No.

In the Supreme Court of the United States

NICK FELICIANO, PETITIONER,

v.

DEPARTMENT OF TRANSPORATATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a question of critical importance to hundreds of thousands of Americans who serve their country both as federal civilian employees and members of the Armed Services' reserve components.

Congress enacted the differential pay statute, 5 U.S.C. § 5538, to eliminate the financial burden that reservists face when called to active duty at pay rates below their federal civilian salaries. To ensure that these reservists suffer no financial penalty for active-duty service, the differential pay statute requires that the government make up the difference. Federal civilian employees are entitled to differential pay when performing active duty "pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." That section, Section 101(a)(13)(B), enumerates several statutory authorities and includes a catchall provision: "any other provision of law during a war or during a national emergency declared by the President or Congress."

Recently, in a decision that departed from settled understandings of this language, the Federal Circuit held that reservists relying on Section 101(a)(13)(B)'s catchall provision to claim differential pay must show that they were "directly called to serve in a contingency operation." *Adams* v. *DHS*, 3 F.4th 1375, 1379 (Fed. Cir. 2021). Under that demanding, fact-intensive standard, the Federal Circuit has rejected claims for differential pay even by reservists like petitioner whose activation orders expressly invoked a presidential emergency declaration.

The question presented is:

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

RELATED PROCEEDINGS

United States Merit Systems Protection Board:

Nick Feliciano v. Department of Transportation,
No. AT-4324-18-0287-I-4
(Sept. 1, 2021)

Charles Flynn v. Department of State,

No. DC-4324-21-0367-I-1
(Sept. 17, 2021)

Evan H. Nordby v. Social Security Administration,
No. DE-4324-19-0012-I-1
(May 28, 2021)

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

Nick Feliciano v. Department of Transportation,
No. 22-1219
(May 15, 2023)

Charles Flynn v. Department of State,

No. 22-1220
(May 15, 2023)

Evan H. Nordby v. Social Security Administration,
No. 21-2280
(May 11, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases—Continued Page(s)

Cases—Continued Page(s)

Statutes and Regulations

Statutes and Regulations—Continued Page(s)

Other Authorities

Other Authorities—Continued Page(s)

Other Authorities—Continued Page(s)

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-6a) is available at 2023 WL 3449138. The order of the court of appeals denying rehearing (App. 51a-52a) is unreported. The decision of the Merit Systems Protection Board (App. 7a-50a) is available at 2021 WL 4033810.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. The court of appeals denied a timely petition for rehearing en banc on Oct. 27, 2023. Chief Justice Roberts extended the time to file the petition to February 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 53a-73a.

STATEMENT OF THE CASE

This case presents a question of exceptional importance that warrants this Court's review: whether a federal civilian employee called or ordered to active duty 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.

At any time, more than a million Americans serve in the Armed Services' reserve components, including each branch's reserve component and each state's national guard. And at any moment, those reservists can be called to active duty, asked to leave behind friends, families, and civilian jobs to serve their country. Department of Defense, *2020 Demographics Profile of the Military Community* 3 (2020). But for the many reservists who serve the United States in two capacities—both as

reservists and as federal civilian employees—military salaries often do not reflect that sacrifice. Federal civilian employees at every GS level serve in the reserve components, often in positions with salaries far below their civilian pay. When activated, those reservists leave behind not only their loved ones but also higher-paying jobs. The financial burden can be severe. In addition to reduced pay, reservists frequently incur increased expenses because of mobilization. Lawrence Kapp, et al., Cong. Rsch. Serv., RL30802, *Reserve Component Personnel Issues: Questions and Answers* 27 (2021). As a result, reservists are "more likely to have debts referred to collection, have utilities shut off, or to have two or more overdrawn checks per year" compared to other uniformed servicemembers. Kristy N. Kamarck, Cong. Rsch. Serv., R46983, *Military Families and Financial Readiness* 5 (2022).

To ensure financial security for the reservists who serve their country twice over, Congress enacted the differential pay statute, which requires the government to make up the pay difference when a federal civilian employee performs qualifying active duty. By its plain language, the statute sweeps broadly. It covers all service "pursuant to a call or order to active duty" under the following provisions of law: "section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of [title 10], chapter 13 of [title 10], section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress." 5 U.S.C. § 5538(a) (first quotation); 10 U.S.C. § 101(a)(13)(B) (second quotation). In keeping with that language's ordinary meaning, administrative decisions since the statute's enactment long held that reservists activated under *any* provision of law while an emergency declaration was in effect were entitled to differential pay. But in *Adams* v. *DHS*, 3 F.4th 1375 (2021), the Federal Circuit abruptly departed from

that longstanding and commonsense interpretation. Inserting a requirement found nowhere in the statute's text, the Federal Circuit demanded that reservists activated under Section 12301(d) of Title 10, one of the most frequently used activation authorities and the one petitioner Nick Feliciano served under, must show that they were "directly called to serve in a contingency operation" to qualify for differential pay. *Id.* at 1379.

