover, the government is wrong that the authorities "require a connection between active-duty service and a specific, identified exigency." Opp. 8. Section 688 requires *no* exigency to activate reservists and allows those activated to perform such "duties as the Secretary [of Defense] considers necessary in the

interests of national defense," 10 U.S.C. § 688(c), an "extremely broad," "unfettered delegation of authority" to carry out military business, including such manifestly *non*-exigent duty as testifying "in civil litigation * * * at the request of" contractors. *Civil Law Opinions of the Judge Advocate General, U.S. Air Force 1984-1987* at 306-307, available at https://bit.ly/3lUXFH0. Others authorize activation "[i]n time of war or national emergency," 10 U.S.C. § 12301(a); 10 U.S.C. § 12302(a) (similar), with no requirement that their duties be related to the exigency.

"The fact that 'during' simply does not mean 'during and in relation to' is sufficient to decide this case." U.S. *Ressam* Br. 16. But at minimum, the statute is ambiguous, meaning other tools of statutory interpretation—the legislative history, the cross-reference's usage in other statutes, and the veterans canon, break the tie. See *Loving* v. *I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (Kavanaugh, J., for the court). Those tools foreclose the government's strained interpretation. See Pet. 12-17.

Legislative history. The government is wrong that the as-introduced Reservists Pay Security Act of 2003, S. 593, 108th Cong., 1st Sess. (2003) ("S.B. 593") so differed from the enacted statute that its legislative history is irrelevant. Opp. 10. The change the government addresses did not alter the scope of *activated* personnel entitled to differential pay. It simply eliminated *inactive* personnel from eligibility, by changing the beneficiary class from reservists performing "service in the uniformed services" (which includes *inactive* duty), S.B. 593, to reservists "called to active duty." By late 2004, the bill incorporated the as-enacted cross-reference to Section 101(a)(13)(B). Contrary to the government's suggestion, the introduced and amended version of S.B. 593, like the enacted legislation, *all provided differential pay to all activated reservists*. The government identifies no *relevant* textual difference.

The stated purpose remained unchanged before and after the amendment: "To ensure that a Federal employee who takes leave without pay in order to perform service as a member of the uniformed services or member of the National Guard shall continue to receive [the same] pay." S.B. 593, at 1; Am. S.B. 593, at 1-2. The CBO reports for both the introduced and amended bills used the same method for estimating cost: using the *total* number of reservists on active duty, without considering the basis for activation. Compare Congressional Budget Office, Cost Estimate, S. 593: Reservist Pay Security Act of 2003, at 2-3 (May 1, 2003), https://bit.ly/3asMRxp, with Congressional Budget Office, Cost Estimate, S. 593: Reservist Pay Security Act of 2004, at 2-3 (Aug. 4, 2004), https://bit.ly/3PMEpcj.

Even after the amendment, the bill's sponsors repeatedly emphasized that the bill would "ensure that a Federal employee who takes leave without pay in order to perform active duty military service shall continue to receive [the same] pay." S. Rep. No. 108-409, at 1 (2004). In 2005, Senator Durbin reaffirmed that the bill would allow "members of the National Guard and Reserve who are Federal employees to maintain their normal salary when called to active duty." 151 Cong. Rec. 8968 (2005). In 2006, Senator Barbara Mikulski likewise confirmed that the bill would "ensure that the U.S. Government also makes up for this pay gap for Federal employees who are activated in the Guard and Reserves." 152 Cong. Rec. 7079 (2006). Other public statements assure differential pay for all reservists on active duty, regardless of the nature of their orders. See 151 Cong. Rec. 345, 6072, 17259, 21704 (2005); 152 Cong. Rec. 6043, 11312 (2006). The government cannot provide a *single* citation suggesting more limited application. And the law's authors reaffirmed in this litigation that "Congress did not intend to limit the application of the law by the kind of

service the reservists rendered or the provision of law under which the reservists were called to active duty." Mem. Cong. Br. 4.

Veterans canon. The government concedes that "the pro-veteran canon of statutory interpretation * * * comes into play where there is statutory ambiguity." Opp. 11. Under it, a statute providing benefits to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943); see Pet. 16. The veterans canon dictates petitioner's interpretation.

Rule of Lenity. The government does not dispute that under the Federal Circuit's interpretation of the statute, every private employer that pays differential pay to its employees called to active duty under § 12301(d) is committing a federal crime under 18 U.S.C. § 209(a), at least if their duties are insufficiently related to an exigency. See Opp. 11. At minimum, the rule of lenity forecloses that result. *Wooden* v. *United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring).

