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 FOR TEXAS, SOUTH CAROLINA, 19 OTHER STATES, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are home to tens of thousands of reservists who play a vital role in their local communities, as well as across the nation and the globe. Federal law entitles such reservists who are also employed by the federal government as civilians to differential pay while they serve in active duty during a war or national emergency. Because the U.S. Court of Appeals for the Federal Circuit has denied Petitioner Nick Feliciano and other reservists the statutory benefits they have earned, this case implicates Amici's interests.[1]

SUMMARY OF ARGUMENT

Reservists play a key role in our national defense. Differential pay—that is to say, pay that makes up the difference between a reservist's civilian salary and active-duty pay—gives reservists some financial security while they protect the physical security of all Americans. Yet for several years now, the Federal Circuit has issued a string of opinions denying differential pay to reservists just because they did not serve directly in a contingency operation. Neither text, context, nor common sense supports that rule. Instead, each confirms that a reservist called to active duty during a war or declared national emergency is entitled to differential pay.

I. The Federal Circuit and the federal government each has its own theory as to why Feliciano is not entitled to differential pay under 5 U.S.C. §5538. The court of appeals requires a reservist to show that he has been called to active duty that meets the statutory definition of a "contingency operation" to receive differential pay. By contrast, the federal government argues that a

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

reservist is entitled to differential pay only if his active duty service has some (undefined) connection beyond a temporal overlap to a war or declared national emergency. Both are mistaken. The statute unambiguously allows a reservist who is called to active duty during a war or declared national emergency to receive differential pay from his federal civilian employer, regardless of the precise duties he will be performing.

The Federal Circuit misunderstood the connection between 5 U.S.C. §5538 (the differential-pay statute) and 10 U.S.C. §101(a)(13)(B), which it cross-references. Although section 101(a)(13)(B) defines "contingency operation," section 5538(a) merely incorporates by reference "provision[s] of law referred to in section 101(a)(13)(B)." Section 5538(a) thus does not require that a reservist serve in a contingency operation to receive differential pay because the provisions of law referred to in section 101(a)(13)(B) do not. In particular, Petitioner Feliciano falls under that section's catchall provision, which sweeps in any lawful call or order to active duty during a war or declared national emergency.

The Federal Circuit also erred with respect to the *ejusdem generis* canon. That canon is irrelevant here because the statute is unambiguous. And even if the canon were relevant, the Federal Circuit misapplied it. The common thread running through the provisions enumerated in section 101(a)(13)(B) is not that they involve service directly in a contingency operation, but rather that they involve augmenting military capabilities in response to a national crisis. Feliciano's voluntary activation during a war or national emergency plainly falls within that category.

The federal government does not defend the Federal Circuit's reasoning. Instead, it asks the Court to adopt an idiosyncratic reading of the term "during" that implies more than temporal overlap. But no definition of the term "during" requires the substantive connection that the government argues for, and the context of the differential-pay statute does not support it. The differential-pay statute promises to provide financial security to those activated under "any . . . provision of law during a war or during a national emergency." 10 U.S.C. §101(a)(13)(B). No rule of common sense or common experience supports an inference that this language ties differential pay to anything more than contemporaneouty between a reservist's activation orders and a war or national emergency. This is not a situation—as with an inquiry about an attorney's argument "during" a court hearig—in which context suggests that the speaker's use of the term "during" is both temporally (the speaker wants to know about something that happened at the time of the hearng) and substantively (the speaker wants to know what was said at the hearing) limiting.

The federal government also confuses an activation order with the active-duty service that activation order precipitates. The differential-pay statute is keyed to the former, not the latter. *See* 5 U.S.C. §5538(a) (entitling a federal civilian employee to differential pay "who is absent from a position of employment with the Federal Government in order to perform active duty service in the uniformed services *pursuant to a call or order to active duty* under" identified statutory provisions).

II. The nature of the modern military gives important context to the text of section 5538. Today's armed forces are engaged in long-term, worldwide

security operations that require immense logistical support. Whenever a servicemember leaves his or her normal post to serve on the front lines, someone must take that servicemember's place. And that person may be a reservist. That is why getting the answer right in this case is so important. Denying reservists the benefits they have earned makes it difficult to recruit and retain dedicated and talented people. The Federal Circuit's decision and the federal government's arguments thus threaten both the livelihood of reservists and our national defense.

ARGUMENT

I. The Differential-Pay Statute's Text Controls.

The Court can and should resolve this case based on statutory language alone. Congress clearly provided that reservists must receive differential pay from their federal civilian employers whenever they are called or ordered to active duty during a war or declared national emergency, regardless of the precise role they will play. The Federal Circuit's contrary test is wrong, as is the federal government's.

