No. 23-861

In the Supreme Court of the United States

NICK FELICIANO, PETITIONER,

v.

DEPARTMENT OF TRANSPORTATION

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

REPLY BRIEF FOR THE PETITIONER

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A reservist is entitled to differential pay whenever "call[ed] or order[ed] to active duty under * * * a provision of law referred to in [10 U.S.C.] section 101(a)(13)(B)." 5 U.S.C. § 5538(a). Section 101(a)(13)(B) refers to several provisions of law by title and section number and to "any other provision of law during a war or during a national emergency declared by the President or Congress." Any speaker of ordinary English would immediately know the rule of decision from the statute's plain text. Even if the text were not clear, the statute's structure, context, legislative history, and the pro-veteran canon all confirm that differential pay is available to any reservist ordered to duty while a war or national emergency is ongoing.[1]

[1] The Special Counsel, who enforces the Uniformed Services Employment and Reemployment Rights Act (USERRA) as it applies to federal employees, has recently gone on the record supporting petitioner in this case. *See* Hampton Dellinger, *Opinion: Federal Employees Should Retain Rights to Reservist Differential Pay*, Military Times, Oct. 23, 2024, https://bit.ly/4eYzBgo ("[T]he pro-military benefits canon and

The government's defense of the result in *Adams* v. *DHS* has required a series of fallbacks as every successive position has collapsed under scrutiny. Having abandoned OPM's guidance, the Federal Circuit's reasoning, and even the arguments it advanced below, the government in its merits brief debuts yet another position. "During," in its view, requires a "substantive connection" with a national emergency. Resp. Br. 14. And the government now contends it is not the "provision of law" under which a reservist is "order[ed] to active duty" that matters, 5 U.S.C. § 5538(a), but instead whether the government's orders calling a reservist to active duty "note [that] they are in support of a contingency operation." Resp. Br. 11. The government's latest position is not only counter-textual; it is impossible to square even with *Adams*. See 3 F.4th 1375, 1379 (Fed. Cir. 2021) ("§ 5538(a) does not entitle a claimant to benefits when they are activated 'in support' of a contingency operation, only when they are directly called to serve in a contingency operation"). And that position would give *the government* unilateral discretion to determine whether any given reservist should receive differential pay.[2]

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congressional intent lead me to the conclusion that the differential pay statute should be read to ensure that all civilian federal employee reservists who serve are granted differential pay whenever a war or national emergency is ongoing.")

[2] The government admits that under its new interpretation, petitioner is "entitled to differential pay." Resp. Br. 36. But the government faults petitioner for not anticipating that the government would take this novel position and contends that even if the Court were to adopt it, the Court still should affirm. Resp. Br. 36-38. If the Court adopts an interpretation of the statute inconsistent with the Federal Circuit's and has any doubt about petitioner's entitlement to differential pay, it should vacate and remand for the court of appeals to apply the correct legal standard in the first instance.

The government's latest fallback stands on no firmer ground than the positions it has struck before. Congress used an ordinary word here to mean what "is surely [its] most natural reading." *United States* v. *Ressam*, 553 U.S. 272, 274 (2008). "During" means "during." The Court should reject the government's latest position of convenience and reaffirm the principle that when Congress writes a statute that has a clear meaning, courts must follow the text where it leads. The decision below should be reversed.

ARGUMENT

I. PLAIN MEANING DECIDES THIS CASE

The government must provide differential pay when a reservist is "call[ed] or order[ed] to active duty under * * * a provision of law referred to in section 101(a)(13)(B)." 5 U.S.C. § 5538(a). Section 101(a)(13)(B) refers to several provisions of law and "any other provision of law during a war or during a national emergency declared by the President or Congress." So long as the call to active duty is during a war or a national emergency, a reservist activated under any provision of law is thus entitled to differential pay.

A. The only available reading of the word "during" in this statute is temporal. The statute asks whether a "provision of law" is "referred to" in 10 U.S.C. § 101(a)(13)(B)—if it is, differential pay is owed. Section 101(a)(13)(B) refers to "any" "provision of law" "during a war or during a national emergency declared by the President or Congress." As petitioner's brief explained, Pet. Br. 16-17, the statutory scheme never uses "during" to refer to the reservist or his service, only to the provision of law at issue. Whether the reservist has been called to active duty under a provision of law "referred to" in § 101(a)(13)(B) depends exclusively on time.

