No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal employees at every GS level serve in the military reserves and National Guard, often at ranks with salaries far below their civilian pay. In the differential pay statute, 5 U.S.C. § 5538, Congress eliminated the severe financial penalty that these thousands of federal employees would otherwise suffer from serving on active duty by permitting them to collect differential pay for periods when they are called to qualifying active duty.

The differential pay statute provides that qualifying active duty includes "a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." Section 101(a)(13)(B) refers to the following provisions of law: "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.*" (emphasis added). Numerous other federal benefits, including two provisions of the Family and Medical Leave Act, base coverage on an identical cross-reference.

In a decision that contradicts longstanding interpretations of that cross reference, the Federal Circuit held that 10 U.S.C. § 12301(d), one of the most commonly used provisions for activating reservists and Guard members, is not a "provision of law referred to in section 101(a)(13)(B) of title 10."

The question presented is:

Whether 10 U.S.C. § 12301(d) is "a provision of law referred to in section 101(a)(13)(B) of title 10."

RELATED PROCEEDINGS

The are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-9a) is published at 3 F.4th 1375. The order of the court of appeals denying rehearing (App. 17a-18a) is unreported. The decision of the Merit Systems Protection Board (App. 10a-16a) is available at 2020 WL 698369.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2021. App. 1a. The court of appeals denied a timely petition for panel rehearing and rehearing en banc on December 29, 2021. App. 18a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 19A-29A.

STATEMENT OF THE CASE

Approximately two hundred thousand federal employees serve this country in two capacities, performing civilian jobs at every level of seniority across a range of agencies while simultaneously serving as members of the military reserves and National Guard. For many of these employees, military service poses a hardship beyond the rigors of military life and the risk of serious injury or death: when they leave their civilian jobs to report for military duty, they often serve at ranks receiving salaries far below their civilian pay, exposing them and their families to severe financial hardship. To prevent that additional burden, in 2009, Congress enacted the differential pay statute, 5 U.S.C. § 5538, requiring "Federal agencies to make up the difference between [a reservist's] military pay and what [he] would have earned on [his] Federal job." 149 Cong. Rec. 5,764 (2003) (statement of Sen. Durbin, introducing legislation).

Reservists and members of the National Guard are entitled to differential pay whenever they are "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." App. 19a. This case presents a fundamental and frequently recurring question: What kinds of active-duty service qualify for differential pay?

By its plain language, the statute authorizes differential pay *whenever* a reservist is "perform[ing] active duty in the uniformed services pursuant to a call or order to active duty under * * * a provision of law referred to in [10 U.S.C. §] 101(a)(13)(B)." That provision lists numerous 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." 10 U.S.C. § 101(a)(13)(B). There is little question that petitioner Bryan Adams was called to active duty under a "provision of law referred to in section 101(a)(13)(B)"; he was ordered to report under 10 U.S.C. § 12301(d), which is "any other provision of law * * * during a national emergency declared by the President," namely the emergency ordered on September 14, 2001, and renewed ever since. See Proclamation No. 173, 86 Fed. Reg. 50,835 (Sept. 10, 2021); Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

But the Federal Circuit created an additional requirement, holding that the differential pay statute was limited to "contingency operations," inserting a term that *nowhere appears* in Section 5538. The court reasoned that section 101(a)(13)(B) is the definition for "contingency operations," and so a deployment must qualify as a "contingency operation" for a deployed reservist to draw differential pay. Because petitioner had "not alleged any

* * * connection between his service and the declared national emergency," the court concluded that his service did not qualify as a "contingency operation." App. 7a-8a.

The Federal Circuit's decision cannot stand. The court's atextual addition is impossible to square with the plain text of 10 U.S.C. § 101(a)(13)(B) and Congress's purpose of ensuring that no reservist ordered deployed suffers financial hardship for heeding the call to duty. The Federal Circuit's decision—which because of that court's exclusive jurisdiction represents the last word on this issue absent further review—is of central importance for thousands of reservists who bought houses or had children based on the reasonable expectation that the federal salaries they have planned their lives around will continue to be paid when they report as ordered to active-duty service, regardless of whether their service happens to be in response to a "contingency operation."