More than two years after *Adams*, this Court's review is urgently needed. The Federal Circuit's flawed decision has been disastrous for federal civilian employee reservists, denying many the differential pay that the statute plainly mandates they receive. More than that, the decision has created profound uncertainty for reservists who upon receiving activation orders are left guessing—until long after they have incurred financial obligations while on active duty and returned to civilian life—whether that service will be deemed sufficiently related to an ongoing emergency to warrant differential pay. And no further percolation is possible: the Federal Circuit has repeatedly declined to revisit this important question over which it has exclusive jurisdiction.

This case is the ideal vehicle to review the question presented. Petitioner served for more than two years on active duty, conducting small-boat security law enforcement and escorting military vessels to and from Charleston Harbor. This role was critical to protecting arriving and departing vessels, military installations, and civilians in the surrounding area. During his active-duty service, petitioner manned a military vessel, carried a military-issued firearm, and was authorized to use lethal force and even destroy vessels if appropriate. And it is undisputed that the national emergency declared following the September 11 attacks remained in effect while petitioner served on active duty. The argument that petitioner was entitled to differential pay because he was

called to active duty during a national emergency was pressed at every stage of this case. There are no barriers to its resolution in this Court.

This Court should grant review to bring the operation of the differential pay statute back into alignment with its text and restore this vital lifeline for members of the reserve components.

A. Legal Background

1. For over a century, lawmakers have recognized that reservists should not suffer a reduction in pay when performing active duty. New York first provided differential pay benefits in 1911 for public employees ordered to active duty in the National Guard or Naval Militia. See Opinion of the Attorney General, *Military Law*, Section 245, Subdivision 1, 1940 N.Y. Op. Atty. Gen. No. 214 at 1 (N.Y.A.G. 1940). Over time, New York expanded coverage to state employees who volunteered or were ordered to serve in the National Guard, Naval Militia, or the reserves of the federal Army, Navy, or Marine Corps. *Ibid.* In 1955, Michigan authorized local governments to implement differential pay programs for their employees. See Military Leaves; Reemployment Protection Act 133 of 1955, 1955 Mich. Legis. Serv. P.A. 133 (codified at Mich. Comp. Laws § 32.273a). New Jersey enacted its first differential pay statute in 1963. N.J. Stat. Ann. § 38A:4-4 (1963). Other states followed suit, and by 2004 at least half of all states covered most or all differences in pay for state employee reservists. S. Rep. No. 108-409, at 2 (2004). Many private employers have adopted similar policies.

The federal differential pay statute's story begins after the September 11, 2001, terrorist attacks. In the years that followed, the reserve components played, and continue to play, an essential role in the war on terror. Nearly eight hundred thousand members of the reserve components had served in active duty in operations Noble

Eagle, Enduring Freedom, and New Dawn by the end of 2010. See Kathryn Roe Coker, *The Indispensable Force: The Post-Cold War Operational Army Reserve*, 1990-2010, 301 (2013). Where reservists were once viewed as a "force of last resort," Kapp, *supra*, at 9, the Defense Department began to wield them as an "operational force such that the [reserve components] provide operational capabilities while maintaining strategic depth to meet U.S. military requirements across the full spectrum of conflict." Dep't of Def., Dir. 1200.17, *Managing the Reserve Components as an Operational Force*, at 10 (Oct. 29, 2008). Section 12301(d), which allows the Secretary of Defense to call up or retain a member of the reserve components with the reservist's consent, has been vital to this effort. In guidance issued in 2002, the Undersecretary of Defense instructed the Armed Services to use volunteer reservists to the maximum extent possible. See Gov't Accountability Off., GAO-03-921, *Military Personnel: DOD Actions Needed to Improve the Efficiency of Mobilizations for Reserve Forces* at 13 (2003).

