

No. 23-861

IN THE
Supreme Court of the United States

NICK FELICIANO,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

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

**BRIEF FOR MEMBERS OF CONGRESS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Richard J. Durbin is the senior United States Senator from Illinois. He was first elected to the Senate in 1996 and re-elected in 2002, 2008, 2014, and 2020. Senator Durbin is the Majority Whip, the second-highest ranking position among Senate Democrats. He currently chairs the Judiciary Committee and sits on the Appropriations Committee and the Agriculture, Nutrition, and Forestry Committee.

Senator Durbin introduced legislation in 2001—the Reservists Pay Security Act—to ensure that America’s men and women in uniform are paid the equivalent of their full civilian salary while on active military duty. He continued advocating for this bill and others like it until it was passed as part of the Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524.

Illinois is home to over 21,000 active-duty military members and more than 24,000 military reservists. *See* Defense Manpower Data Center, *Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned, By Duty Location and Service/Component* (Sept. 30, 2021) (“Defense 2021 Manpower Data”).² Senator Durbin has a strong interest in helping his constituents who are civilian federal employees in the National Guard and Reserves avoid a loss of income when they are called to active military duty.

¹ No counsel for a party authored this brief in whole or in part, and no one other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties received notice of amici’s intent to file this brief at least 10 days prior to its due date.

² *Available at* <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>.

Senator Sherrod Brown represents Ohio and is the longest serving Ohioan on the Senate Veterans Affairs Committee. Ohio is home to 17,000 National Guard and reserve members. Senator Brown believes that these Servicemembers should not be subject to a loss of income when summoned to active military duty.

Chris Van Hollen is the junior U.S. Senator from Maryland, which is home to about 28,500 active-duty military members and around 18,000 military reservists, *see* Defense 2021 Manpower Data, *supra*. Maryland has the highest per capita concentration of federal civilian employees among the states and houses significant military installations and training institutions, including the United States Naval Academy, Joint Base Andrews, Aberdeen Proving Ground, and Fort Meade. First elected to Congress in 2002, Senator Van Hollen is Chair of the Senate Appropriations Subcommittee on Financial Services and General Government and sits on the Senate Foreign Relations Committee, among others. While serving in the House of Representatives, he co-sponsored the Reservists Pay Security Act of 2003.

Congressman Mike Levin represents California's 49th District. First elected to Congress in 2018, he serves as Ranking Member of the House Veterans' Affairs Economic Opportunity Subcommittee, which has jurisdiction over servicemembers civil relief. He is also the Representative for the Marine Corps Base Camp Pendleton. California has over 157,000 active-duty service-members, more than any other state, and nearly 53,000 National Guard and reserve members. *See* Defense 2021 Manpower Data, *supra*.

Congresswoman Eleanor Holmes Norton represents Washington, D.C. First elected to Congress in 1990, she now sits on the House Committee on Oversight

and Accountability and chairs the Subcommittee on Highways and Transit of the Transportation and Infrastructure Committee. Ms. Norton was a co-sponsor of the Reservists Pay Security Act of 2001. The District of Columbia is home to almost 11,000 active-duty service-members and about 4,000 Guard and reservists. *See* Defense 2021 Manpower Data, *supra*.

SUMMARY OF ARGUMENT

The bipartisan Reservists Pay Security Act was written to ensure that federal employees in the National Guard and Reserves do not suffer a loss of income when they are called to active military duty. The law requires the government to pay Guard members and reservists “differential pay” while on active duty, i.e., the difference between their military pay and what they would have been paid in their federal civilian employment during their time on active duty.

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.” 10 U.S.C. §101(a)(13)(B) (emphasis added); *see* 5 U.S.C. §5538 (citing §101(a)(13)(B)). And both contemporaneous statements by the law’s authors and other legislative materials confirm 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.

The Federal Circuit, however, held that petitioner Nick Feliciano’s 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, was

insufficient to qualify him for differential pay. The court relied on its earlier interpretation of 10 U.S.C. §12301(d) which narrows the law’s scope significantly, limiting differential pay to those who perform service in “an active duty *contingency operation*.” Pet.App.4a (emphasis added); see *Adams v. Department of Homeland Security*, 3 F.4th 1375, 1378 (Fed. Cir. 2021). It was not Congress’s intent to limit the law in this fashion.

If allowed to stand, the 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.