Even if the temporal meaning of "during" were not the only interpretation available here, it would still be the most natural one. The government does not dispute that the word "during" virtually always denotes a purely temporal connection in ordinary English. See Resp. Br. 14-17, 30. As the government explained in its brief in *United States* v. *Ressam*, "[t]he plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of'"; "[i]t does not normally mean 'at the same time and in connection with.'" U.S. Br. at 13-14, *United States* v. *Ressam*, 553 U.S. 272 (2008) (No. 07-455), 2008 WL 189554 (quoting *United States* v. *Rosenberg*, 806 F.2d 1169, 1178-79 (3d Cir. 1986)).

A purely temporal meaning makes good sense in this context. No clear line separates service that has a "substantive connection" to a war or national emergency from service that does not. And apart from its own say-so in a reservist's activation orders based on its expectations of the duty to be performed, the government does not even purport to identify such a line. A reservist might, for example, be called to do logistics at the Pentagon to facilitate the flow of troops and materiel to the battlefield; or a reservist might conduct security operations at home to free up the servicemembers who ordinarily do those duties for combat operations overseas. As the Defense Department has recognized, even reservists called upon to perform routine functions during a national emergency support the effort by "conserv[ing] resources for other critical needs." Dep't of Def., Report of the Commission on Roles and Missions of the Armed Forces 2-23 (1995). Given the wide variety of ways reservists contribute to overall military effectiveness during times of war or national emergency, it would be unnatural to read "during" in the crabbed and unnatural way the government urges.

Phrases like "wartime" and "time of national emergency" typically denote periods of extraordinary events with nationwide scope and effect. No ordinary speaker would think the question "Did you serve during the war?" concerned only participation in contingency operations. And no ordinary speaker would think the question "Were you on active duty during the COVID-19 emergency?" asked only about pandemic-related duties. A sentence including the word "during" might suggest a substantive connection where a temporal one alone would be nonsensical (such as asking whether an attorney argued "during" a court hearing, Resp. Br. 14). But here the word's ordinary meaning is its most natural one by far.

This statute is just like the one at issue in *United States* v. *Ressam*, 553 U.S. 272 (2008). Section 844(h) of Title 18 enhances the criminal sentence of a person who "carries an explosive during the commission of any felony." In *Ressam* the Court readily concluded that "the most natural reading of" during in that statute is temporal and that there is "no need to consult dictionary definitions of the word 'during'" to see that. *Ressam*, 553 U.S. at 274. The same is true in this case.

B. The government contends that "during" can sometimes connote a substantive connection, citing a series of examples that bear no resemblance to the operative language here. Resp. Br. 13-17; *id.* at 15 (listing examples). But even in the government's examples the word "during" does none of the work. Instead, each of those sentences, taken as a whole, *implies* a substantive connection because only a substantive connection would be meaningful. Using any linking word—even a purely temporal word—would suggest the same connection. To illustrate the point, take each of those examples and replace the word "during" with the word "while"—a word the government recognizes has a solely temporal meaning. See Resp. Br. 13, 15. If a court enters an order

"while" a case is on remand, everyone knows that the order referred to is an order in the remanded case, because otherwise the sentence would impart no useful information. The government's other examples share this feature:

- documents generated "while" an agency is deliberating are documents related to the deliberations;
- records captured "while" engaged in combat operations are related to combat operations;
- disclosures "while" in litigation are related to the litigation;
- radiation exposure "while" engaged in plant operations is related to plant operations;
- hazardous conditions found "while" inspecting a dam are related to the dam.

Resp. Br. 15-16. In each of these examples, a sentence containing the purely temporal word "while" implies a substantive connection because one would have no reason to write the sentence absent such a link.

The statutory scheme here is different, because a purely temporal relationship to a war or national emergency *is* meaningful. That is true in ordinary usage; it is true in how Congress legislates with respect to national emergencies generally; and it is true when considering the role reservists play in bolstering overall military readiness. As the government concedes, numerous statutory authorities turn solely on the existence of a national emergency or state of war. See Resp. Br. 30-31; see also Pet. Br. 19-21 (listing examples).

Even the most cursory survey of federal emergency statutes reveals that Congress has given the Executive Branch countless authorities that apply whenever there is a national emergency—either because they apply "in time

of" national emergency, or because they use "during" in a concededly temporal sense.