Recognizing the need for measures that would allow sustained reservist deployment, Congress took up its first differential pay bill in 2003. See Reservist Pay Security Act of 2003, S. 593, 108th Cong., 1st Sess. (2003). The bill's sponsors made clear that it was intended to cover all reservist activations, without exception: the bill "would ensure that Federal employees who take leave to serve in our military reserves receive the same pay as if no interruption in their employment occurred." 149 Cong. Rec. 5,764 (2003) (statement of Sen. Mikulski). When scoring the bill, the Congressional Budget Office based its calculations on the cost "to pay the difference between civilian and military salaries for *any federal employees called to active duty* in the uniformed services or National Guard." Cong. Budget Off., Cost Estimate, S. 593:

Reservist Pay Security Act of 2003 2 (May 1, 2003) (emphasis added). And when Congress changed the bill's wording to the language it ultimately enacted, the CBO conducted its new analysis under the same assumptions. See Cong. Budget Off., Cost Estimate, S. 593: Reservist Pay Security Act of 2004, at 2-3 (Aug. 4, 2004).

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

Consistent with the catchall clause's broad language, until *Adams*, the Merit Systems Protection Board nearly uniformly allowed differential pay for reservists called to active duty under any provision of law during the emergency declared following September 11, 2001. See, *e.g.*, *Robinson* v. *Dep't of Veteran Affs.*, No. DC-4324-21-0219-I-1, 2021 WL 1961624 (M.S.P.B. May 12, 2021); *Del Colle* v. *DOJ*, No. SF-4324-21-0122-I-1, 2021 WL 1377041 (M.S.P.B. Apr. 8, 2021); *Santiago* v. *Dep't of Veterans Affs.*, No. DC-4324-20-0796-I-1, 2021 WL 1171023 (M.S.P.B. Mar. 22, 2021); *Colicelli* v. *Dep't of Veterans Affs.*, No. DC-4324-19-0769-I-1, 2020 WL 1915737 (M.S.P.B. Apr. 14, 2020); *Woods* v. *Dep't of Veteran Affs.*, No. CH-4324-19-0031-I-1, 2019 WL 1315856 (M.S.P.B. Mar. 21, 2019); *Nicewicz* v. *Dep't of Navy*, No. DC-4324-18-0627-I-1, 2019 WL 438258 (M.S.P.B. Jan. 31, 2019); *Miller* v. *Dep't of Treasury*, No. CH-3330-16-0518-I-1, 2016 WL 6406552 (M.S.P.B. Oct. 24, 2016); *Doe* v. *Dep't of*

State, No. NY-4324-15-0127-I-2, 2016 WL 5919634 (M.S.P.B. Oct. 6, 2016); *Marquiz* v. *Dep't of Def.*, No. SF-4324-15-0099-I-1, 2015 WL 1187022 (M.S.P.B. Mar. 12, 2015). As the MSPB explained in case after case, the statutory language was "straightforward" and "unambiguous." *Marquiz*, 2015 WL 1187022.

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

In reaching that conclusion, the Federal Circuit principally relied on the canon of *ejusdem generis*. In its view, Section 101(a)(13)(B)'s catchall must be read, like "all of the identified statutes," to "involve a connection to the declared national emergency." *Adams*, 3 F.4th at 1380. The government has since acknowledged that the Federal Circuit's characterization of the provisions expressly enumerated in Section 101(a)(13)(B) as all "involv[ing] a connection to [a] declared national emergency" was a "misstatement." Gov't C.A. En Banc Br. 12 n.4. Section 688 of Title 10, for example, allows retiree activation "at any time" without any connection to a national emergency. And Section 12304 explicitly permits activation "other than during a war or national emergency."

The Federal Circuit has denied three petitions for rehearing en banc asking it to reconsider *Adams*. App. 51a-52a; Order, *Flynn* v. *Dep't of State*, No. 22-1220 (Nov. 1, 2023); Order, *Nordby* v. *SSA*, No. 21-2280 (Nov. 1, 2023).

B. Factual and Procedural Background

1. Petitioner served as a civilian air traffic controller and a member of the Coast Guard Reserve. App. 9a. From 2012 to 2017, he was absent from his position at the Federal Aviation Administration to perform active duty in the Coast Guard. App. 14a. After completing a period of active duty under Section 12302, petitioner served an additional fourteen months under Section 12301(d). App. 2a; see App. 74a-75a, C.A. App. 573, 579. He was subsequently retained for medical treatment until February 2017.

Petitioner's activation orders under Sections 12301(d) and 12302 stated that his call-up was "in support of a DOD contingency operation." App. 74a-75a, C.A. App. 573, 579. Specifically, the order calling him to active duty under 12301(d) noted that he was being activated "in support of * * * Operation Iraqi Freedom, Operation Enduring Freedom, etc."; the 12302 order referred to "Operation Expeditionary SPOE." App. 75a, C.A. App. 573; App. 74a, C.A. App. 579. As authority, both orders invoked President Bush's September 14, 2001, executive order lifting the Armed Services' strength limitations under authority conferred by the National Emergencies Act. App. 74a-75a, C.A. App. 573, 579; see Executive Order No. 13223, 66 Fed. Reg. 48,201 (Sept. 14, 2001). Petitioner's orders further stated that the Defense Department had determined that he was exempt from length-of-service limitations under Section 4312(c)(4)(B) of Title 38, which applies to reservists ordered to active duty "because of a war or national emergency." App. 74a-75a, C.A. App. 573, 579.