The importance of this issue extends further than the differential pay statute, moreover, because the relevant statutory language, conditioning a federal employee's rights on their reporting to active duty "under * * * a provision of law referred to in [10 U.S.C. §] 101(a)(13)(B)," appears in numerous other provisions, including statutes relevant to the calculation of retirement benefits, access to healthcare benefits, and entitlement to benefits under the Family Medical Leave Act (FMLA), to name just a few examples. See 5 U.S.C. § 6381(7)(B), 29 U.S.C. § 2611(14)(B); 10 U.S.C. § 12731(f)(2)(B)(i); 10 U.S.C. § 1145(a)(2)(B); see also 29 U.S.C. § 3102(16)(A)(ii); 37 U.S.C. § 436(a)(2)(C)(ii); 10 U.S.C. § 1074(d)(2). This Court's review is urgently needed.

A. Legal Background

There is longstanding societal recognition that reservists should not suffer a reduction in pay because they have been ordered to active duty. More than a century ago, New York provided differential pay benefits

for employees of the state, its municipalities, and its political subdivisions who were 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. *Id.* In 1955, Michigan began permitting 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). In 1963, New Jersey enacted a differential pay statute for state employees ordered to active duty by the Governor. N.J. Stat. Ann. § 38A:4-4 (1963). Other states followed suit, and by 2004, at least half of all states covered either a significant portion of or all differences in pay for state employee-reservists. S. Rep. No. 108-409, at 2 (2004). Many private employers likewise adopted differential pay policies.[1]

Congress enacted the federal differential pay statute in March 2009, after nearly a decade of extensive use of over a hundred thousand reservists to fight in Afghanistan and Iraq. The statute represented the culmination of years of effort to protect reservists. The language of § 5538(a) was first proposed as part of the Reservists Pay Security Act of 2004. See S. Rep. No. 108-409, *supra*, at 1. The Senate committee report described the purpose of the bill in broad terms: "to ensure that a Federal employee who takes leave without pay in order to perform active duty military service shall continue to

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[1] See Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 Wm. Mitchell L. Rev. 797, 818 & n.111 (2004) (citing a list of 297 employers that had adopted pay differential policies for reservists called to active duty).

receive pay in an amount * * * no less than the basic pay the individual would be receiving if no interruption in Federal employment had occurred." *Id.* at 1. The Senate Report did not suggest that the scope of the statutory relief was limited by the nature of the mission the reservists were ordered to perform. Instead, it stated without qualification that the provision "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." *Id.* at 2. Sponsor Senator Richard Durbin described the legislation as applying to all active-duty service, not just service in connection with specially designated contingency operations. See 149 Cong. Rec. 5,764 (2003) (statement of Sen. Durbin).

As Senator Durbin stated:

> We should not encourage Americans to protect their country and then punish those who enlist in the armed forces by taking away a large portion of their salaries. 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.

Ibid. Co-sponsor Senator Barbara Mikulski emphasized that the legislation sought to "do everything we can to reduce unnecessary financial burdens on members of the military." *Ibid.* (statement of Sen. Mikulski). She gave no indication that the provision's relief was limited based on the type of operation the reservist was ordered to assist.

As enacted, the statute requires differential pay for reservists and members of the National Guard who are "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. Section 101(a)(13), which is part of the definitional section of title 10, defines the term "contingency operation." App. 24a. Subparagraph (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." *Ibid.*

When Congress enacted the differential pay statute, the cross-reference to section 101(a)(13)(B) was already well known to it. The previous year, Congress had used an identical cross reference to "a provision of law referred to in section 101(a)(13)(B) of title 10" to define coverage under two provisions of the Family and Medical Leave Act, 5 U.S.C. § 6381(7)(B) and 29 U.S.C. § 2611(14)(B). See 2008 National Defense Authorization Act, Pub. L. 110-181, div. A, tit. V, § 585(a), 122 Stat. 128, 131. Consistent with its plain terms, the Department of Labor ("DOL"), in a regulation released the same year, interpreted the statutory cross-reference to encompass a call to active duty under "*any other provision of law* during a war or during a national emergency declared by the President or Congress." The Family and Medical Leave Act of 1993, Final Rule, 73 Fed. Reg. 67934, 67954, 68084 (Nov. 17, 2008) (emphasis added); see also *id.* at 67955-56, 68111 (similarly defining "contingency operation").

B. Factual and Procedural Background

1. At all times relevant to this case, petitioner Bryan Adams was a Human Resources Specialist for U.S. Customs and Border Protection ("Customs"), an agency within the Department of Homeland Security ("DHS"), a position categorized at GS-12, Step 1 on the federal

payscale. He simultaneously served in the Arizona Air National Guard as a Technical Sergeant (paygrade E-6). C.A. Appx. 25.