For example, as the government concedes, the extraordinary contracting authorities in 50 U.S.C. § 1435 (also known as Public Law 85-804) are available to the President and federal agencies whenever there is *any* ongoing national emergency. Resp. Br. 30. Those authorities apply "during a national emergency declared by Congress or the President," among other times. 50 U.S.C. § 1435. But the Executive avails itself of them even for contracts having nothing to do with any declared emergency. See, *e.g.*, Authorizing the Exercise of Authority Under Public Law 85-804, 79 Fed. Reg. 68,757, 68,757 (Nov. 13, 2014) (authorizing USAID Ebola-related contracting even though no Ebola-related emergency declaration was in effect); Authority to Hold Harmless and Indemnify in Certain Circumstances Under One Contract, 68 Fed. Reg. 19,705, 19,705 (Apr. 17, 2003) (authorizing indemnification on the ground that "[t]here are currently national emergencies that have been declared by the President in accordance with applicable law").

Further examples litter the United States Code. Just in Title 10 alone, in time of national emergency:

- The President may suspend "any provision of law relat[ed] to the promotion, involuntary retirement, or separation of commissioned officers of the Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard Reserve," 10 U.S.C. § 123(a);
- The President may suspend statutory officer strength and distribution in grade requirements, 10 U.S.C. § 527;
- The President may temporarily "appoint any qualified person * * * to any officer grade in the

Army, Navy, Air Force, Marine Corps, or Space Force," 10 U.S.C. § 603;

- Certain retired officers may be ordered to active duty, and time limits on recall service by retired servicemembers do not apply, 10 U.S.C. § 688(f);
- Limitations on the number of retired officers who may be ordered to active duty at any one time do not apply, 10 U.S.C. § 690(c);
- The President may suspend any provision of law related to the promotion, or mandatory retirement or separation, of permanent reserve warrant officers of any armed force, 10 U.S.C. § 12243;
- Officials may commute a court martial sentence of dismissal for any commissioned officer, cadet, or midshipman to reduction to an enlisted grade, 10 U.S.C. § 857 Art. 57(a)(4);
- The President may suspend the operation of statutes governing the authorized strengths and distribution of reserve officers in an active status in the armed forces, 10 U.S.C. § 12006(a);
- Limitations on the size of the Office of the Secretary of the Army, Navy, and Air Force do not apply, 10 U.S.C. §§ 7014(f)(5), 8014(f)(5), 9014(f)(5);
- Restrictions on the number of retired members of the U.S. armed forces who may be ordered to active duty under 10 U.S.C. § 688a do not apply, 10 U.S.C. § 688a(f);
- Minimum funding requirements for the Junior Reserve Officers' Training Corps do not apply if the Secretaries of the military departments decide funding must be allocated elsewhere, 10 U.S.C. § 2031(i)(2)(B);

- More than ten retired flag officers may be on active duty in the Navy, 10 U.S.C. § 8102;
- Reserve officers who are not on active duty list who are ordered to active duty may be considered for promotion, 10 U.S.C. § 14317(e);
- Members of the Fleet Reserve and Fleet Marines Corps Reserve may be ordered to active duty without their consent, 10 U.S.C. § 8385(a).

That Congress routinely enacts statutory authorities that turn solely on the existence of a war or national emergency saps any credibility from the government's argument that Congress could not have done so here. In legislation, as in common parlance, it is the norm to talk about events that happen "during" a war or a national emergency in a purely temporal sense. No sound basis exists to depart from the word's ordinary meaning here.

II. OTHER TRADITIONAL TOOLS OF STATUTORY INTERPRETATION ALSO SUPPORT A TEMPORAL READING

Plain meaning decides this case. But every other tool of statutory interpretation also favors reading "during" in a purely temporal sense here.

A.1. Statutory structure, context, legislative history, and the pro-veteran canon all confirm what the statute's text establishes: "during" requires only a temporal overlap.

Statutory structure and context favor petitioner, because requiring "a fact-intensive *post hoc* review" of a servicemember's duties to determine eligibility for differential pay would contravene the statutory scheme, as the government does not dispute. Resp. Br. 11-12, 35-36. The government's only response is that its characterization of a reservist's service in an activation order should be dispositive, and that a reservist may ask the government for "clarification" in appropriate cases.