Although the statutory authority for his call to active duty changed, petitioner's duties and responsibilities remained the same. Under both the 12301(d) and 12302 orders, petitioner manned a Coast Guard vessel to escort other military vessels to and from safe harbor, protecting

both the ships and the harbor itself. Despite the similarity of the orders and petitioner's identical duties under each, the FAA denied him differential pay for the portion of his service performed under Section 12301(d).

2. Petitioner appealed that denial to the MSPB on the ground that the FAA had violated the Uniformed Services Employment and Reemployment Rights Act by wrongly denying him differential pay. Citing the Federal Circuit's decision in *Adams*, the MSPB denied relief. App. 34a-37a. Under *Adams*, the MSPB explained, a reservist activated under Section 12301(d) must present "evidence that he was directly involved in a contingency operation" to qualify for differential pay. App. 37a.

3. The court of appeals affirmed. Applying *Adams*, the court held that petitioner was ineligible for differential pay because "[his] service does not qualify as an active duty contingency operation." App. 4a. The court acknowledged that the orders calling petitioner to active duty under Section 12301(d) expressed their purpose "to support various operations—Operation Iraqi Freedom, Operation Enduring Freedom, etc." App. 2a (quotation marks omitted). But the court nonetheless concluded that petitioner would have needed "new evidence" to demonstrate a sufficient "connection between his service and the ongoing national emergency." App. 4a-5a.

The court of appeals denied rehearing en banc. App. 51a-52a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

A. The question presented is exceptionally important

The question presented has exceptional practical importance for the hundreds of thousands who serve their

country twice over: as federal civilian employees and members of the Armed Services' reserve components. By depriving many such public servants of differential pay under a puzzling and murky standard, the Federal Circuit's *Adams* rule creates uncertainty and hardship for servicemembers who rely on this vital income.

For today's reservist, voluntary mobilization is both commonplace and central to the character of their service. Section 12301(d) is among the three most frequently used activation authorities. Kurt A. Rorvik, *Ready, Reliable, and Relevant: The Army Reserve Component as an Operational Reserve* 37 (2015). Tens of thousands of reservists have served under this provision since the September 11 terrorist attacks. See Coker, *supra*, at 301.

Voluntary active duty under Section 12301(d) enables the Armed Services to find qualified personnel for required positions without triggering statutory limits on involuntary unit mobilization. See Gov't Accountability Off., *Special Operations Forces—Additional Actions Are Needed to Effectively Manage Air Reserve Component* 4 (2019). The Defense Department has therefore made it express policy to rely on "[v]oluntary duty, per section 12301(d) * * * to meet mission requirements." Dep't of Def., Dir. 1200.17, *supra*, at 2.

Differential pay is vital to the 21% of reservists—some two hundred thousand people—who also serve their country in civilian roles. See Samuel F. Wright, *Enforcing USERRA against a Federal Agency*, 5 (Mar. 2016), https://perma.cc/VTJ7-4QQ9. Individuals at every GS level serve in the reserve components, often in positions with salaries far below their civilian pay. "[T]he salary gap between military duty and civilian work can be considerable." 149 Cong. Rec. 5,764 (2003) (statement of Sen. Durbin). Some differential pay cases have resulted in the payment of tens or hundreds of thousands of dollars in back pay to reservists. See, *e.g.*, *Doe* v. *Dep't of State*,

MSPB Docket No. NY-4324-15-0127-I-2 (award of differential pay exceeded $125,000). The sheer number of MSPB decisions involving claims for differential pay shows just how essential it is and how common these claims are. See, *e.g.*, *Robinson*, 2021 WL 1961624; *Del Colle*, 2021 WL 1377041; *Santiago*, 2021 WL 1171023; *Colicelli*, 2020 WL 1915737; *Woods*, 2019 WL 1315856; *Nicewicz*, 2019 WL 438258; *Miller*, 2016 WL 6406552; *Doe*, 2016 WL 5919634; *Marquiz*, 2015 WL 1187022. For the servicemember who decides to buy a house or have a child, uncertainty about the availability of differential pay can pose a serious hardship.

