No. 23-861

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

REPLY BRIEF FOR THE PETITIONER

BRIAN J. LAWLER
PILOT LAW, P.C.
4623 Mt. Gaywas Dr.
San Diego, California 92117
(866) 512-2465
blawler@pilotlawcorp.com

RYAN T. FENN
TESS C. SAPERSTEIN
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
DANIEL YABLON
MATTHEW L. FARLEY
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued **Page(s)**

Other Authorities

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

REPLY BRIEF FOR THE PETITIONER

Texas, South Carolina, 18 other states and the District of Columbia. The Members of Congress who sponsored the legislation. Two of the nation's preeminent membership organizations for veterans and reservists. All agree that the Federal Circuit's rule in *Adams* v. *DHS*, 3 F.4th 1375 (Fed. Cir. 2021) represents a profoundly flawed reading of the differential pay statute's straightforward language that threatens financial hardship for the hundreds of thousands of reservists who also serve their country as federal civilian employees. All urge this Court to take up this exceptionally important question. Few petitions garner such widespread and bipartisan support, raise questions of such nationwide significance, and seek review of decisions that are so clearly wrong. The Court should grant certiorari and fix the statute that the Federal Circuit has broken.

The government's arguments against review are meritless. On substance, the government abandons any defense of the Federal Circuit's own reasoning or the test that it announced. And its retreat from *Adams* only further illustrates why this Court's review is sorely needed. Seeing that the *ejusdem generis* canon the court

of appeals relied on in fact favors petitioner, the government now offers only a single merits argument: that the word "during" requires more than a temporal link. But the government points to no textual indicia that Congress intended the word to take on this atypical meaning, and all relevant statutory context shows otherwise. The government also apparently is unwilling to endorse the Federal Circuit's atextual bottom-line holding that reservists are entitled to differential pay "only when they are directly called to serve in a contingency operation." *Adams*, 3 F.4th at 1379. Instead, it now says the question is whether a reservist's service is "'in the course of' a national emergency," Opp. 11, whatever that means. The significant gap between the government's position and the court of appeals decision it purports to defend only adds to the confusion and is reason enough to grant review.

On importance, the government also does not dispute that the question presented has profound importance for hundreds of thousands of federal civilian employee reservists who, like petitioner, face financial hardship as a result of the Federal Circuit's flawed rule. That explains why 20 states and the District of Columbia are before this Court representing the interests of tens of thousands of their citizens. And the government concedes that the question presented is within the Federal Circuit's exclusive jurisdiction. The possibility that a regional circuit might one day address some other statutory cross-reference having nothing to do with differential pay is no reason to delay review.

Finally, the two purported vehicle defects that the government identifies are contrived. Neither of them are vehicle issues at all.

First, the government faults petitioner (at 18) for not raising arguments before the court of appeals "about the specific nature of his service." But the question presented

is whether the Federal Circuit's test for differential pay is wrong, and the United States does not dispute (indeed, concedes) that petitioner pressed *that* argument below.

Second, the government argues (at 18) that petitioner could lose on remand because he did not properly request differential pay from his employing civilian agency. That is both mistaken and irrelevant. That the government might be able to raise some *new* argument on remand—one that it declined to press before the court below—is no obstacle to this Court's review of the sole ground on which petitioner lost below. Regardless, if the Court believes that this case is an unsuitable vehicle, it should grant one of the two other pending petitions presenting the same important question (for one of which the government has identified *no* purported vehicle issues).

ARGUMENT

I. THE DECISION BELOW IS WRONG

A. The government does not even attempt to defend the court of appeals' rule or the reasoning it employed. And for good reason. As the government conceded below, the court of appeals' assertion that the activation authorities enumerated in Section 101(a)(13)(B) of Title 10 deal only with emergency-related service was a "misstatement." Gov't C.A. En Banc Br. 12 n.4. And while the government argued below that these provisions at least require that a reservist's service relate to "a specific, identified exigency," *ibid.*, that too was mistaken. Several of the enumerated authorities, like the catch-all provision—"any other provision of law during a war or during a national emergency declared by the President or Congress"—require only that a national emergency be ongoing at the time of activation. Pet. 18-19. That is, they demand only a *temporal* connection between activation and a national emergency. It is thus unmistakably clear that the statute does *not* limit differential pay to

reservists who are personally involved in emergency response. The government now abandons that position—the sole ground for the court of appeals' decision in *Adams*—altogether.