The salaries for those two positions are quite different. GS-12, Step 1 currently has an annual base pay of $66,829. See Office of Personnel Management, *Pay & Leave, Salary Table 2021-GS*, https://bit.ly/3oBrsHo. In contrast, paygrade E-6 has an annualized salary of $33,293-$51,566 depending on years of service. See Dept. of Defense, *Monthly Basic Pay Table*, Effective January 1, 2021, https://bit.ly/305rHjM. Even the highest paid E-6 is paid 20 percent less than a GS-12, Step 1, and the lowest paid E-6s make half. For petitioner, the difference was about $11,000 annually.

For five months in 2018, C.A. Appx. 333, 342, petitioner was ordered mobilized under 10 U.S.C. § 12301(d), which authorizes the activation of reservists "at any time * * * with the consent of that member." 10 U.S.C. § 12301(d). Customs did not pay petitioner for all the time he was on military leave and did not provide him with differential pay pursuant to 5 U.S.C. § 5538(a) for those periods. C.A. Appx. 342-343. The Agency denied petitioner's request for differential pay. *Id.* at 29.

2. Petitioner appealed the denial to the Merit Systems Protection Board, claiming DHS had violated USERRA by denying him differential pay. C.A. Appx. 19-32. The Administrative Judge denied petitioner's appeal on the ground that he had failed to show that his military service was a motivating factor in the agency's decision to deny differential pay. App. 12a-16a.

3. The court of appeals affirmed. *Id.* at 1a-9a. The court agreed that the Administrative Judge "erred * * * by requiring that [petitioner] show that his military service was a substantial motivating factor in the agency's decision to deny differential pay"; rather, petitioner "was only required to show he was denied a benefit of

employment." *Id.* at 4a. But the court concluded that petitioner was not "entitled to differential pay as a benefit of employment" under 5 U.S.C. § 5538(a) for his five months of active duty.[2] *Id.* at 5a. The court acknowledged that Section 5538 entitled employees to differential pay whenever they are absent from their federal civilian job "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 [10 U.S.C. §] 101(a)(13)(B)." *Id.* at 4a-5a.

The court held that the critical statutory phrase in 10 U.S.C. § 101(a)(13)(B)—"any other provision of law"—did not, in "context," refer to petitioner's active-duty service under § 12301(d). *Id.* at 9a. Rather, the court reasoned that "all of the identified statutes" listed in § 101(a)(13)(B) "involve a connection to the declared national emergency." *Id.* at 8a. The court considered it "implausible that Congress intended for the phrase 'any other provision of law during a war or national emergency,' to necessarily include § 12301(d) voluntary duty that was unconnected to the emergency at hand." Id. at 9a. As a consequence, the court concluded that petitioner's service under § 12301(d) did not qualify as active duty under "any other provision of law." *Ibid.*

Finally, the court concluded that its interpretation was "consistent with the policy guidance from [the Office of Personnel Management] on the matter" because "OPM guidance instructs that 'qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d).'" *Ibid.* (citing *OPM, OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538*, at 18, https://bit.ly/305UqoB). But see Maj. Jeremy R. Bedford,

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[2] The court of appeals also concluded that time petitioner spent in annual training does not qualify as "active duty" service. App. 5a-6a. Petitioner does not challenge that conclusion here.

Armed Forces Mobilizations under 10 U.S.C. § 12301(d) and Federal Employees: Why OPM Guidance is Incorrect, 42 Campbell L.R. 1, 16 (2020) (arguing that OPM guidance "wrongfully excludes soldiers on voluntary active duty from the [differential pay] benefit"); App. 20-27 (same).

The court of appeals denied a timely petition for panel rehearing or rehearing en banc. App. 18a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS ERRONEOUS

The Federal Circuit erred. Section 12301(d) is a "a provision of law referred to in [10 U.S.C. §] 101(a)(13)(B)." The statutes' text, structure, purpose, and the settled meaning of the same cross-reference in other statutes, all show this to be true. And even if the statute *were* susceptible to multiple interpretations, the veterans canon would break the tie in petitioner's favor.

1. Text. The text of § 5538(a) and § 101(a)(13)(B) are sufficient to resolve this case. "The preeminent canon of statutory interpretation requires" courts "to '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) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)) (alterations inoriginal). Interpretation thus "begins with the statutory text, and ends there as well if the text is unambiguous." *Bedroc*, *supra*, at 183.

That bedrock principle should have resolved this case in favor of petitioner. The plain text of the incorporated provision unambiguously refers to active duty under "any other provision of law * * * during a national emergency." Section 12301(d) is a "provision of law," and therefore it is a provision of law referenced under this statute as long as it is "during a national emergency." The United States has

been in a state of national emergency continuously since a few days after the terrorist attacks of September 11, 2001.