In addition to these personal harms, the denial of differential pay to those called to active duty under Section 12301(d) will discourage voluntary activations at a time when the Department of Defense increasingly relies on them. Bringing skills learned from civilian employment when they are called to active duty, reservists make up "a significant 'reservoir' of military-civilian specialists available for use" by the Armed Services. Coker, *supra*, at xxxv. The differential pay statute protects these servicemembers from the hardship of a substantial pay cut while serving in active duty.

The Federal Circuit's differential pay rule short-changes many deserving reservists who serve in noncombat roles, including those like petitioner who bring valuable skills from civilian life. But the practical problems it has sown run considerably deeper. Because *Adams* demands a case-by-case assessment of a reservist's service record, reservists volunteering for active duty have no way to know if they will receive differential pay. Even express language in a reservist's activation order invoking a national emergency or stating that the order is "in support of a DOD contingency operation" may not satisfy the Federal Circuit's stringent and unpredictable test. App. 76a, C.A. App. 568; App.; 2a-

3a. Understandably, in the two years since *Adams*, the decision has resulted in extensive litigation, numerous calls for rehearing en banc, and three petitions now pending with this Court. See *Nordby* v. *SSA*, No. 23A685; *Flynn* v. *Dep't of State*, No. 23A666.

Adams has created uncertainty in the private sector, too. Several statutes applicable to private employers include similar cross-references to Section 101(a)(13)(B), including provisions of the Family and Medical Leave Act and federal antibribery statutes. See, *e.g.*, 29 U.S.C. § 2611(14)(B); 18 U.S.C. § 209(h). These provisions have not been subject to extensive litigation, but the Federal Circuit's *Adams* decision unsettles longstanding expectations and raises for private employers the specter of even criminal liability. Section 209(h), for example, protects private employers from bribery charges for offering differential pay to employees called to active duty. Understood since its introduction in Congress to apply to reservists whose active duty service is "voluntary," 150 Cong. Rec. 10,770 (2004) (statement of Sen. Warner), that provision's scope is now in doubt; private employers must curtail pay to reservist employees or operate under the cloud of legal risk. The reach of the FMLA's leave protections for reservists called to active duty is also unclear after *Adams*. See 29 U.S.C. § 2611(14)(B) (cross-referencing Section 101(a)(13)(B) to define covered active duty under FMLA); cf. *Adams*, 3 F.4th at 1379 (concluding that cross-reference in another leave provision was broader than the one in the differential pay statute). The Federal Circuit's decision leaves private employers with little guidance on whether an employee's active duty will qualify as a "contingency operation" under its fact-sensitive and unpredictable test.

Even within the federal government, confusion remains. The Solicitor General's brief opposing certiorari in *Adams* took a softer tack than the decision below,

asking that reservists show merely "some connection" to a declared national emergency. Gov't Br. in Opp. at 6, *Adams* v. *DHS*, No. 21-1134 (May 17, 2022). Guidance from the Office of Personnel Management, in stark contrast, counsels agencies to provide differential pay only to reservists activated under provisions *expressly* enumerated in Section 101(a)(13). Off. of Pers. Mgmt., Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538, at 18 https://perma.cc/5D7V-25BV. OPM's rule—even harsher than the Federal Circuit's—denies differential pay for Section 12301(d) activations categorically. Although the Federal Circuit has insisted that it does not "defer" to OPM's guidance, see *Nordby* v. *SSA*, 67 F.4th 1170, 1174 (Fed. Cir. 2023), administrative judges and the MSPB continue to rely on it. App. 35a-37a; see, *e.g.*, *Santiago* v. *Dep't of Veterans Affs.*, No. DC-4324-20-0796-I-1, 2023 WL 5250208, at *3 (M.S.P.B. Aug. 15, 2023); *Stockwell* v. *DHS*, No. CH-4324-17-0314-I-2, 2023 WL 4539140, at *2 n.3 (M.S.P.B. July 13, 2023). And at oral argument below, government counsel refused to disclaim reliance on OPM's guidance in a future case, while acknowledging it was "different" from what the Federal Circuit had held.[1] Only a decision from this Court can provide clarity and ensure reservists know at the time of deployment—that is, at the time they will be incurring expenses—how much they will be paid.

B. No further percolation on the question presented is possible and this Court's review is appropriate now

This Court's intervention is appropriate now. Because the Federal Circuit has exclusive jurisdiction over differential pay cases arising in the MSPB, no conflict among the circuits can or will develop. For its

[1] Oral Arg. Recording 15:35-16:55, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-1219_01092023.mp3.

part, the Federal Circuit has repeatedly reaffirmed its holding in *Adams* and has shown no interest in en banc review. No further percolation is possible.