B. Striking out on its own, the government seeks for the first time to justify the court of appeals' result by relying solely on the word "during." But neither text nor context supports its position. As the government concedes, this Court has held (at the government's own urging) that "[t]he term 'during' denotes a temporal link." Opp. 7 (quoting *United States* v. *Ressam*, 553 U.S. 272, 274-275 (2008)); see also U.S. Br. at 13-14, *United States* v. *Ressam*, 553 U.S. 272 (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.'"). Notwithstanding this precedent, the government contends that "during" —in some idiomatic contexts—"can also mean 'in the course of.'" Opp. 7. True enough. But the government does not even attempt to distinguish the word's usage here from that in statutes like the one this Court construed in *Ressam*. Nor does it point to anything in the statute's text that would counsel this concededly atypical reading over what the government itself has called "[t]he plain everyday meaning" of the word. U.S. Br. at 13-14, *Ressam*.

To the contrary, both statutory structure and the word's usage in other provisions show that the government's strained reading of "during" is wrong. As the government no longer disputes, other activation authorities enumerated in Section 101(a)(13)(B) require only a temporal connection between the call or order to active duty and a national emergency. And Congress routinely uses phrases like "during *and in relation to*" or "during *and because of*" to indicate when more than a temporal connection is required—including elsewhere in

statutes governing reservist benefits. Pet. 17-18; see, *e.g.*, 5 U.S.C. § 6323(b) (creating rules for leave that is "during *and because of*" a reservist's service (emphasis added)).[1] Its use of this language in related provisions shows that "[h]ad Congress wanted to include a [substantive-connection] requirement, it certainly knew how to do so." *Polselli* v. *IRS*, 598 U.S. 432, 439 (2023).

C. What the government calls "context" supporting its interpretation (at 9-10) is nothing more than bare supposition about congressional intent. As the government's argument goes, the United States has been in a declared national emergency since before the differential pay statute's enactment. And, in its view, Congress could not possibly have meant to allow differential pay for "*any* reservist who performs active duty of *any* type * * * so long as *any* national emergency is ongoing." Opp. 10. The government's motivated reasoning is mistaken on its own terms, and to the extent congressional intent is a relevant factor, all available evidence shows that the government draws exactly the wrong inference about it.

First, if the requirement that a national emergency be ongoing is an illusory limitation, it is one that Congress has endorsed in numerous statutory schemes. Two of the activation authorities enumerated in Section 101(a)(13)(B), for example—including one amended as recently as 2011—authorize mobilization "in time of" a declared national emergency. See 10 U.S.C. §§ 12301, 12302. The fact that national emergency declarations have become commonplace in recent years provides no

---

[1] See, *e.g.*, 18 U.S.C. § 1028A(1),(2); 18 U.S.C. § 115(b)(1)(B)(iv); 18 U.S.C. § 1752(b)(1)(A); 8 U.S.C. § 1324(a)(1)(B)(iii); 18 U.S.C. § 3559(c)(2)(D); 18 U.S.C. § 929(a)(1); 18 U.S.C. § 924(c)(1)(A), (c)(5), 18 U.S.C. § 3559(f)(3); 18 U.S.C. § 3632(d)(4)(D)(xxii); Urban Property Protection and Reinsurance Act of 1968, Pub. L. No. 90-448, § 1106(e), 82 Stat. 555, 567.

basis to rewrite what Congress enacted—whether the differential pay statute or these other authorities. And reading "during" consistent with its plain everyday usage does not transform the differential pay statute, as the government contends (at 9), into a "roundabout way of including *all* active-duty service." Congress and the President remain free to end existing emergency declarations at any time.

