No. 23-861

IN THE

Supreme Court of the United States

NICK FELICIANO,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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

SARAH KELLY-KILGORE
HOLLAND & KNIGHT LLP
4675 MacArthur Ct.
Ste. 900
Newport Beach, CA 92660

CHAD VANDERHOEF
HOLLAND & KNIGHT LLP
100 North Tampa St.
Ste. 4100
Tampa, FL 33602

CHAZZ FREEMAN
HOLLAND & KNIGHT LLP
701 Brickell Ave
Ste. 3300
Miami, FL 33131

TIMOTHY TAYLOR
Counsel of Record
HOLLAND & KNIGHT LLP
1650 Tysons Blvd.
Ste. 1700
Tysons, VA 22102
(703) 720-8600
timothy.taylor@hklaw.com

SARAH MOLINOFF
HOLLAND & KNIGHT LLP
601 SW Second Ave.
Ste. 1800
Portland, OR 97204

Counsel for Amici Curiae

August 26, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

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 20,000 active-duty servicemembers and more than 22,000 Guard and reservists. *See* Def. Manpower Data Ctr., *Number of Military and DoD Appropriated Fund (APF) Civilian Personnel, By Assigned Duty Location and Service / Component* (June 30, 2024) ("Defense 2024 Manpower Data"), *available at* https://t.ly/E3Q8c. 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.

Chris Van Hollen is the junior United States Senator from Maryland, which is home to nearly 30,000 active-duty servicemembers and around 18,000 Guard and

[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.

reservists. *See* Defense 2024 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 cosponsored the Reservists Pay Security Act of 2003.

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 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 over 11,000 active-duty servicemembers and over 3,000 Guard and reservists. *See* Defense 2024 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)). 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 reservists render or the provision of law under which reservists are 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 Reserves, was insufficient to qualify him for differential pay. The court relied on its earlier interpretation of 10 U.S.C. §12301(d), which narrowed 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. *Dep't of Homeland Sec.*, 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 reversal of the decision below.

ARGUMENT

I. 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 (2004) (citing Def. Manpower Data Ctr., Report No. 2002-005, *DRAFT Tabulations of Responses from the 2000 Survey of Reserve Component Personnel: Vol 1, Military Background* iv, 326–27 (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." Cong. Rsch. Serv., RL30802, *Reserve Component Personnel Issues:*

Questions and Answers 26 n.123 (Nov. 2, 2021), *available at* https://t.ly/jGJZo.

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 found that Mr. Feliciano "fail[ed] to demonstrate that his voluntary, active service under 10 U.S.C. §12301(d) met the statutory definition of a contingency operation" and had "not alleged any connection between his service and the ongoing national emergency." Pet.App.4a.

The Federal Circuit's interpretation contradicts not only the statute's text but also the historical evidence of Congress's intent. Nowhere in the legislative history of the Reservists Pay Security Act is such a limitation contemplated. Quite the opposite: Statements of several members, including Senator Durbin, demonstrate that lawmakers did not limit the law's application by the kind of service rendered or the provision under which reservists are called to active duty. Rather, Congress was focused purely on supporting federal-employee reservists called to serve. It was Congress's intent to provide for differential pay for such federal-employee reservists *whenever* they are summoned to active military duty.

Senator Durbin and former Senator Barbara Mikulski of Maryland first introduced the Reservists Pay Security Act in 2001, supported by a bipartisan coalition of cosponsors, 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 would "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).

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

A report of the Senate Committee on Governmental Affairs on the Reservists Pay Security Act of 2004, submitted by Chairwoman Susan Collins of Maine, confirms the law's broad reach. The 2004 report 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 intent, as stated in the report, was to "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.

The law was always intended to cover a large swath of the uniformed services. Indeed, that was the point, as Congress recognized. The 2004 report noted that "[a]pproximately 10 percent of the 1.2 million members of the Guard and Reserve are federal employees," suggesting the law would affect all of them. *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.