Congress's use of the phrase "*any* other provision of law" in § 101(a)(13)(B) supports this broad interpretation of the incorporated provision. As this Court has previously noted, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). Because "Congress did not add any language limiting the breadth of that word," it follows that this Court "must read [the provision] as referring to *all*" other provisions of law during a war or national emergency. *Gonzales*, 520 U.S. at 5 (emphasis added). Absent such limiting language, "the phrase 'any other [provision of law] means what it says," and there is no basis under which it "[w]ould be limited to some subset" of provisions. *Ibid.*

The few administrative decisions to have considered the issue have overwhelmingly held orders under §12301(d) to be covered. In *Marchand* v. *Gov't Accountability Office*, 12-GA-05 VT, Order Granting Complainant's Motion for Summary Judgment (Dec. 27, 2012), https://perma.cc/9JZA-V38S, the Office of Compliance[3] held that reservists mobilized under §12301(d) are entitled to differential pay. The Office concluded that "Congress's intent is clear" that it had meant what it said in extending benefits to reservists ordered to active duty under "any other provision of law" during a national emergency. *Id.* at 4. In addition, before

[3] The Office of Compliance is an independent, non-partisan agency established to administer and enforce the Congressional Accountability Act. Under Section 206 of the CAA, the Office applies certain rights and protections of USERRA for employees of legislative branch agencies. The Office provides an administrative hearing process for employees bringing claims under the CAA.

the court of appeals decision below, a number of Merit Systems Protection Board ("MSPB") administrative judges likewise concluded that §12301(d) orders are covered. See, *e.g.*, *Marquiz* v. *Dep't of Defense*, No. SF-4324-15-0099-I-1, 2015 WL 1187022 (M.S.P.B. Mar. 12, 2015), aff'd by an equally divided Board, 123 M.S.P.R. 479, (M.S.P.B. 2016); see also Bedford, *supra*, at 25 & nn.168-169 (with one exception, "[s]ubsequent cases before the MSPB have followed the same legal reasoning in ordering agencies to grant differential pay") (collecting authorities).

2. Structure. The structure of Section 101(a)(13)(B) follows a "categorical approach" familiar to this Court. See *Borden* v. *United States*, 141 S. Ct. 1817 (2021). Under that approach, the statute focuses not on the particular *facts* of a given case, but rather on the provision of *law* at issue. *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 762 (2021); see also *Borden*, 141 S. Ct. at 1211. Here, Congress directed the courts applying § 5538(a) to look not to what petitioner's particular orders called him to do, but rather to whether petitioner's call to active duty was pursuant to a provision of law "referred to" in § 101(a)(13)(B).

Thus, the government does not—and could not—argue that a call to active duty under (for example) 10 U.S.C. § 12304 is not a call to active duty "pursuant" to "a provision of law referred to in section 101(a)(13)(B) of title 10" because § 12304 is enumerated in § 101(a)(13)(B), regardless of the specific duties the servicemember is ordered to undertake. The panel's interpretation thus leads to absurd results. Under the Federal Circuit's reading of the statute, two soldiers could be called to serve side by side doing the same duties in the very same military operation, but under the panel's holding, if one serves under 10 U.S.C. § 12304 and the other under 10 U.S.C. § 12301(d), the first will get differential pay and the second will not, even though absolutely nothing will differ about the

nature or duration of their service. "[I]t is quite impossible that Congress could have intended th[at] result," and "the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment).

While Congress easily could have limited the differential pay statute to service in connection with a national emergency, it did not. There is therefore no textual or logical basis for placing a more limited treatment on § 12301(d) orders. Section 12301(d) is a provision of law "referred to" in § 101(a)(13)(B) because, during a national emergency, that section refers to active-duty service under "any provision of law."

3. Purpose and legislative history. Reading § 5538(a) to permit differential pay for reservists called to duty pursuant to § 12301(d) is consistent with the manifest purpose of the statutory scheme—to prevent federal employees from suffering a reduction in pay and thereby incurring a financial burden in the performance of active duty. That is apparent both from the provision's broad text and all available legislative history.

For example, a committee report discussing a substantially identical predecessor provision described its purpose in broad terms: "to ensure 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, when taken together with military pay and allowances, would be no less than the basic pay the individual would be receiving if no interruption in Federal employment had occurred." See S. Rep. No. 108-409, at 1 (2004). There is no reference *anywhere* in the Senate Report to an intent to limit the sweep of the differential pay statute to national-emergency related service. Instead, the Report states without qualification 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." *Ibid.* (emphasis added). In introducing the legislation, sponsor Senator Richard Durbin framed the purpose in similar terms as applying to *all* active-duty service, not just service connected to national emergencies or activation under statutes involving national emergencies. See 149 Cong. Rec. 5,764 (2003) (statement of Sen. Durbin).