ARGUMENT

THE DECISION BELOW CONTRAVENES CONGRESS’S INTENT FOR THE RESERVISTS PAY SECURITY ACT TO COVER ALL FEDERAL-EMPLOYEE RESERVISTS CALLED TO ACTIVE DUTY DURING A WAR OR DECLARED NATIONAL EMERGENCY

Most members of the military reserves and National Guard hold civilian jobs in the private or public sector. When mobilized for active duty, these individuals are often paid military salaries significantly lower than their civilian pay. Indeed, a Department of Defense survey from 2000 showed that of approximately 35,000 reserve personnel, 41% of respondents reported a loss of income during mobilization and deployment. S. Rep. No. 108-409, at 2 n.2 (2004) (citing Defense Manpower Data Center, Report No. 2002-005, *DRAFT Tabulations of Responses from the 2000 Survey of Reserve Component Personnel: Vol 1, Military Background* iv, 326-327 (Aug. 2002)).

Recognizing the significant adverse financial effects on reservists and their families during mobilizations,

large employers and many states provide “differential pay” to cover the difference between the pay and benefits employees receive when they are and are not on active military duty. For years, however, the largest single employer of Guard and Reserve members in the United States—the federal government—failed to provide activated men and women with differential pay.

Senator Richard Durbin introduced the Reservists Pay Security Act in 2001 to remedy this issue by ensuring that federal employees in the National Guard and Reserves do not incur a loss of income when they are called to active military duty. After several years of effort, this provision, which has long enjoyed bipartisan support, was enacted into law as part of the Omnibus Appropriations Act of 2009. It is now codified at 5 U.S.C. §5538.

The law applies to any “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 ... a provision of law referred to in section 101(a)(13)(B) of title 10[.]” 5 U.S.C. §5538(a). In turn, 10 U.S.C. §101(a)(13)(B) lists a number of provisions followed by the catchall “or *any* other provision of law during a war or during a national emergency declared by the President or Congress.” (emphasis added). By proclamation of four different presidents, there has been a continuous declared national emergency since September 14, 2001. *See Notice on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, 86 Fed. Reg. 50,835 (Sept. 10, 2021).

Petitioner Nick Feliciano was mobilized pursuant to 10 U.S.C. §12301(d), which states: “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.” Section 12301(d) is among “the authorities most commonly used to activate members of the National Guard and Reserve for overseas military operations ... as well as for certain domestic military operations.” Kapp & Salazar Torreon, Cong. Rsch. Serv., RL30802, *Reserve Component Personnel Issues: Questions and Answers* 26 n.123 (Nov. 2, 2021).³

The Federal Circuit held that Mr. Feliciano’s activation pursuant to §12301(d) was insufficient to qualify him for differential pay. That holding substantially limits the reach of the Reservists Pay Security Act, by requiring recipients of differential pay to perform service in “an active duty *contingency operation*.” Pet.App.4a (emphasis added).

The Federal Circuit interpretation is not only contrary to the clear statutory language but also contrary to Congress’s express intent. Nowhere in the legislative history of the Reservists Pay Security Act is such a limitation contemplated. Quite the opposite: The law was intended to broadly “alleviate the financial burdens created when 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). It was Congress’s intent, in other words, to provide for differential pay for federal employee reservists *whenever* they are summoned to active military duty.

The Federal Circuit reached the opposite conclusion on the ground that Mr. Feliciano “fail[ed] to demonstrate that his voluntary, active service under 10 U.S.C.

³ Available at <https://sgp.fas.org/crs/natsec/RL30802.pdf>.

§12301(d) met the statutory definition of a contingency operation” and “has not alleged any connection between his service and the ongoing national emergency.” Pet.App.4a. Statements of several members (including Senator Durbin) make clear that this reasoning runs contrary to Congress’s intent, that lawmakers did not limit the law’s application by the kind of service rendered or the provision under which the reservists were called to active duty. Rather, Congress was focused purely on supporting federal-employee reservists called to serve.

Senator Durbin and former Senator Barbara Mikulski of Maryland first introduced the Reservists Pay Security Act in 2001, supported by a bipartisan coalition of co-sponsors, including former Senator James Inhofe of Oklahoma, who served as chair and ranking member of the Senate Armed Services Committee. *See* Reservists Pay Security Act of 2001, S. 1818, 107th Cong. (2001); *see also* Reservists Pay Security Act of 2001, H.R. 3337, 107th Cong. (2001) (House companion bill with 120 bipartisan cosponsors). Senator Mikulski explained that the legislation “will ensure that the Federal employees who are in the military reserves and are called up for active duty in service to their country will get the same pay as they do in their civilian jobs.” 147 Cong. Rec. 26,275 (2001).