A. The statute's language is clear.

"We start where we always do: with the text of the statute." *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (quoting *Van Buren v. United States*, 593 U.S. 374, 381 (2021)) (alterations omitted). The differential-pay statute provides that:

> [1] An employee who is absent from a position of employment with the Federal Government
>
> [2] in order to perform active duty in the uniformed services
>
> [3] pursuant to a call or order to active duty under

> [a] section 12304b of title 10 or
>
> [b] a provision of law referred to in section 101(a)(13)(B) of title 10
>
> shall be entitled, while serving on active duty, to receive [differential pay].

5 U.S.C. §5538(a). In short, a federal civilian employee is entitled to differential pay if called to serve under identified Title 10 authorities, including "a provision of law referred to in section 101(a)(13)(B)." *Id.*

Section 101(a)(13)(B), in turn, contains one half of the statutory definition of the term "contingency operation." The entirety of the definition reads:

> (13) The term "contingency operation" means a military operation that—
>
> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against enemies of the United States or against an opposing military force; or
>
> (B) results in a call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304(a), 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or 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).

Putting the two statutes together, then, an activated federal civilian employee is entitled to differential pay if called to active duty under "[the enumerated provisions

of sub-part B] or any other provision of law during a war or during a national emergency declared by the President or Congress." *Id.*

That straightforward textual analysis controls here. Feliciano is a federal civilian employee called to active duty under a "provision of law during a war or during a national emergency." *Id.* As such, he was "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). He thus "shall be entitled" to differential pay. *Id.*

The Federal Circuit and the federal government each offer alternative, albeit very different, theories for why the text is not so straightforward. Neither holds up.

B. The Federal Circuit misread section 5538's cross-reference.

According to the Federal Circuit, a federal civilian employee "must have served pursuant to a call to active duty that meets the statutory definition of contingency operation" to receive differential pay. *Adams v. Dep't of Homeland Sec.*, 3 F.4th 1375, 1377, 1378 (Fed. Cir. 2021); *accord Nordby v. SSA*, 67 F.4th 1170, 1173 (Fed. Cir. 2023). Not so.

1. To begin, the Federal Circuit conflates a military operation with a call to active service. "The term 'contingency operation' means a military operation." 10 U.S.C. §101(a)(13). A military operation is not the same thing as the activation orders that supply manpower for that operation. And the differential-pay statute ties differential pay to the latter, not the former.

Congress could very easily have written the differential-pay statute to benefit those absent from their federal civilian jobs "pursuant to a call or order to active duty *in a contingency operation*." But that's not the statute Congress wrote. It provided differential pay for reservists "call[ed] or order[ed] to active duty under . . . a provision of law *referred to in*" one half of the statutory definition of "contingency operation." 5 U.S.C. §5538(a) (emphasis added). Appropriately, then, all of the referenced provisions are activation authorities. They are statutory provisions under which a reservist could be "call[ed] or order[ed] to, or retain[ed] on, active duty." 10 U.S.C. §101 (a)(13)(B). None requires service in a contingency operation.

2. The Federal Circuit's rule also depends on an erroneous application of the *ejusdem generis* principle to limit section 101(a)(13)(B)'s general term—"or any other provision of law during a war or during a national emergency"—to include only those provisions that have "a connection to the declared national emergency." *Adams*, 3 F.4th at 1379–80. But *ejusdem generis* has no application when, as here, a statute's meaning is plain.

Even if *ejusdem generis* applied, the Federal Circuit failed to identify the trait common to each of the specifically enumerated provisions preceding the general term Petitioner relies on. Indeed, several of the enumerated provisions do not even mention direct involvement in an ongoing emergency. Attending to the text's subject and purpose, an ordinary English speaker would understand the enumerated provisions to be linked by a precipitating emergency that strains existing military capacity and necessitates the activation of reserve forces—whether to serve in a direct *or* supporting role. That link is confirmed by the general

term's own qualifier, which identifies the circumstances under which differential pay should be awarded to include calls to active duty under "any other provision of the 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).

3. This Court has consistently disavowed "wooden[]" application of *ejusdem generis* "every time Congress includes a specific example along with a general phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008). As a tool for resolving textual ambiguity, the canon instead "comes into play only when there is some uncertainty as to the meaning of a particular clause or statute." *United States v. Turkette*, 452 U.S. 576, 581 (1981). Least of all should it be used to "create ambiguity where the statute's text and structure suggest none." *Ali*, 552 U.S. at 227.

These principles should have stopped the Federal Circuit from applying *ejusdem generis* here. The differential-pay statute directly addresses the very questions that—when textually uncertain—the *ejusdem generis* canon is designed to resolve.