Id. at 11. But leaving differential pay to the government's *ipse dixit* plainly contradicts the statute's mandate that qualifying reservists receive it. And the possibility that further review or "clarification" may be required thwarts the statute's command that reservists receive differential pay at the same time and in the same manner as basic pay. 5 U.S.C. § 5538(c). Such a reading would frustrate financial planning for reservists and their families who need to know their household budget at the outset of a deployment, not sometime later after the government has considered a request for "clarification."

Congress has also consistently understood the statute to mean what its plain language says. Pet. Br. 22-25; *Amici Curiae* Members of Cong. Cert. Br.; contra Resp. Br. 31-34. Indeed, the government concedes (as it must) that the Congressional Budget Office ("CBO") score for the statute—as well as those for numerous others involving the same statutory cross-reference—unequivocally supports petitioner's interpretation. Resp. Br. 34; see also Pet. Br. 23-25.

Moreover, as petitioner's brief explained, Pet. Br. 26-30, reading the statute to require a substantive connection between an individual reservist's orders and the emergency will vastly and retroactively expand the scope of criminal liability for private employers that provide differential pay under 18 U.S.C. § 209(h). The exemption in § 209(h) is identical to the mandate in § 5538: each cross-references 10 U.S.C. § 101(a)(13)(B) in the same manner. If the government's position about the availability of differential pay were right, it would greatly restrict the availability of differential pay not only to *federal* employee reservists, but to virtually all reservists in the United States, even those whose private employers wish to pay them. That result is untenable, especially where, as here, any interpretation by this Court could create unexpected retroactive criminal liability for

employers across the country. The government does not so much as mention § 209(h), much less explain why unexpected criminal liability is not an inevitable consequence of its reading.

Finally, the pro-veteran canon favors petitioner because, even if there were "interpretive doubt," the pro-veteran canon would require resolving any ambiguity in petitioner's favor. Contra Resp. Br. 34-35.

2. The government's efforts to undermine these arguments fail.

a. Petitioner's brief established that the statutory structure is radically inconsistent with the "fact-intensive *post hoc* review" that the government's "substantive connection" test would require. Pet. Br. 17-18. The government does not disagree, and in fact, appears tacitly to concede that its approach would be deeply at odds with the statutory scheme.

The government has, instead, contorted its entire case to avoid this argument. Now, the government insists that its newfound reading of the statute avoids the structural anomaly "a fact-intensive *post hoc* review" would create. That is so, the government says, because it will simply treat its own characterization in a reservist's orders as dispositive in determining whether the reservist was ordered to active duty under a provision of law referred to in § 101(a)(13)(B) "during" an emergency. Resp. Br. 11-12, 13-14, 23-25, 29, 35-36.[3] The government's attempt to substitute its own discretion for

[3] The government's position means that the petitioner in *Flynn* v. *Department of State*, No. 23-868 (U.S.)—who left his position at the State Department to serve at the Pentagon and whose orders reference an ongoing national emergency—is also entitled to differential pay. See Petition for a Writ of Certiorari at 3-5, *Flynn* v. *Department of State*, No. 23-868 (U.S.) (explaining orders and service).

any legal standard is a marked departure from the Federal Circuit, which held below that even a reservist whose orders reference contingency operations must present "evidence that [the reservist] was 'directly involved' in a contingency operation." Pet. App. 3a; see *Adams*, 3 F.4th at 1379-1380. And that claim has absolutely no basis in the textual interpretation of the statute (and the word "during") that the government now advances. The government provides no explanation of how it gets from its interpretation of "during" to its conclusion that a reservist is ordered to active duty under a provision of law referred to in § 101(a)(13)(B) "in the course of" a national emergency only when the government says so in its order calling that reservist to active duty.

b. Petitioner's brief established that the legislative history of the differential pay statute overwhelmingly points to an intent by Congress to make differential pay broadly available to all reservists called to active duty while an emergency is ongoing. Pet. Br. 22-25.

The government contends that this legislative history is irrelevant because the word "during" appears in § 101(a)(13)(B) rather than directly in § 5538. Resp. Br. 32. But the government concedes that the CBO score for the bill—which necessarily must account for how the differential pay statute operates within the broader statutory scheme—is flatly inconsistent with the government's interpretation. Resp. Br. 33-34. As members of this Court have recognized, CBO scores are "very important for Congress." Oral Arg. Tr. 69:19-70:2, *Dep't of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42 (2024) (No. 22-846) (Kavanaugh, J.). And the CBO's analyses of both the differential pay statute and other statutes involving the same cross-reference unmistakably show that Congress understood it was mandating differential pay for all reservists called to

active duty while a national emergency is ongoing. See Pet. Br. 23-25.