Second, contemporaneous evidence demonstrates that Congress understood the differential pay statute to cover all reservists serving at the time of its enactment and intended precisely that result. Consistent with the committee report and statements by the bill's sponsors, the Congressional Budget Office calculated the statute's cost based 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). Remarkably, the government's only response is to suppose that the CBO must have "overlooked" what it contends is the statute's plain meaning. See Opp. 13 n.3. But it is implausible that no one on the Hill would have noticed such a significant error in the CBO's scoring. Indeed, Section 12301(d) is among the most frequently used activation authorities, with tens of thousands serving under that provision since 2001, and those reservists accounting for a substantial percentage of the bill's estimated cost. See Pet. 10. And the bill's sponsors have filed an *amicus* brief explaining that Congress understood the statute to cover all reservists called to active duty while a national emergency is ongoing.

Third, the government's policy concerns are misplaced. As the Department of Defense has recognized,

and the government does not dispute, reservists called upon to perform even routine functions during a national emergency serve a vital role by "conserv[ing] resources for other critical needs"—essentially, by backfilling jobs, they free up other servicemembers for emergency-related duties. Dep't of Def., Report of the Commission on Roles and Missions of the Armed Forces 2-23 (1995). Extending differential pay to these reservists regardless of the nature of their service is a sound policy choice, and one that Congress was free to make.

The government's rule not only defies the statute's plain text but also basic notions of fairness and common sense. Under its interpretation, two reservists activated pursuant to the same "call or order to active duty" under the same "provision of law," 5 U.S.C. § 5538(a), could be treated differently—one denied differential pay and another granted it—based only on the accident of how closely each reservist's precise duties related to a pending national emergency. The government's rule is also totally unadministrable because reservists often will not learn how closely their duties will be tied to a national emergency until their mission is already underway—long after they and their families must plan budgets and incur expenses associated with mobilization. Indeed, duties could change daily with no change in underlying orders. Are reservists entitled to differential pay only on those days when their activities sufficiently relate to emergency response, thereby qualifying as being "in the course of" that emergency? And what counts as service "in the course of" a national emergency anyway? Can it really be that disaster response is enough but protecting military installations to support overseas counterterrorism operations, as petitioner did for years, is too little?

D. Even if the government were right that the differential pay statute requires *some* nexus between a reservist's service and a national emergency, the court of

appeals' decision would still merit review. The government offers no defense of the court of appeals' holding in *Adams* that a reservist is entitled to differential pay only if "directly called to serve in a contingency operation," 3 F.4th at 1379. Instead, relying on its definition of the word "during," the government now contends that the question is whether a reservist's service is "'in the course of' a national emergency." Opp. 11. What that might mean is anyone's guess.

The government's change in tack is emblematic of the confusion that has reigned since the Federal Circuit's *Adams* decision. Indeed, the government in litigation has repeatedly sought to distance itself from the *Adams* rule. See, *e.g.*, Opp. 11; Gov't Br. in Opp. at 6, *Adams* v. *DHS*, No. 21-1134 (May 17, 2022) (arguing that reservists need show only "some connection" to a declared national emergency). Meanwhile, the Office of Personnel Management continues to advise federal agencies to limit differential pay to reservists activated under authorities *expressly* enumerated in Section 101(a)(13)(B), disregarding the statute's catch-all provision altogether. Although the government now represents that OPM "intends to revise the guidance," at oral argument below, it refused to rule out adopting OPM's current position. Pet. 13 & n.1. And the government does not dispute that administrative judges and the MSPB continue to rely on it. See *ibid.* Whatever the appropriate standard for differential pay, two things are clear: The Federal Circuit's reasoning and rule are wholly unsupportable; and this Court's review is urgently needed to provide clarity for reservists, agencies, and the lower courts.

