

No. 21-1134

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IN THE  
**Supreme Court of the United States**

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BRYAN ADAMS,

*Petitioner,*

*v.*

DEPARTMENT OF HOMELAND SECURITY,

*Respondent.*

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

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

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STEPHEN W. PRESTON  
DANIEL S. VOLCHOK  
*Counsel of record*  
MATTHEW F. FERRARO  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Ave. N.W.  
Washington, D.C. 20006  
(202) 663-6000  
daniel.volchok@wilmerhale.com

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**TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5
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 .....	5
CONCLUSION .....	11

**TABLE OF AUTHORITIES****STATUTORY PROVISIONS**

	Page(s)
5 U.S.C. § 5538 .....	4, 6
10 U.S.C.	
§ 101.....	4, 6
§ 12301.....	4, 6, 7, 8, 11
Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524.....	2

**EXECUTIVE DOCUMENTS**

<i>Notice on the Continuation of the National Emergency With Respect to Certain Terrorist Attacks</i> , 86 Fed. Reg. 50,835 (Sept. 10, 2021).....	6
--	---

**LEGISLATIVE MATERIALS**

147 Cong. Rec. 26,275 (2001) .....	8
149 Cong. Rec. 5764 (2003) .....	9
151 Cong. Rec. 21,704 (2005) .....	10
Emergency Supplemental Appropriations Act, 152 Cong. Rec. 6043 (2006).....	10
Equity for Reservists Pay Act of 2003, H.R. 1345, 108th Cong. (2003).....	8
Reservists Pay Security Act of 2001, H.R. 3337, 107th Cong. (2001).....	8
Reservists Pay Security Act of 2001, S. 1818, 107th Cong. (2001).....	8
Reservists Pay Security Act of 2003, H.R. 217, 108th Cong. (2003).....	8

**TABLE OF AUTHORITIES—Continued**

	Page(s)
Reservists Pay Security Act of 2004, S. 593, 108th Cong. (2004).....	8
Reservists Pay Security Act of 2004, S. Rep. No. 108-409 (2004).....	5, 7, 9, 10
Reservists Pay Security Act of 2005, S. 981, 109th Cong. (2005).....	10
Reservists Pay Security Act of 2006, H.R. 5525, 109th Cong. (2006).....	10

**OTHER AUTHORITIES**

Annual Report by the Assistant Secretary of Defense (Reserve Affairs), <i>Ready Reservists in the Federal Government</i> (Dec. 2001) .....	10
Defense Manpower Data Center, Report No. 2002-005, <i>DRAFT Tabulations of Responses from the 2000 Survey of Reserve Component Personnel: Vol 1, Military Background</i> (Aug. 2002) .....	5
Defense Manpower Data Center, <i>Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned, By Duty Location and Service/Component</i> (Sept. 30, 2021), <a href="https://dwp.dmde.osd.mil/dwp/app/dod-&lt;br/&gt;data-reports/workforce-reports">https://dwp.dmde.osd.mil/dwp/app/dod- data-reports/workforce-reports</a> .....	2, 3

**TABLE OF AUTHORITIES—Continued**

	Page(s)
Kapp, Lawrence & Barbar Salazar Torreon, Cong. Rsch. Serv., RL30802, <i>Reserve Component Personnel Issues: Questions and Answers</i> (Nov. 2, 2021), <a href="https://sgp.fas.org/crs/natsec/RL30802.pdf">https://sgp.fas.org/crs/natsec/RL30802.pdf</a> .....	7
Press Release, <i>Durbin: Congress Approves Legislation Allowing Reservists Who Are Federal Employees To Receive Full Salary</i> (Mar. 10, 2009), <a href="https://www.durbin.senate.gov/newsroom/press-releases/durbin-congress-approves-legislation-allowing-reservists-who-are-federal-employees-to-receive-full-salary">https://www.durbin.senate.gov/newsroom/press-releases/durbin-congress-approves-legislation-allowing-reservists-who-are-federal-employees-to-receive-full-salary</a> .....	11

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**INTEREST OF AMICI CURIAE<sup>1</sup>**

Richard J. Durbin is the senior U.S. Senator from Illinois. He was first elected to the Senate in 1996 and re-elected in 2002, 2008, 2014, and 2020. As the Majority Whip, Senator Durbin holds the second-highest ranking position among Senate Democrats. He cur-

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<sup>1</sup> 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. All parties have consented to the filing of this brief.

rently chairs the Senate Judiciary Committee and sits on the Appropriations Committee and the Agriculture, Nutrition, and Forestry Committee. 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”).<sup>2</sup>

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.