B. To bolster its latest interpretation, the government offers a hodgepodge of arguments that it contends show that the statute requires a substantive connection. None is persuasive.

1. The government argues that reading the word "during" in § 101(a)(13)(B) to have a purely temporal meaning would change the number of military operations that qualify as "contingency operation[s]" in other applications having nothing to do with differential pay. See Resp. Br. 10-11, 17, 22. That argument is fanciful. Even during a war or a national emergency, a contingency operation must still be "a military operation" and must still be one that "results in" reservists being called to active duty under a particular provision of law. Those are significant limitations (ones that do not apply when a statute merely cross-references the provisions of law "referred to" in § 101(a)(13)(B)). The government identifies no set of facts under which petitioner's interpretation would change whether any real-world military operation qualifies as a contingency operation.

The government also overstates the significance of enlarging the number of contingency operations for the purpose of other applications of § 101(a)(13)(B). Even if reading "during" to have a purely temporal meaning changed the number of "contingency operations," the government articulates no reason that should be any cause for concern, much less a sound basis to disregard the statute's plain meaning here.

2. The government argues that affording § 101(a)(13)(B)'s catchall provision its most natural reading would render the enumerated activation authorities superfluous. Resp. Br. 17-20. It would not.

At its core, the government's argument is that, because the United States has been in a state of national emergency for decades, Congress could have achieved the same practical result by expressly providing differential pay to "all reservists" called to active duty. Resp. Br. 19. But that argument is fundamentally flawed as a matter of both logic and congressional design. That the United States has been in a time of national emergency for several decades is a *historical* fact about the world, but it is not a *necessary* fact about the world. Congress or the President could end existing national emergency declarations at any time. And if those emergencies ended, differential pay would be limited to calls to active duty under the enumerated provisions in the statute. Those enumerated provisions therefore have independent effect.

Congress's enactment of countless other statutory authorities that turn solely on the existence of a national emergency demonstrates that, in Congress's view, this limitation is a salient one. See pp. 6-9, *supra*. As noted above—and as the government concedes—Congress has enacted numerous statutes (like 50 U.S.C. § 1435) that operate in the exact same manner that this one does—*i.e.*, that use a purely temporal reference to national emergencies, notwithstanding that some emergency declarations have been continuously in effect for many years. Under the government's unprecedented theory of superfluity, the *only* limitation on the exercise of emergency powers under each of these statutes would also be superfluous. That view is impossible to square with Congress's past practice and vast portions of the United States Code.

3. As a last refuge, the government argues that later-enacted statutes support its position. The government points to legislative amendments adding sections 12304a, 12304b, and 14 U.S.C. § 3713 as enumerated bases for differential pay that it contends show Congress does not

consider "during" to have a temporal meaning here. Resp. Br. 20-22. That argument goes nowhere.

a. Post-enactment history is the least probative indicium of congressional intent, and this Court has cautioned against placing too much stock in it. See *Marvin M. Brandt Revocable Trust* v. *United States*, 572 U.S. 93, 109 (2014) (explaining that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (quoting *United States* v. *Price*, 351 U.S. 304, 313 (1960))).

But even if later amendments to the statute could shed light on its meaning, the government is incorrect that adding additional provisions of law as independent bases for awarding differential pay would have been "unnecessary" if "during" has a purely temporal meaning. Resp. Br. 20-21. The enumeration of those statutes matters because if existing national emergencies end, only reservists activated under enumerated provisions would be eligible for differential pay. Enumerating those authorities ensures that reservists activated under them will remain eligible for differential pay. Thus, this argument—like the government's superfluity argument—rests on the flawed view that Congress treats the continuing existence of national emergencies as an immutable feature of American governance.