Ejusdem generis flows from two gap-filling semantic intuitions. The first is that when a general term follows specific terms falling within a shared category, the speaker very likely had that category in mind. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012). Thus, "[i]f one speaks of 'Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors,' the last noun does not reasonably refer to Sam Walton (a great competitor in the marketplace) or Napoleon Bonaparte (a great competitor on the battlefield). It refers to other great *athletes*." *Id.*

That intuition is not needed here because, sticking with the analogy, section 101(a)(13)(B) does not stop at "other great competitors." *Id.* It expresses its intended qualifier expressly, textually clarifying the scope of the category Congress had in mind for its general term. Congress did not state merely that differential pay should be granted to reservists activated under "any other provision of law." It chose instead to specify that differential pay should be granted to reservists activated under "any other provision of law *during a war or during a national emergency declared by the President or Congress*." *Id.* (emphasis added).

The second semantic intuition underlying *ejusdem generis* is that "when the tagalong term is given its broadest application, it renders the prior enumeration superfluous." Reading Law, *supra*, at 199–200. To avoid superfluity, then, courts give "the enumeration the effect of limiting the general phrase." *Id.* at 200. If, for example, a will devises to a particular person "'my furniture, clothes, cooking utensils, housewares, motor vehicles, and all other property' . . . almost any court will construe the last phrase to include only personalty and not real estate." *Id.* at 199. After all, "[i]f the testator really wished the devisee to receive *all* his property, he could simply have said 'all my property.'" *Id.* at 200.

Again, resort to this intuition is unnecessary here because reading section 101(a)(13)(B)'s catchall term broadly would not render its specific terms superfluous. While calls to active duty under the enumerated provisions apply in both peacetime and wartime, the catchall term applies only "during a war or during a national emergency declared by the President or Congress." 10 U.S.C. §101(a)(13)(B).

Congress has thus made a deliberate choice to provide differential pay in a narrow set of specified exigent circumstances—such as when a state governor requests assistance to respond to a major disaster, *id.* §12304a, a rebellion makes it impracticable to enforce the laws, *id.* §252, or a natural disaster is imminent, 14 U.S.C. §3713—regardless of whether the nation is at war or in the throes of a declared national emergency. But when the nation is at war or in a declared state of national emergency, any lawful activation qualifies.

In short, the Federal Circuit's precedent narrowing the circumstances in which activated reservists qualify for differential pay departs from—rather than heeds—the plain meaning of section 101(a)(13)(B) by drawing unbidden inferences to answer questions already answered by the statute's plain text. That precedent should be corrected. The most fundamental of all semantic intuitions—the one lying at the heart of all semantic canons—is that "a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 461–62 (2002) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring). But "when Congress did specifically address itself to a problem," courts should not "find secreted in the interstices of legislation" a different answer from the one Congress expressly provided. *Id.* "When the words of a statute are unambiguous, then, [the] first canon is also the last: judicial inquiry is complete." *Barnhart*, 534 U.S. at 462.

4. Even assuming *ejusdem generis* had something to contribute here, the Federal Circuit did not identify a trait common to all the enumerated provisions. It held that "to satisfy as 'any other provision of law [during a war or during a national emergency]' under 10 U.S.C. § 101(a)(13)(B) and qualify as a contingency operation, there must be a connection between the voluntary military service and the declared national emergency." *Nordby*, 67 F.4th at 1173. But the Federal Circuit, perhaps because it treated the differential-pay statute as being keyed to the nature of a reservist's service rather than the nature of his call to service, did not deem a "temporal overlap" enough. *Id.* at 1174; *see also* 10 U.S.C. §101(a)(13)(B) (referring to "any other provision of law *during* a war or *during* a national emergency" (emphasis added)).

The problem with that theory is that the term "national emergency" does not appear in the lion's share of enumerated provisions. *See, e.g.*, 10 U.S.C. §§688, 12304a, 12305, 12406, 252; 14 U.S.C. §3713. In fact, 10 U.S.C. §12304 applies precisely in times "other than during war or national emergency." The federal government thus conceded below that connection to a national emergency cannot serve as the relevant link between the enumerated provisions. *See* Gov't C.A. En Banc Br.12 n.4. *Adams* also states that the differential-pay statute benefits only those "directly called to serve in a contingency operation." 3 F.4th at 1379. But, again, none of the enumerated provisions requires that an activated reservist serve on the front lines of any operation—much less a contingency operation.

Rather, each of the enumerated provisions is a means for augmenting military capabilities in response to a national crisis. The Secretary of Defense may order

reservists to active duty when "necessary in the interests of national defense," 10 U.S.C. §688(c), or for the "duration of [a] war or emergency"—whether declared or not—"and for six months thereafter," *id.* §12301(a). The President's authority under 10 U.S.C. §12304 is triggered when "necessary to augment the active forces." 10 U.S.C. §12304a applies when a governor seeks federal aid in response to "a major disaster or emergency," while 10 U.S.C. §12305 applies when "essential to the national security of the United States." 10 U.S.C. §252 operates when the judicial system breaks down and 14 U.S.C. §3713 when the nation faces "an imminent, serious natural or manmade disaster."