The legislation was reintroduced in the 108th Congress, again with bipartisan cosponsors, including former Republican Senators Judd Gregg of New Hampshire and George Allen of Virginia. *See* Reservists Pay Security Act of 2004, S. 593 (2004); *see also* Reservists Pay Security Act of 2003, H.R. 217 (2003) (House companion bill with 97 bipartisan cosponsors); Equity for Reservists Pay Act of 2003, H.R. 1345 (2003) (House companion bill with 94 bipartisan cosponsors). At the

time, Senator Durbin described how the law would allow “citizen-soldiers to maintain their normal salary when called to active service by requiring Federal agencies to make up the difference between their military pay and what they would have earned on their Federal job.” 149 Cong. Rec. 5764 (2003). He added: “We must provide our reservist employees with financial support so they can leave their civilian lives to serve our country without the added burden of worrying about the financial well-being of their families. They are doing so much for us; we should do no less for them.” *Id.* Senator Mikulski similarly said then that 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,” adding that “[w]e owe reservists our support and a debt of gratitude.” *Id.*

Nowhere did Senator Durbin or Senator Mikulski (or any other Member of Congress, for that matter) state that such support and gratitude would be limited by the specific legal provision that ordered reservists to active service during a war or national emergency.

Likewise, a report of the Senate Committee on Governmental Affairs on the Reservists Pay Security Act of 2004, submitted by Chairwoman Susan Collins of Maine, described the bill’s purpose as “ensur[ing] that a Federal employee who takes leave without pay in order to perform active duty military service shall continue to receive pay in an amount which ... would be no less than the basic pay the individual would be receiving if no interruption in Federal employment had occurred.” S. Rep. No. 108-409, at 1.

The report further explained that the law “would alleviate the financial burdens created when 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. The report added that “[a]pproximately 10 percent of the 1.2 million members of the Guard and Reserve are federal employees,” suggesting the law would affect a large number of servicemen and women. *Id.* & n.4 (citing Annual Report by the Assistant Secretary of Defense (Reserve Affairs), *Ready Reservists in the Federal Government* 3 (Dec. 2001)). There is no hint in the report of the Federal Circuit’s contingency-operation limitation.

Senator Durbin again introduced the Reservists Pay Security Act in 2005, S. 981, 109th Cong. (2005), with ten bipartisan co-sponsors, including Senators Allen, Lindsey Graham of South Carolina, and the late Johnny Isakson of Georgia. *See also* Reservists Pay Security Act of 2006, H.R. 5525, 109th Cong. (2006) (House companion bill with 10 bipartisan cosponsors). At the time, Senator Durbin described the “premise” behind the bill: “If you are willing to serve in the Guard or Reserve and if you are willing, when activated, to leave your job and your family behind to risk your life for America, we should do our best as a nation to stand behind you. That is it.” 151 Cong. Rec. 21,704 (2005). That statement, of course, applies equally to Guard members and reservists not serving in a “contingency operation.”

When the bill was proposed as an amendment to the Emergency Supplemental Appropriations Act (2006), Senator Durbin explained: “What this amendment says is that the Federal Government will stand behind its employees activated in the Guard and Reserve to make up the difference in pay for them.” 152 Cong. Rec. 6043 (2006). And when the Reservists Pay Security Act was finally adopted as part of the Omnibus Appropriations Act of 2009, Senator Durbin released a statement

describing how the law will “ensure that our brave men and women are paid the equivalent of their full civilian salary while they have been called to active military duty.” Press Release, *Durbin: Congress Approves Legislation Allowing Reservists Who Are Federal Employees To Receive Full Salary* (Mar. 10, 2009).⁴ “For too long,” he added, “we encouraged Americans to serve their country in the National Guard and Reserves while punishing those who enlist by taking away a large portion of their income As the largest single employer of Guard and Reserve members, the federal government has the responsibility to do the right thing and stand behind our soldiers.” *Id.* Senator Durbin did not suggest that Congress’s responsibility to “do the right thing” turned on what provision of law ordered the Guard and Reserves to active service during a war or national emergency.

The Reservists Pay Security Act was written to prevent members of the National Guard and Reserve who are civilian employees of the federal government from suffering a loss in pay when they are called up for active duty. It would frustrate the intent of Congress to exclude the many reservists who are called to duty pursuant to 10 U.S.C. §12301(d) during a war or national emergency. The Court should grant certiorari to correct the Federal Circuit’s erroneous interpretation.

⁴ Available at <https://www.durbin.senate.gov/newsroom/press-releases/durbin-congress-approves-legislation-allowing-reservists-who-are-federal-employees-to-receive-full-salary>.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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