Similarly, in estimating the cost of the proposed bill, the Congressional Budget Office (CBO) based its calculations on the effect of the bill in increasing federal salary payments "to pay the difference between civilian and military salaries for *any federal employees called to active duty* in the uniformed services or National Guard following enactment of the bill." Congressional Budget Office Cost Estimate, S. 593: Reservist Pay Security Act of 2003, 2 (May 1, 2003) (emphasis added). Accordingly, the CBO based its calculations on the *total* number of reservists who were also federal employees. *Ibid.* The CBO never considered in its calculations the percentage of reservists who would be called to active duty in some way connected to a declared national emergency. Cf. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 484-485 (1999) (rejecting reading of statute inconsistent with estimates in legislative history).

This history demonstrates that the purpose behind the differential pay statute was to provide differential pay to *all* reservists called to active duty during a national emergency, particularly in light of the increased need for and deployment of reservists in the post-9/11 era. The Federal Circuit's interpretation of the statute, which contradicts the plain meaning of the statute's text, also flouts Congress's manifest intent in enacting the law.

4. Usage in other statutes. Congress has based entitlements to other benefits on precisely the same statutory cross-reference language, "provision[s] of law referred to in section 101(a)(13)(B) of title 10." See 5 U.S.C. § 6381(7)(B); 10 U.S.C. § 1074(d)(2); 10 U.S.C. § 1145(a)(2)(B); 10 U.S.C. § 12731; 15 U.S.C. § 1681a(q)(1)(A); 15 U.S.C. § 632(q)(5)(A)(i)(I); 18 U.S.C. § 209(h); 29 U.S.C. § 2611(14)(B); 29 U.S.C. § 3102(16)(A)(ii); 37 U.S.C. § 436(a)(2)(C)(ii). The Federal Circuit's mistaken decision conflicts with longstanding understanding of those provisions.

Significantly, Congress employed the same statutory cross-reference used in § 5538(a) *over a year earlier* in two provisions of the FMLA, 5 U.S.C. § 6381(7)(B) and 29 U.S.C. § 2611(14)(B). See 2008 National Defense Authorization Act, Pub. L. 110-181, div. A, tit. V, § 585(a), 122 Stat. 128, 131. Later in 2008, and again *before* the enactment of 5 U.S.C. § 5538(a), the Department of Labor interpreted the statutory cross-reference to encompass a call to active duty under "*any other provision of law* during a war or during a national emergency declared by the President or Congress." The Family and Medical Leave Act of 1993, Final Rule, 73 Fed. Reg. 67934, 67954, 68084 (Nov. 17, 2008) (emphasis added); see also *id.* at 67955-56, 68111 (similarly defining "contingency operation"). That remains the definition used by the Department of Labor today. See 29 C.F.R. § 825.102 (defining "covered active duty"). We are not aware that the federal government is limiting the availability of FMLA benefits based on the nature of the reservist's deployment.

Reenactment of statutory text ratifies the settled interpretation of that text. See *Lindahl* v. *Off. of Pers. Mgmt.*, 470 U.S. 768, 782 n.15 (1985) (collecting cases); *Lorillard* v. *Pons,* 434 U.S. 575, 580 (1978). Here, five months *before* Congress enacted what would become

§ 5538(a), the Department of Labor interpreted exactly the same textual cross-reference broadly to mean that *all* calls to active duty pursuant to a "provision of law" during a national emergency are "referred to" in § 101(a)(13)(B). There is no reason to think that Congress was not aware of that interpretation of a statute it had *just* enacted and intended to incorporate the same understanding in the differential pay statute.

Another provision further demonstrates that Congress understood the cross-reference to refer to all periods of active duty during a national emergency. Federal law makes it a crime for private employers to pay the salaries of servicemembers. 18 U.S.C. § 209(a). Congress amended § 209 in 2004—at a time when Congress was actively considering legislation that ultimately became the differential pay statute—to exempt private employers who pay differential pay when such employees are "on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10." 18 U.S.C. § 209(h). The Federal Circuit's narrow reading of the cross-reference makes private employers' *criminal liability* turn on fine distinctions regarding whether the reservist has been called to qualifying active duty under § 12301(d) rather than active duty under § 12304 or any of the other specifically enumerated statutes.