On this important legal question, all roads to review run through the Federal Circuit. Federal civilian employee reservists complaining that they were wrongly denied differential pay must seek relief before the MSPB. 38 U.S.C. § 4324. With exceptions not relevant here, the MSPB's decisions are subject to judicial review exclusively in the Federal Circuit. 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9); see *Perry* v. *MSPB*, 582 U.S. 420, 422 (2017). These jurisdictional rules ensure that, at the circuit level, only the Federal Circuit can decide whether or when a reservist called to active duty under Section 12301(d) is eligible for differential pay. Although there may be some remote possibility that another court of appeals could interpret a *different* cross-reference to Section 101(a)(13)(B), none has done so in the decades since that provision's enactment. As both a formal and a practical matter, unless this Court grants review, the Federal Circuit's word on this is the last.

For that reason, this Court often grants certiorari even in the absence of a circuit conflict when the Federal Circuit has exclusive jurisdiction, and it has done so in each of the past three terms. See, *e.g.*, *Rudisill* v. *McDonough*, No. 22-888; *Amgen* v. *Sanofi*, No. 21-757; *Arellano* v. *McDonough*, No. 21-432; *George* v. *McDonough*, No. 21-234. Given the profound importance of the issue and its recurring nature, the same is warranted here.

C. This case is the perfect vehicle to resolve the question presented

This case presents an ideal vehicle for review. The Federal Circuit held that petitioner was ineligible for differential pay on a single, outcome-determinative ground that dooms the claims of many similarly situated

reservists. Petitioner fully preserved his argument that a reservist activated under Section 12301(d) has been ordered to active duty under a provision of law referred to in Section 101(a)(13)(B), raising it before both the MSPB and Federal Circuit. See App. 36a, 3a-4a. And no antecedent factual or legal issues would prevent the Court from resolving this important legal question.

Moreover, of the three differential pay petitions currently pending with the Court, only this case involves a member of the reserve components whose activation orders expressly invoked a presidential emergency declaration. Thus, if the Court were to decide that *some* connection to a national emergency were required, this case would allow it to clarify whether an express invocation of an emergency declaration in a reservist's activation orders suffices to satisfy that requirement. The Court's guidance here is urgently needed to provide certainty for servicemembers and their families.

II. THE DECISION BELOW IS WRONG

The Federal Circuit's rule is impossible to square with the plain language of the statute: a reservist called to active duty under Section 12301(d) while a national emergency is ongoing has self-evidently been called to active duty under a "provision of law * * * during a national emergency." 10 U.S.C. § 101(a)(13)(B). The Federal Circuit erred in adopting a contrived reading of this straightforward language, inserting words found nowhere in the statute to cabin what it fretted would otherwise be expansive obligations to reservists deployed under voluntary activation authorities. And even the government has acknowledged that *Adams* relied on a "misstatement" about the relevance of contingency operations to other activation authorities enumerated in the statute. See Gov't C.A. En Banc Br. 12 n.4.

1. The differential pay statute's plain language resolves this case. Statutory interpretation begins with

the text, and, "[i]f the words of a statute are unambiguous, this first step of the interpretive inquiry is [the] last." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360 (2019). The relevant statutory provisions here are clear. Reservists in federal civilian service are entitled to differential pay if activated "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 lists several statutory activation authorities and "any other provision of law during a war or during a national emergency declared by the President or Congress." Thus, while a presidential national emergency declaration is in effect, a reservist activated under "any other provision of law"—including Section 12301(d)—is entitled to differential pay.

That is so because "[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 (2008). And Section 12301(d) is an "other provision of law"; that is, one not expressly enumerated in Section 101(a)(13)(B). A reservist activated under Section 12301(d) while an emergency declaration is in effect has been activated under "any other provision of law * * * during a national emergency declared by the President."

Congress's use of the word "any" reinforces this commonsense reading. As this Court has repeatedly explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976))). Absent other limiting language, "*any*" means "*all*." *Id.* at 222-223. And its use in a "final, catchall phrase" reflects that Congress did not intend to limit that phrase to items "of the same nature as the preceding specific phrases." *Id.* at 223-224.

Everyday usage and close textual parsing lead to the same sensible result: federal civilian employee reservists should suffer no financial harm for performing active duty in times of greatest need. Because the statute's text is clear, the Federal Circuit's analysis should have started—and ended—here. See *Nat'l Ass'n of Mfrs.* v. *DOD*, 583 U.S. 109, 127 (2018); *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016).