II. THE TIME TO REVIEW THIS QUESTION IS NOW

A. The government does not dispute that the question presented is incredibly important and potentially affects hundreds of thousands of reservists. Nor could it. Twenty states, the District of Columbia,

three United States Senators, two members of the House of Representatives, and two service member advocacy organizations have made that plain. See States' Br.; Mem. of Congress Br.; ROA Br.; MVA Br. An issue that greatly affects both the financial security of hundreds of thousands of reservists and guardsmen, and our nation's military readiness, warrants the Court's review.

B. Contra the government's claim (at 17), there is no meaningful potential for further percolation of the question presented. As the government concedes, the Federal Circuit has exclusive jurisdiction over appeals from the denial of differential pay. That it has thrice denied rehearing *en banc* to reconsider *Adams* shows that it never will. The government's suggestion that some other cross reference—it points to FMLA's cross reference to Section 101(a)(13)(B)—might be litigated in some other circuit, leading to a circuit split, is pure fantasy.[2] To date, that provision has never been litigated. Indeed, the government points to no cases that have *ever* been litigated in any other circuit that could potentially lead to a circuit conflict over the question presented. The fact is, if the Court does not intervene to resolve this question in this case, the question presented will never be reviewed. And hundreds of thousands of service members will be injured by the Federal Circuit's atextual reading.

III. THIS CASE IS AN IDEAL VEHICLE

This case is the ideal vehicle to resolve the question presented. Petitioner preserved his differential pay argument at every stage of the proceedings, and that his

[2] The FMLA's "covered active duty" provision appears in a different context and imposes different requirements, including that the reservist show "deployment of the member with the Armed Forces to a foreign country." A regional court of appeals called to interpret that provision will not face the same question presented here. *Compare* 10 U.S.C. § 5538(a), *with* 29 U.S.C. § 2611(14)(B).

activation orders expressly referenced ongoing contingency operations (as the court of appeals recognized) illustrates the absurdity of the *Adams* rule.

The government's contention (at 18) that petitioner may lose on remand because he failed to timely request differential pay is both wrong and irrelevant. The differential pay statute requires agencies to provide differential pay "to the extent practicable, at the same time and in the same manner as would basic pay." 5 U.S.C. § 5538(c)(3). Nothing in the statute requires servicemembers to request it. And no court has accepted the government's argument that the agency's human resources manual supersedes this statutory command.

Regardless, the possibility that petitioner might lose on remand on some alternative ground—that neither the court of appeals nor MSPB addressed—is not an obstacle to the Court's review. This Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Cert. Reply Br. at 2, *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15). As the government routinely argues, "the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to [this Court's] review." Gov't Cert. Reply Br. at 3, *United States* v. *Bean*, 123 S. Ct. 584 (2002) (No. 01-704). The government cannot avoid review of the predicate legal issue by trying to divine how MSPB *might* rule on the merits later.

The government also argues that the Court should deny review because "petitioner failed to raise arguments about the specific nature of his service in the court of appeals." Opp. 18. But petitioner argued below—and argues here—that the specific nature of his service should be irrelevant to his entitlement to differential pay. Whether petitioner pressed other arguments below is

irrelevant to whether the Court should grant review of the question the government concedes he *did* press and that he *has* presented to this Court. And on plenary review, nothing would prevent the Court from deciding the correct interpretation of the statute—whether that is petitioner's interpretation, the Federal Circuit's, or something else altogether.

Moreover, the Court has two other cases it may choose from to answer this legal question. For one of them, even the government's fertile imagination could furnish no vehicle problems. If one of those cases is a superior vehicle, the Court should review it instead of or together with this case. See *Flynn* v. *Dep't of State*, No. 23-868; *Nordby* v. *SSA.*, No. 23-866.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BRIAN J. LAWLER
PILOT LAW, P.C.
4623 Mt. Gaywas Dr.
San Diego, California 92117
(866) 512-2465
blawler@pilotlawcorp.com

RYAN T. FENN
TESS C. SAPERSTEIN
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
DANIEL YABLON
MATTHEW L. FARLEY
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

MAY 2024