Congress never intended that result. Sponsor Senator Mark Warner of Virginia, introducing the amendment, stated that it "would clarify the Reserve officers on *voluntary* extended active duty are not prohibited from accepting payment of any part of salary or wages that a private employer paid to the Reserve officer before his or her call or order to active duty." 150 Cong. Rec. 10770 (2004) (emphasis added). And when Senator Richard Durbin introduced the predecessor of the differential pay statute, he singled out for praise

private employers that "cover the pay differential for Reserve and National Guard members called to active duty." 149 Cong. Rec. 5,764 (2003) (statement of Sen. Durbin). The Federal Circuit's decision would criminalize the very actions of private employers lauded by the principal sponsor of the differential pay statute simply because their employees were called to active duty under 10 U.S.C. § 12301(d) rather than another statute.

5. Veterans canon. Lastly, the veterans canon further supports interpreting these provisions to mean what they plainly say. 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); accord *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); 3 Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 60:2, at n.60 (8th ed. Westlaw Nov. 2021 update) (discussing liberal construction of remedial statutes, including veteran-benefit laws). This rule of construction retains its vitality today. See, e.g., *Brown* v. *Gardner*, 513 U.S. 115, 117-18 (1994) (noting "rule that interpretive doubt is to be resolved in the veteran's favor"); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (noting "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"). The canon functions as a tie-breaker; if other interpretive tools leave the meaning of a provision unclear, the canon dictates ruling for the veteran. Here the statute unambiguously favors petitioner; but were it even slightly ambiguous, the veterans canon would dictate reading it broadly to protect servicemembers called to serve their country. See *Marchand*, *supra*, at 4 (invoking veterans canon to order

award of differential pay to reservist ordered to active duty under § 12301(d))

6. The Federal Circuit was unpersuaded by all of the textual, structural, and historical evidence discussed above. Instead, the court based its interpretation entirely on an application of the *ejusdem generis* canon. App. 8a. The panel looked to the enumerated statutes in § 101(a)(13)(B) and attempted to divine a common extratextual thread linking them together. After looking at "the enumerated provisions" in § 101(a)(13)(B), the court concluded "that all of the identified statutes involve a connection to the declared national emergency." App. 8a-9a. That was error.

As an initial matter, the list in the statute is not subject to the *ejusdem generis* canon. App. 8a. The canon ordinarily comes into play only when the existence of a catch-all would render enumerated items in a list superfluous. *CSX Transp., Inc.* v. *Alabama Dept. of Revenue*, 562 U.S. 277, 295 (2011); accord *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114–15 (2001); 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:17 (7th ed. 2007). But the catch-all does not do that here. Here, the catch-all clause is only operative during a war or national emergency, while the specific provisions are not so limited. Thus, the Federal Circuit erred in applying the *ejusdem generis* canon *at all*.

The court also erred in its application of the canon by attributing a common attribute to the provisions in the list that is *not even shared by all the statutes in the list*. The Federal Circuit concluded that "all of the identified statutes involve a connection to the declared national emergency." App. 8a. That is demonstrably wrong. For example, § 12304, enumerated in § 101(a)(13)(B), is entitled "Selected Reserve and certain Individual Ready Reserve members; order to active duty *other than during*

war or national emergency," 10 U.S.C. § 12304 (emphasis added), and permits the President to activate reservists "when[ever] the President determines that it is necessary to augment the active forces for *any* named operational mission," § 12304(a) (emphasis added). Similarly, 10 U.S.C. § 688 permits the Secretary of Defense to recall retired members to active duty when the "Secretary considers [it] necessary in the interests of national defense." § 688(c). The provision places time limits on how long retired members can be recalled to service *except* in "time of war or of national emergency declared by Congress or the President," § 688(f), clearly indicating that the Federal Circuit misapprehended the scope of the general authority.

Furthermore, the Federal Circuit did not explain what provision of law *would* qualify as "any provision of law" under its reading of the statute. The principle that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" is "one of the most basic interpretive canons." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (citation omitted); see also *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). The panel's interpretation of § 5538(a) flunks this basic requirement by reading the "any other provision" of law portion of § 101(a)(13)(B) out of the statute. See *Marchand*, *supra*, at 3-4 (concluding that the "narrow construction of § 5538 offends the canon against superfluity"). The Federal Circuit's interpretation of the statute is fundamentally erroneous.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

1. The question presented has exceptional practical importance for the approximately two hundred thousand

civilian federal employees who also serve as reservists.[4] The Federal Circuit's decision could deprive reservists ordered to active duty under 10 U.S.C. § 12301(d) (or any provision of law not specifically enumerated in 10 U.S.C. § 101(a)(13)(B)) of differential pay, a vital benefit which many have reasonably come to rely upon. Section 12301(d) orders are commonplace. Bedford, *supra* (indicating routine nature of § 12301(d) activation).