The legislative history of later iterations of the bill again confirms that Congress intended for the law to cover all federal-employee reservists summoned to

active military duty. Senator Durbin introduced the Reservists Pay Security Act in 2005, S. 981, 109th Cong. (2005), with ten bipartisan cosponsors, 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." 151 Cong. Rec. 21,704 (2005). When the bill was proposed as an amendment to the Emergency Supplemental Appropriations Act (2006), Senator Durbin similarly 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). These statements, of course, apply equally to Guard members and reservists not serving in a "contingency operation."

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), *available at* https://t.ly/ExbTy. "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.*

Congress understood that it was doing "the right thing" when it enacted the Reservists Pay Security Act. *Id.* No one envisioned that its protections would be limited by the reservist's proximity to a "contingency operation" when ordered to active service during a war or national emergency.

II. Congress Was Aware That The Reservists Pay Security Act Would Require Differential Pay Whenever A National Emergency Exists.

By referring to 10 U.S.C. §101(a)(13)(B), Congress intended the Reservists Pay Security Act to require differential pay whenever a national emergency exists, regardless of the nature of the service or the statute governing the reservist's orders.

The final clause of §101(a)(13)(B) requires differential pay "during a war or during a national emergency declared by the President or Congress." At the time the Reservists Pay Security Act was enacted, there were dozens of national emergencies declared by the President under the National Emergencies Act, 50 U.S.C. §1601 *et seq*. *See* Brennan Ctr. for Justice, *Declared National Emergencies Under the National Emergencies Act* (Aug. 12, 2024), *available at* https://t.ly/Ynp0p.

This is no reason to judicially amend the Reservists Pay Security Act by artificially narrowing its breadth. Congress was aware of these emergencies' existence at the time and what their effect would be on the Act's coverage. "Congress legislates against the backdrop of existing law." *Parker Drilling Mgmt. Servs.* v. *Newton*,

587 U.S. 601, 611 (2019) (quoting *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013)). For national emergencies declared by the President under the National Emergencies Act, "Such proclamation shall immediately be transmitted to the Congress[.]" 50 U.S.C. §1621(a). And the National Emergencies Act is no backwater of the U.S. Code. Congress has relied upon it as the predicate for over 100 other statutory emergency authorities. *See* Cong. Rsch. Serv., R46379, *Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act* 7–20 (July 14, 2020), *available at* https://t.ly/96cNI.

Further, Congress can expeditiously disapprove national emergencies if it is so inclined. "Any national emergency declared by the President . . . shall terminate if . . . there is enacted into law a joint resolution terminating the emergency[.]" 50 U.S.C. §1622(a); *see id.* §1622(c) (joint resolution expedited procedures). That question comes up frequently. "Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated." *Id.* §1622(b).

Nor does the doctrine of *ejusdem generis* provide a basis for limiting the reach of the final clause. Many of the statutory references that precede it are similarly broad. For example, 10 U.S.C. §688 allows a reservist to be ordered to active duty "at any time," without regard to whether the active duty is in support of a contingency operation.

The Reservists Pay Security Act's interaction with declared national emergencies was no surprise to Congress. Far from being an "implausible" result,

Adams, 3 F.4th at 1380, the Act's breadth was foreseen and intended.

* * *

The Reservists Pay Security Act was written to prevent members of the National Guard and Reserves 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 reverse the Federal Circuit's erroneous interpretation.

CONCLUSION

The Federal Circuit's decision should be reversed.

Respectfully submitted,

SARAH KELLY-KILGORE
HOLLAND & KNIGHT LLP
4675 MacArthur Ct.
Ste. 900
Newport Beach, CA 92660

CHAD VANDERHOEF
HOLLAND & KNIGHT LLP
100 North Tampa St.
Ste. 4100
Tampa, FL 33602

CHAZZ FREEMAN
HOLLAND & KNIGHT LLP
701 Brickell Ave
Ste. 3300
Miami, FL 33131

TIMOTHY TAYLOR
Counsel of Record
HOLLAND & KNIGHT LLP
1650 Tysons Blvd.
Ste. 1700
Tysons, VA 22102
(703) 720-8600
timothy.taylor@hklaw.com

SARAH MOLINOFF
HOLLAND & KNIGHT LLP
601 SW Second Ave.
Ste. 1800
Portland, OR 97204

Counsel for Amici Curiae

August 26, 2024