2. The interpretation the Federal Circuit adopted instead is untenable. None of the arguments that the government or the court of appeals advanced support a requirement that a reservist's service directly relate to a national emergency in order to qualify for differential pay.

Start with the government's principal argument: that the word "during" contains this hidden relational requirement. Common usage leads elsewhere, so the government follows a more circuitous path. It first defines "during" as "in the course of." "In the course of," it says, can mean "in the process of." These phrases, the argument continues, entail a "substantive connection," thus illustrating that "[i]n at least some situations, then, the term 'during' connotes more than a mere temporal overlap." Gov't C.A. En Banc Br. 7. But nothing in the statute suggests this concededly atypical meaning. Absent a clear indication otherwise, the government's definitional daisy chain cannot supplant "the most natural reading of the word." *Ressam*, 553 U.S. at 274; see *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Under the word's ordinary and natural meaning, a reservist activated "contemporaneous with" a national emergency is activated "during" that emergency. See *Ressam*, 553 U.S. at 275.

Consistent with everyday usage, when Congress has sought to impose a relational requirement like the one the Federal Circuit found here, it has done so expressly. A

host of federal statutes govern conduct undertaken "during and *in relation to*" a predicate crime. See, *e.g.*, 18 U.S.C. § 924(c)(1)(A) (emphasis added). Even elsewhere within the statutes governing servicemember benefits, Congress has used the phrase "during *and because of*" to describe leave that was both contemporaneous with and related to a reservist's active duty service. 5 U.S.C. § 6323(b) (emphasis added). In the government's view, that language is all surplusage: the word "during" does all the work alone.

As this Court has repeatedly held, "during" and "in relation to" are separate requirements, and "during," standing alone, does not mean both. *Ressam*, 553 U.S. at 275; see, *e.g.*, *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998); *Smith*, 508 U.S. at 237. Indeed, the Court has expressly rejected—at the government's urging—precisely the argument the government now advances: that the word "during" "implicitly included" a relational requirement. *Ressam*, 553 U.S. at 275; see U.S. Br. at 13-14, *Ressam* v. *United States*, 553 U.S. 272 (2008) (No. 07-455) ("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.'").

Nor does the canon of *ejusdem generis* compel this counterintuitive interpretation. For one, the Federal Circuit simply got it wrong when saying that "all of the [enumerated provisions in Section 101(a)(13)(B)] involve a connection to the declared national emergency." *Adams*, 3 F.4th at 1380. Section 12304, for example, governs "order[s] to active duty *other than* during war or national emergency," allowing the President to activate reservists when he "determines that it is necessary to augment the active forces." 10 U.S.C. § 12304 (emphasis added). And other enumerated provisions authorize mobilization "[i]n time of national emergency" without limiting activated

troops to emergency-related duties. 10 U.S.C. § 12302; see 10 U.S.C. § 12301. That is, these enumerated provisions—like the catchall—require only a *temporal* connection between activation and a declared national emergency.

Even if the word "during" could connote more than a temporal connection, the differential pay statute's structure forecloses that interpretation here. When the government activates a member of the reserve components, its obligation to award differential pay turns on whether the "call or order to active duty" is one "under * * * a provision of law referred to in section 101(a)(13)(B)." 5 U.S.C. § 5538(a). The differential pay statute thus mandates a provision-by-provision inquiry, not a fact-intensive, *post hoc* review of each reservist's individual service record. Contrary to Section 5538's unambiguous text, the Federal Circuit's rule would allow two reservists activated pursuant to the same "call or order to active duty" under the same "provision of law" to receive different treatment.

But it gets worse. Ignoring the "call or order to active duty" entirely, the Federal Circuit's test excludes even reservists like petitioner whose activation orders *expressly invoked* a presidential emergency declaration, unless the reservist can show that he was "directly involved in a contingency operation." App. 76a, C.A. App. 568; App. 3a (quotation marks omitted); see *Adams*, 3 F.4th at 1379-1380. That result is irreconcilable with the statute's text, structure, or purpose. And it substitutes for the differential pay statute's clear standard a byzantine system under which reservists have no way to know if they will receive differential pay until long after the fact. No wonder that three petitions related to differential pay are currently pending with this Court. At the very least, the Federal Circuit erred in holding that the nature of a reservist's service, rather than the face of

the "call or order to active duty," determines a reservist's eligibility for differential pay.

3. Policy judgment, not application of traditional tools of statutory construction, lies at the heart of the Federal Circuit's flawed rule. Rather than follow the text where it leads, the court of appeals concluded that the statute's plain meaning was "implausible" and could not have been what "Congress intended." *Adams*, 3 F.4th at 1380. That results-based reasoning is both improper and misplaced.