For today's reservist, voluntary mobilization is both commonplace and central to the character of their service. Since September 11, 2001, more than one million reservists have been activated, voluntarily and involuntarily, in the largest and longest mobilization in the history of the reserves. Cong. Rsch. Serv., *supra* note 4, at 8, 27. This massive mobilization reflects a change in the character of the reserves, a change that relied on voluntary mobilization under 10 U.S.C. § 12301(d). Historically, the reserves were considered a force of last resort, but in 2008 the Department of Defense ("DoD") redesignated them as a fully operational force that would "provide operational capabilities and strategic depth to meet U.S. defense requirements across the full spectrum of conflict including under [10 U.S.C.] sections 12301, 12302, 12304, and 12306." U.S. Dep't of Def., Dir. 1200.17, *Managing the Reserve Components as an Operational Force*, at para. 4.a-b (Oct. 29, 2008) ("DoD Directive 1200.17"). The Department simultaneously made it an express policy to rely on "[v]oluntary duty, per section 12301(d) * * * to meet mission requirements." *Id.* at para. 4.g. The agency has followed through on this policy: when

[4] Lawrence Kapp & Barbara Salazar Torreon, Cong. Rsch. Serv., RL30802, Reserve Component Personnel Issues: Questions and Answers, at 3 (2021) (noting over 1 million reservists); Samuel F. Wright, JAGC, USN (Ret.), *Enforcing USERRA against a Federal Agency*, at 5 (March 2016) (noting that over twenty percent of reservists serve their country as federal civilian employees).

the Department of Defense mobilized thousands of reservists to respond to the latest national emergency, the COVID-19 pandemic, it relied primarily on voluntary mobilization under 10 U.S.C. § 12301(d). Reserve Organization of America C.A. Amicus Br. 12.

Differential pay is vital to many thousands of reservists. Individuals at every GS level serve in the reserves and Guard, often at ranks with salaries far below their civilian pay; "the salary gap between military duty and civilian work can be considerable." 149 Cong. Rec. 5764 (2003). There have been differential pay cases that have resulted in the payment of hundreds of thousands of dollars in differential pay. In *Doe* v. *Department of State*, MSPB Docket No. NY-4324-15-0127-I-2, for example, the amount of differential pay awarded the servicemember exceeded $125,000. The sheer number of MSPB decisions involving claims for differential pay show just how essential it is and how common these claims are. See C.A. Appx. 325-26 (discussing MSPB cases). For the servicemember who decides to buy a house or have a child, the denial of differential pay can pose a serious hardship. In addition to these personal harms, the denial of differential pay to those mobilized under 10 U.S.C. § 12301(d) will discourage voluntary mobilizations at a time when DoD increasingly relies on such mobilizations. Reserve Organization of America C.A. Amicus Br. 12-13.

In addition, numerous cases seeking differential pay for § 12301(d) orders have been brought in the last several years through the MSPB, through the Court of Federal Claims, see *Downey* v. *United States*, 147 Fed. Cl. 171 (2020) (holding that claim for denial of differential pay for active-duty service under 12301(d) was actionable under Tucker Act), and more are pending in the Federal Circuit right now. See, e.g., *Flynn* v. *Department of State*, No. 22-1220 (Fed. Cir.); *Feliciano* v. *Department of Transportation*, No. 22-1219 (Fed. Cir.). In addition,

claims for differential pay by employees of the Legislative Branch can be heard by the Office of Compliance, which has concluded that § 12301(d) orders are subject to the differential pay mandate. While the Federal Circuit's erroneous decision, absent review, resolves the availability of differential pay for § 12301(d) orders for the executive branch, legislative branch personnel will continue to enjoy that benefit. Only this Court's review can create a uniform national rule.