Moreover, since 2009 Congress has had an especially powerful incentive to keep the enumerated provisions up to date. In 2009, OPM issued guidance that differential pay was flatly unavailable unless a reservist was called to active duty under an *enumerated* provision in § 101(a)(13)(B)—a position the government refused to disclaim as recently as oral argument below. See Resp. Br. 25 n.4 (explaining it took a "more restrictive view"); see also Off. of Pers. Mgmt., Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538, at 18. Reservists thus had to contend with agencies

refusing to provide them differential pay for qualifying service under the catchall; the only way they could avoid enduring a pay cut for their active-duty service was to bring an action with the MSPB. See Pet. Br. 5-6 (documenting MSPB actions). By promptly enumerating additional statutory authorities, Congress made it easier for reservists called up under them to access differential pay without litigation. Congress's legislative amendments since 2009 can be explained by OPM's interpretation of the statute.

b. That OPM's guidance incorrectly excluded the Coast Guard provision now codified at 14 U.S.C. § 3713 from differential pay even for reservists activated during a national emergency explains why Congress made entitlement to pay under that provision retroactive. See Resp. Br. 21 (arguing the retroactive amendment would have been "entirely unnecessary"). Rather than force reservists to make futile requests that, under OPM's guidance, their employing agencies would simply have denied, Congress instead chose to make that provision an enumerated basis for differential pay and to make that entitlement retroactive. Given the government's longstanding recalcitrance on differential pay, it is unsurprising that Congress "employed a belt and suspenders approach" in later amendments to ensure prompt payment. *Atl. Richfield Co.* v. *Christian*, 590 U.S. 1, 14 n.5 (2020).

4. The government claims that it would yield "anomalous results" to give "during" its temporal meaning here. Resp. Br. 22. That argument is unpersuasive, too.

The government is incorrect that it is anomalous for certain statutes to be triggered merely because there exists an unrelated national emergency. Resp. Br. 22. As the many statutes listed above show, see pp. 6-9, *supra*—all of which are triggered "in time of" national

emergency—Congress routinely drafts legislation using exactly the same temporal triggering condition as the one present here. Under the government's view of this case, all those statutes share the same supposed anomaly as the differential pay statute: each remains in effect so long as there is any declared national emergency. If anything, the litany of similar provisions throughout Title 10 demonstrates that the most common way Congress legislates with respect to national emergencies is precisely the way it has done here—purely with respect to time.

The government is also incorrect that it creates any kind of anomaly for reservists to receive differential pay when they are called to active duty for training or a court martial. Resp. Br. 22-23. Soldiers are already paid their military salaries while they are training or undergoing a court martial before conviction.[4] There is nothing anomalous about Congress matching reservist's civilian salaries when those activities occur during a national emergency—particularly since basic training for new

[4] Service members are entitled to receive pay according to their pay grades and years of service if they are "on active duty in a pay status" and "[n]ot prohibited by law from receiving such pay." 7A U.S. Dep't of Def., DoD 7000.14 – R, *Financial Management Regulation*, Ch. 1, sec. 3.1 (May 2024). "A forfeiture of pay or allowances" resulting from being court martialed "shall be applicable to pay and allowances accruing *on and after the date on which the sentence takes effect.*" 10 U.S.C. § 857(a)(1) (emphasis added). If a service member is in military confinement and awaiting trial by court martial, they are presumed innocent and "entitled to otherwise proper credits of pay and allowances." See 7A U.S. Dep't of Def., DoD 7000.14 – R, *Financial Management Regulation*, Ch. 1, Table 1-12. Although a service member could have pay reduced because of a sentence imposed by a court martial, the Department of Defense's Financial Management Regulation demonstrates that the default assumption is that basic pay accrues even while a servicemember is confined. See 7A Dep't of Def., DoD 7000.14 – R, *Financial Management Regulation*, Ch. 1, sec. 4.2.6.

servicemembers typically spans several months, and thus failure to provide differential pay during that period could cause hardship to their families.

III. THE COURT SHOULD REVERSE OR VACATE THE COURT OF APPEALS' JUDGMENT

If the Court adopts the government's interpretation of the differential pay statute, it should vacate and remand. Contra Resp. Br. 36-38. The court of appeals held that petitioner was not entitled to differential pay even though it recognized that he was ordered to active duty in support of a contingency operation. See Pet. App. 1a-6a. The government concedes that was wrong: had the court of appeals applied the government's current interpretation, it would have reached the opposite conclusion. Resp. Br. 36-37. And in light of the Federal Circuit's holding in *Adams* that orders indicating a reservist's service was "in support of" a contingency operation are insufficient to warrant differential pay, challenging that decision (which the government only belatedly conceded was wrong) marked petitioner's only path to relief before that court. See 3 F.4th at 1379. This Court should adopt petitioner's interpretation of the statute and reverse. But at a minimum, the Court should vacate the decision below and remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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