The Federal Circuit observed that the United States has remained in a declared national emergency since the September 11, 2001, terrorist attacks. *Id.* at 1379. But the Federal Circuit's discomfort that four Presidents have renewed this emergency declaration cannot displace unambiguous statutory text. Federal law plainly leaves to "the President or Congress" the authority to determine a national emergency's duration, and thus the duration of both the powers and responsibilities that accompany that determination. 10 U.S.C. § 101(a)(13)(B); see, *e.g.*, 10 U.S.C. § 527 (suspension of strength limitations during national emergency); 38 U.S.C. § 4312(c)(4)(B) (exemption from service limitations for reservists during national emergency). The government, for its part, continues to avail itself of such emergency powers—doing so, for example, when it determined that petitioner was exempt from service limitations. App. 76a, C.A. App. 568. That emergency declarations have become more frequent or longer-lived gives courts no license to second-guess Congress's work. Indeed, "even the most formidable argument concerning the statute's purposes could not overcome" unambiguous statutory text. *Kloeckner* v. *Solis*, 568 U.S. 41, 55 n.4 (2012). And for good reason: "the best evidence of Congress's intent *is* the statutory text." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 544 (2012) (emphasis added).

That is certainly the case here, where there is no doubt that Congress intended the differential pay statute to mean just what it says. The committee report for a precursor bill with nearly identical language described its scope in broad terms: it would "alleviate the financial burdens created" whenever "federal employees are called to active duty and experience a reduction in pay because their military pay and allowances are less than their basic federal salary." S. Rep. No. 108-409, at 2 (2004). And in estimating the cost of this proposal (whose relevant text is the same as the enacted statute's), the Congressional Budget Office based its calculations on "the total number of reservists on active duty," not solely those expected to fight in contingency operations. Cong. Budget Off., Cost Estimate, S. 593: Reservist Pay Security Act of 2004, 2-3 (August 4, 2004); cf. *Sutton* v. *United Air Lines*, 527 U.S. 471, 486-487 (1999) (basing scope of provision on congressional estimates of number of people affected). Congress endorsed exactly the straightforward interpretation that the Federal Circuit rejected as "implausible," and it was fully aware of the financial costs involved in its choice.

True, as the government noted when opposing certiorari in *Adams*, there is little legislative record for the omnibus appropriations bill in which Congress later enacted these protections into law. Gov't Br. in Opp. at 10-11, *Adams*, *supra* (No. 21-1134). But neither the government nor the Federal Circuit has offered a shred of evidence for its view that Congress meant to exclude wide swaths of reservists activated during an emergency from differential pay, much less that it meant to do so implicitly by adopting an unorthodox definition of the word "during." To the contrary, the members of Congress who authored these provisions filed an *amicus* brief in *Adams* explaining that the Federal Circuit's decision was "contrary to Congress's intent" and would

"severely burden" servicemembers. Members of Congress Amicus Br. at 5, *Adams* v. *DHS*, No. 21-1134 (Mar. 18, 2022). "The relevant statutory text shows that Congress intended for the law to apply broadly to federal employees who are called up to active duty under '*any*' 'provision of law during a war or during a national emergency declared by the President or Congress.'" *Id.* at 4 (quoting 10 U.S.C. § 101(a)(13)(B)).

And nothing is "implausible" about Congress's choice. Reservists called upon to perform even routine functions during a national emergency support the effort by "conserv[ing] resources for other critical needs," like emergency response and combat operations. Dep't of Def., Report of the Commission on Roles and Missions of the Armed Forces 2-23 (1995). Recognizing the importance of off-battlefield support for operational success, the Defense Department has routinely sought and received "contingency operations" funding for noncombat activities including "training," "logistic support," and "administration." See, *e.g.*, National Defense Authorization for Fiscal Year 2020 § 4302, Pub. L. No. 116-92, 133 Stat. 1198, 2081. Members of the reserve components serving in all capacities make a "critical contribution" to the nation's defense. Coker, *supra*, at 313. That is no less true for reservists activated under Section 12301(d), who often bring vital specialized skillsets even when they do not serve as boots on the ground.

4. Finally, the veteran's canon requires giving the differential pay statute's language its most natural meaning. This Court "ha[s] long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991)). At most, the government's

parsimonious reading of the statute hangs on a stretched definition of "during" and unlikely assumptions about congressional intent. To the extent those arguments create any "interpretive doubt," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), the Court should take this opportunity to construe the differential pay statute in favor of those serving our nation in times of crisis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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