Senator Richard Blumenthal is the senior U.S. Senator from Connecticut. First elected in 2010 and reelected in 2016, Senator Blumenthal sits on several committees, including the Senate Committee on Veterans’ Affairs. Connecticut is home to about 7,000 active-duty military members and about 7,000 military reservists. *See* Defense 2021 Manpower Data, *supra*.

Congressman Anthony Brown represents Maryland’s fourth congressional district. Originally elected to Congress in 2016, Mr. Brown serves on the House Armed Services Committee, among others. A retired Colonel in the United States Army Reserve, Mr. Brown’s military record spanned more than a quarter century and included a deployment to Iraq, where he earned a Bronze Star. Maryland is home to about

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

30,000 active-duty military members and nearly 19,000 military reservists. *See* Defense 2021 Manpower Data, *supra*.

Senator Sherrod Brown is the senior U.S. Senator from Ohio. First elected to the Senate in 2006, Mr. Brown sits on the Senate Committee on Veterans' Affairs, among others. When serving in the House of Representatives, he co-sponsored the Reservists Pay Security Act of 2001. Ohio is home to about 7,000 active-duty military members and about 27,000 military reservists. *See* Defense 2021 Manpower Data, *supra*.

Congresswoman Carolyn B. Maloney represents New York's twelfth congressional district. First elected to Congress in 1992, she now chairs the House Committee on Oversight and Reform and sits on the House Committee on Financial Services. Ms. Maloney was a co-sponsor of the Reservists Pay Security Act of 2001. New York is home to over 20,000 active-duty military members and nearly 29,000 military reservists. *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 Reform 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 servicemembers and about 4,000 Guard and reservists. *See* Defense 2021 Manpower Data, *supra*.

Former Congressman Robert Wexler represented Florida's nineteenth congressional district from 1997 to 2010. He was the lead sponsor in the House of Representatives of the Reservists Pay Security Act of 2001

and the Reservists Pay Security Act of 2003. He is currently president of the S. Daniel Abraham Center for Middle East Peace.

Amici have a strong interest in helping their 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.

### **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 Bryan Adams’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 reached that holding by narrowing the law's scope significantly, limiting differential pay to those who perform service in "an active duty *contingency operation*." App. 5a (emphasis added). 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.<sup>3</sup>

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

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<sup>3</sup> 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)).

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 Bryan Adams 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).<sup>4</sup>

The Federal Circuit held that Mr. Adams’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*.” App. 5a (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 by deeming it “implausible that Congress intended for the phrase ‘any other provision of law during a war

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<sup>4</sup> Available at <https://sgp.fas.org/crs/natsec/RL30802.pdf>.

or national emergency,’ to necessarily include § 12301(d) voluntary duty that was unconnected to the emergency at hand.” App. 9a. In reality, statements of several members (including amici) make clear that this was exactly 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 Senator James Inhofe of Oklahoma, the current 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.* (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 Omni-

bus 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).<sup>5</sup> “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.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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<sup>5</sup> Available at <https://www.durbin.senate.gov/newsroom/press-releases/durbin-congress-approves-legislation-allowing-reservists-who-are-federal-employees-to-receive-full-salary>.

12

Respectfully submitted.

STEPHEN W. PRESTON  
DANIEL S. VOLCHOK  
*Counsel of Record*  
MATTHEW F. FERRARO  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Ave. N.W.  
Washington, D.C. 20006  
(202) 663-6000  
daniel.volchok@wilmerhale.com

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