Other arguments. The government argues that the availability of "ready alternative" legislative language that would accomplish a party's preferred reading is "strong evidence" that "Congress did not in fact want what [that party] claim[s]." Opp. 9 (quotation marks omitted). That argument decisively undermines the *government's* position. Congress could easily have implemented the government's preferred reading by substituting service "in connection with" a national emergency for "during."

By contrast, the differential pay statute's existing language perfectly embodies petitioner's reading that it provides that reservists are to be given differential pay if called to active duty under any of the statutes listed in Section 101(a)(13)(B), or under any other provision of law

during a national emergency or war. No "ready alternative" is necessary; the existing cross-reference to § 101(a)(13)(B)—off-the-shelf language Congress habitually uses to cross-reference all available authorities for calling reservists to active duty—does the job.

The government argues that Congress could not have meant that interpretation, because it presumably was aware that the country has been in a state of national emergency since 1979. Opp. 9. The government is essentially arguing that this Court should invoke "th[e] narrow exception to our normal rule of statutory construction" because it would be "patently absurd" to read the statute literally. *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring).

But there is nothing absurd about differential pay ordinarily being available. It ordinarily is available from participating private employers. The sponsors of the legislation were concerned about reservists bearing the burdens of maintaining the largest and longest mobilization in reserves history. Pet. 19. So Congress provided that differential pay would almost always be available under § 12301(d)—only unavailable when the United States is *not* at war and *not* in a national emergency—and wrote a differential pay statute to capture that purpose. The fact that the statute conditions differential pay on a condition that in recent decades has nearly always been met is no excuse to completely rewrite it. Courts "presume that [the] legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (quotation marks omitted) (alterations in original).

B. This Issue Is Nationally Important

The government does not dispute that the question presented is exceptionally important to hundreds of thousands of reservists employed by the federal

government. See Pet. 18-23. As *amicus* ROA explained below: "Differential pay helps alleviate the substantial hardships of mobilization orders. But the Panel's decision in this case threatens to deny this crucial benefit to the vast majority of Reservists mobilized voluntarily (and, typically, individually, in order to leverage their mission-critical skills), rather than involuntarily as part of a unit." ROA C.A. Br. 3. "[T]he Federal Circuit's decision would severely burden a significant number of Americans solely because they wear the Nation's uniform. Preventing that result, one that is again contrary to Congress's intent, warrants this Court's review." Mem. Cong. Br. 5.

C. Review Is Warranted Now

There is no basis for deferring review. The government has identified no vehicle problems that might prevent review, and it does not dispute that reservists rarely have the resources to litigate a case to the Supreme Court. This Court does not hesitate to review important questions of statutory interpretation even in the absence of a circuit conflict and even where a conflict could develop. *E.g.*, *Health & Hosp. Corp. of Marion County* v. *Talevski*, No. 21-806; *Texas Dep't of Hous. & Comty. Affairs* v. *Inclusive Comtys. Project, Inc.*, 576 U.S. 519 (2015).

The government's claim that a circuit conflict could somehow develop regarding the interpretation of § 101(a)(13)(B), Opp. 13-14, is fanciful. The government concedes that the Federal Circuit has exclusive jurisdiction over differential pay cases. Opp. 13. The only split possibility it identifies would involve a "private sector employer" taking the government's cramped reading of Section 101(a)(13)(B)'s language in the FMLA context. Opp. 13. The government does not identify any claims challenging the interpretation of Section 101(a)(13)(B) that have arisen in other circuits. *Ibid.*

The negligible chance of an eventual split does not justify indefinitely depriving thousands of reservists of essential pay. Numerous pending cases stand to be dismissed based on the decision below. *E.g.*, *Feliciano* v. *Dep't of Transp.*, No. 22-1219 (Fed. Cir. Dec. 2, 2021); *Flynn* v. *Dep't of State*, Case No. 22-1220 (Fed. Cir. Dec. 2, 2021); *Park* v. *California Military Dep't*, Case No. H049417 (Cal. Ct. App. Sept. 16, 2021); *Sopko* v. *Dep't of Veterans Affs.*, M.S.P.B. Docket No. DC-4324-21-0052-I-3 (Oct. 28, 2020); *Santiago* v. *Dep't of Veterans Affs.*, M.S.P.B. Docket No. DC-4324-20-0796-I-1 (Aug. 11, 2020); *Barrett* v. *Dep't of Veterans Affs.*, M.S.P.B. Docket No. DC-4324-21-0017-I-3 (Oct. 8, 2020). Absent review, that is only the beginning of the hardships the decision below will cause.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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