2. The consequences of the Federal Circuit's error extend beyond differential pay to nearly a dozen federal statutes that similarly determine the availability of benefits by cross-reference to 10 U.S.C. § 101(a)(13)(B). Eleven statutes, including 5 U.S.C. § 5538(a), refer to "a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. § 5538(a); see *supra* p.3. These statutes touch every person serving in the reserves, regardless of their civilian employment. The Federal Circuit's decision conflicts with the longstanding interpretation of these statutes. But because that court sits in review of benefit decisions that proceed either through the MSPB or the Court of Federal Claims, its view is controlling. If it stands, it will deprive reservists of important benefits to which they are entitled. Statutes referencing 10 U.S.C. § 101(a)(13)(B) determine eligibility for Family and Medical Leave Act benefits, health care, supplemental insurance, retired pay, small business programs, and spousal benefits.[5]

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[5] 5 U.S.C. § 6381(7)(B) (FMLA); 5 U.S.C. § 8702(c) (automatic insurance coverage); 10 U.S.C. § 1074(d)(2) (medical and dental care for certain armed forces members); 10 U.S.C. § 12731 (age and service requirements for retired pay); 15 U.S.C. § 1681a(q)(1)(A) (consumer credit reporting agencies definition of active duty consumer); 15 U.S.C. § 632(q)(5)(A)(i)(I) (eligibility for small business programs); 29 U.S.C. § 2611(14)(B) (FMLA); 29 U.S.C. § 3102(16)(A)(ii) (definition of displaced homemakers in the "Workforce Innovation

The Federal Circuit's decision would cut off these benefits from reservists and their families simply because of the happenstance that they were called to duty under 10 U.S.C. § 12301(d) (or any other statute that falls within the catch-all exception). Indeed, the impact of the decision extends further still. The Federal Circuit's narrow reading of 10 U.S.C. § 101(a)(13)(B) even risks exposing magnanimous, pro-military employers to *criminal* liability.

3. This Court's intervention is especially necessary because the Federal Circuit has exclusive jurisdiction over differential pay cases meaning no conflict among the Circuits can or will develop. Petitioner sought rehearing en banc in this case but the Federal Circuit rejected the petition. Thus, there is little possibility of further percolation.

Petitioner's claim arises under 38 U.S.C. § 4311(a), which entitles service members to employment benefits such as differential pay. *Ibid.* Claimants can vindicate their rights to those benefits under 38 U.S.C. § 4311 either by filing a complaint with the Secretary of Labor or directly with the MSPB. 38 U.S.C. §§ 4322, 4324; 5 C.F.R. 1208.11. If a servicemember wishes to appeal an adverse decision from the Secretary, they must do so before the MSPB. 8 U.S.C. § 4324; 5 C.F.R. 1208.11. Other than cases in which federal antidiscrimination law is implicated, "MSPB 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. *Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1977 (2017).

This Court often grants certiorari even in the absence of a Circuit conflict when the Federal Circuit has exclusive jurisdiction. See, e.g., *George* v. *McDonough*,

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and Opportunity Act"); 37 U.S.C. § 436(a)(2)(C)(ii) (high-deployment allowance).

No. 21-234, 2022 WL 129504, at *1 (U.S. Jan. 14, 2022); *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019); *Return Mail, Inc.* v. *United States Postal Serv.*, 139 S. Ct. 1853 (2019); *Helsinn Healthcare S.A.* v. *Teva Pharm. USA, Inc.*, 139 S. Ct. 628 (2019); *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018); *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018); *SCA Hygiene Prod. Aktiebolag* v. *First Quality Baby Prod., LLC*, 137 S. Ct. 954 (2017); *Matal* v. *Tam*, 137 S. Ct. 1744, 1754–55 (2017); *Kingdomware Techs., Inc.* v. *United States*, 136 S. Ct. 1969 (2016); *U.S. Postal Serv.* v. *Gregory*, 534 U.S. 1, 6 (2001) (reversing a Federal Circuit decision on the ability of the MSPB to review prior disciplinary records). Given the profound importance of the issue and its recurring nature, the same is warranted here.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR REVIEW

This case is an excellent vehicle for resolving the issue. The case involves a single, straightforward legal question. Petitioner alleges that the Federal Circuit erred in holding that 10 U.S.C. § 12301(d) is not "a provision of law referred to in section 101(a)(13)(B) of title 10." Petitioner raised this argument at every stage of these proceedings, both before the MSPB, C.A. Appx. 28-30, 321-326 , and the Federal Circuit, Pet. C.A. Opening Br., 5-6. The Federal Circuit squarely resolved the issue. There are no predicate factual or legal issues that would prevent this Court from reaching the issue. And the question is outcome determinative: if 10 U.S.C. § 12301(d) is a provision of law referred to in section 101(a)(13)(B), petitioner would be eligible for differential pay under 5 U.S.C. § 5538.

Especially in light of the difficulty (if not futility) and expense veterans will face in bringing the question presented to this Court in light of the Federal Circuit's now binding precedent the Court should not wait; it

should grant certiorari now and correct the misinterpretation of this exceptionally important federal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX