No. 23-861

IN THE

Supreme Court of the United States

NICK FELICIANO,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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

BRIEF *AMICUS CURIAE* OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF PETITIONER FELICIANO

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INTEREST OF THE AMICUS[1]

The American Federation of Government Employees ("AFGE") is a national labor organization. On its own and in conjunction with its affiliated councils and locals, AFGE represents over 750,000 civilian employees, including many military reservists, in agencies and departments across the federal government and the District of Columbia. AFGE represents federal employees under the auspices of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1113 (1978), ("CSRA"). The CSRA grants covered federal employees the right to bargain collectively though the labor organization of their choosing and to challenge agency employment actions taken against them, either through a representative or on their own.

AFGE's representation of federal employees extends to administrative litigation before numerous Executive agencies, such as the United States Merit Systems Protection Board ("MSPB"), the United States Equal Employment Opportunity Commission, the United States Federal Labor Relations Authority, and the United States Office of Special Counsel. AFGE's representation includes collective bargaining and representation in grievance arbitrations arising under Chapter 71 of the CSRA, the Federal Service Labor-Management Relations Statute, 5 U.S.C. Ch. 71. *See*, *e.g.*, *Am. Fed'n of Gov't Emps., et al., v. Fed. Labor Relations Auth.*, 25 F.4th 1 (D.C. Cir. 2022). AFGE's representation likewise includes representing employees before the MSPB in adverse action appeals arising under Chapters 75 and 77 of the CSRA, per-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE or its counsel made a monetary contribution to the preparation or submission of this brief.

taining to adverse employment actions and appeals, and in claims arising under the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat 3149 (1994). *See, e.g.*, *Brown v. Dep't of Defense*, 121 M.S.P.R. 584 (2014), vacated by *Brown v. Dep't of Defense*, 646 Fed. App'x 989 (Fed. Cir. 2016); *Sininger v. Dep't of the Army*, 2008 WL 4923781 (MSPB 2008).

Because each of the administrative forums mentioned above has its own provision for seeking judicial review at the conclusion of the administrative process, AFGE also provides representation before federal district courts and federal courts of appeals across the United States, including the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). *See, e.g.*, *Am. Fed'n of Gov't Emps., Nat'l Council of HUD Locals, Council 222 v. Fed. Labor Relations Auth., et al.*, 2022 WL 22270037 (D.D.C. 2022); *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015); *Borza v. Dep't of Commerce*, 774 Fed. App'x 653 (Fed. Cir. 2019); *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332 (Fed. Cir. 2003).

AFGE therefore has a vested interest in this matter and resolution of the question presented is important. An erroneous reading of 5 U.S.C. § 5538(a) would be detrimental to many of the federal employees whom AFGE represents.

SUMMARY OF THE ARGUMENT

The Federal Circuit continues to incorrectly and punitively construe 5 U.S.C. § 5538(a), authorizing differential pay for reservists called up to active-duty service, as requiring a "direct" connection between a reservist's service and a declared national emergency. The statute contains no such requirement. Instead, § 5538(a) simply requires a reservist to be called or

ordered to active duty "during" a declared national emergency. That is all the statute requires. The Federal Circuit's continued error requires this Court's correction because it improperly denies benefits granted to reservists by Congress.

In an unreported and short opinion, the Federal Circuit denied the petition filed by Feliciano because there was no "connection between [his] voluntary military service and the declared national emergency." *Feliciano v. Dep't of Transp.*, 2023 WL 3449138 at *2-3 (Fed. Cir. 2023) ("*Feliciano*"). It did so based on its earlier decision in *Adams v. Dep't of Homeland Sec.*, 3 F.4th 1375 (Fed. Cir. 2021) ("*Adams*"), which held that reservists activated under 10 U.S.C. § 12301(d) are not entitled to differential pay unless "they are directly called to serve in a contingency operation." *Id.* at 1380.

The *Adams* court's construction of § 5538(a) ignores the statute's plain text and adds requirements wholly unsupported by § 5538(a) or the cross-referenced statutory provisions. Section 5538(a) entitles reservists to differential pay when they are absent from their federal position "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). And 10 U.S.C. § 101(a)(13)(B) includes a catch-all provision for "any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B). Read together, those statutory provisions simply require a reservist to be called or ordered to active-duty service "during" the pendency of a declared national emergency.

The decision in *Adams* is also inconsistent with this Court's long-held pro-veteran canon of construction providing that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries'

favor." *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21, n.9 (1991)). Instead of construing § 5538(a) in favor of reservists, the *Adams* court placed a burden on reservists, i.e., requiring them to establish a connection between their service and the national emergency; a connection not contained in or supported by the statutory text. Congress has never sought to punish or disadvantage an individual on the basis of that individual's military service, be it active duty or reserve. But this is precisely what the Federal Circuit's rulings do because they disadvantage reservists who earn less in their military role than in their civilian employment by casting aside the pay parity that Congress clearly intended.

Finally, the erroneous decision in *Adams* harms reservists and their families by forcing them to take a pay cut when they are most in need. As a result of the Federal Circuit's incorrect statutory interpretation reservists and their families have less money to cover groceries, rent, and other expenses when called or ordered to active-duty service.

Consequently, because entitlement to differential pay under § 5538(a) is not limited to active-duty service "directly" connected to a declared national emergency, and because the Federal Circuit's decision in *Feliciano* hinged on its faulty decision in *Adams*, this Court should reverse the judgment of the Federal Circuit.

ARGUMENT

I. The Federal Circuit's Punitive Interpretation of 5 U.S.C. § 5538(a) Must Be Reversed

The Federal Circuit's erroneous interpretation of § 5538(a) in *Adams*, and its progeny, cannot be squared

with the plain text of the statute or this Court's pro-veteran canon. The Federal Circuit's failure to take a broad interpretation of the statute when reservists sacrifice so much should not and cannot stand. Further, the *Adams* court's cramped reading of § 5538(a), moreover, needlessly harms thousands of reservists.

a. The *Adams* Court's Construction of § 5538(a) Is Contrary to the Plain Text

The *Adams* court's ruling that federal employees activated under 10 U.S.C. § 12301(d) are not entitled to differential pay under § 5538(a) unless "they are directly called to serve in a contingency operation[,]" finds no quarter in the statutory text. *See Adams*, 3 F.4th at 1379. Neither § 5538(a) nor the cross-referenced statutory provisions contain any such requirement. Section 5538(a), for example, provides that federal employees are entitled to receive differential pay if they are "absent from [their federal position] in order to perform active duty * * * 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). 10 U.S.C. § 101(a)(13)(B), on the other hand, enumerates several statutory provisions authorizing the federal government to, *inter alia*, call or order reservists to active duty and includes a catch-all provision for "any other provision of law during a war or during a national emergency declared by the President or Congress."

Consequently, neither § 5538(a) nor the catch-all provision in 10 U.S.C. § 101(a)(13)(B) requires a direct connection between the active-duty service and a war or declared national emergency. Rather, those statutory provisions require nothing more than the absence of reservists from their federal position because they were called or ordered to active duty during the pendency of a war or a declared national emergency. The Federal

Circuit's choice to read a substantive requirement into § 5538(a) and the cross-referenced statutory provisions is, thus, wholly unsupported by the plain text.

b. The *Adams* Court's Interpretation of § 5538(a) Conflicts With This Court's Pro-veteran Canon

The Court has long held that when Congress enacts laws granting rights to veterans or members of the Armed Services the legislation "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S 275, 285 (1946). In so doing, the Court has created a canon of construction providing "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-21, n.9 (1991)).

Rather than construing § 5538(a) to the benefit of members of the Armed Services, the *Adams* court's interpretation disadvantaged reservists by creating a burden of proof unsupported by the statutory text. *See Nordby v. Soc. Sec. Admin.*, 67 F.4th 1170, 1173-75 (Fed. Cir. 2023) (requiring claimants to demonstrate a substantive "connection between the voluntary military service and the declared national emergency"). In so doing, the *Adams* court further disadvantaged reservists by introducing substantial uncertainty concerning their entitlement to differential pay. Reservists have little, if any, control over their duties once they are ordered to active-duty service and they are not well-positioned to determine whether those duties will entitle them to differential pay. Following *Adams*, reservists have lost the ability to make an informed choice concerning the fi-

nancial burden they will incur by consenting to activation under 10 U.S.C. § 12301(d).

It beggars belief that Congress intended to disincentivize reserve service in this way. Indeed, Congress has routinely legislated to ameliorate the employment and financial burdens of military service. For example, Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 with the express purpose of "encourag[ing] noncareer service[,] * * * minimiz[ing] the disruption to the lives of persons performing service[,] * * * [and] prohibit[ing] discrimination against persons because of their service[.]" 38 U.S.C. § 4301(a); *see also Hernandez v. Dep't of Air Force*, 498 F.3d 1328, 1331 (Fed. Cir. 2007) (applying USERRA's predecessor statute which sought to minimize the burdens caused by service in the reserves). As the Federal Circuit has failed to construe § 5538(a) to the benefit of reservists, the court's judgement in *Feliciano* should be reversed.

c. The Federal Circuit's Decision in *Adams* Harms Reservists and Their Families

The Federal Circuit's ruling in *Adams* deprives reservists of funds needed to care for themselves and their families during a time of great hardship. The loss of pay reservists may suffer when called or ordered to active duty means that they and their families have less money for groceries, rent, and household expenses. Moreover, when reservists are activated they can incur additional expenses further increasing the monetary burden on veterans and their families. When deployed, reservists cannot, for example, provide childcare, maintain their home, or otherwise assist with the vicissitudes of day-to-day life. Instead, reservists must often hire someone to perform these

tasks for them. It is unconscionable to deny reservists and their families the differential pay clearly granted to them by Congress considering the many sacrifices they make for the country.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

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