C. The federal government's idiosyncratic reading of the term "during" defies context and common sense.

The federal government does not defend the Federal Circuit's approach. Instead, it relies on an atypical definition of the term "during" to contend that for a call to active duty to qualify as being one made under "any other provision of law during a war or during a national emergency," 10 U.S.C. §101(a)(13)(B), that call must be to serve during and in the course of a war or national emergency. BIO.7. This new argument fails.

1. To begin, the federal government relies on an idiosyncratic definition of the term "during" that is neither required by the term's ordinary meaning nor supported by the context of the differential-pay statute.

The federal government's own authorities demonstrate that while the term "during" always connotes a temporal overlap, only context can create the "substantive connection" the federal government argues for. BIO.7. The Oxford English Dictionary, for instance,

defines the term as "[t]hroughout the whole continuance of; hence, in the course of, in the time of." 4 *The Oxford English Dictionary* 1134 (2d ed. 1989). Nothing about that definition—including the phrase "in the course of"—requires more than a temporal overlap.

To be sure, surrounding context may. *See supra* p.14–15. But not necessarily, as evidenced by the federal government's next authority. The American Heritage Dictionary, which also employs the "course of" construction, incorporates usage examples that belie the federal government's contention that "a substantive connection" as well as a "temporal overlap," BIO.7, is conveyed: "1. Throughout the course or duration of: *suffered food shortages during the war*. 2. At some time in: *was born during a blizzard*." *The American Heritage Dictionary of the English Language* 556 (5th ed. 2011). Ordinary readers of the first usage example will not infer that food shortages were suffered only in the battlefield. Though, in context, the reader might draw other inferences, such as that the food shortages had in some sense been caused by "*the* war." *Id.* (emphasis added). In the second definition, the temporal connection alone is warranted. Only the most atypical of the second definition's readers would image that it describes a birth taking place in, or occasioned by, the snow.

Webster's Third International Dictionary is likewise devoid of any suggestion that a strong "substantive" as well as a "temporal overlap," BIO.7, is meant:

> 1: throughout the continuance or course of <no attainder of treason shall work corruption of blood or forfeiture except [during] the life of the person attainted—*U.S. Constitution*>

> 2: at some point in the course of <been away for a couple of weeks [during] the summer—J.M Barzun>

Webster's Third New International Dictionary of the English Language 703 (1986).

To dredge from these straightforward definitions "a substantive connection between the object of the prepositional phrase that begins with 'during' and the term that the phrase modifies," BIO.7, the federal government is forced to rely on yet another tenuous cross-reference. It points to the Oxford English Dictionary's definition of "in the course of" as "in the process of, during the progress of." 3 Oxford, *supra*, at 1055. That is far too thin a reed upon which to deprive a reservist of differential pay, and it becomes more slender still once context is considered.

2. As this Court has recognized in analogous circumstances, where "[t]he most natural reading of" the term "during" fits the text, "[t]here is no need to consult dictionary definitions" at all. *United States v. Ressam*, 553 U.S. 272, 274 (2008). And here, as in *Ressam*, "[t]he term 'during' denotes a temporal link; that is surely the most natural reading of the word as used in the statute." *Id.* at 274–75.

At issue in *Ressam* was a sentencing enhancement for carrying "an explosive *during* the commission of any felony." *Id.* at 274 (emphasis added). The Court was asked to determine whether this enhancement applied to a person who had explosives in his car when he committed the felony of making false statements to a customs official, but who did not carry the explosives for the purpose of committing the predicate felony. *Id.* The Court held that the temporal link alone was sufficient to trigger

the enhancement because a temporal link is what the term "during" generally connotes, and because nothing about the prohibition suggested a different usage. *Id.*

So too here. The differential-pay statute's meaning does not bid departure from the most natural reading of "during." This is not an instance, as is the case with the federal government's counterexamples, in which common experience requires us to infer "and in relation to" after the word "during." When a person asks about an attorney's argument "during" a court hearing, *see* BIO.7, ambiguity about the scope of the information being solicited is reasonably resolved by common experience with people who ask such questions. They are generally interested in what was said at the court hearing and not what was said outside the courtroom but while the hearing was taking place. *Cf. Biden v. Nebraska*, 143 S.Ct. 2355, 2379 (2023) (Barrett, J., concurring) (explaining that "how we communicate conversationally" is relevant context for purposes of statutory interpretation). The same is true of a reference to what a federal government employee learned "during" employment, BIO.8, or to industry concerns raised "during" notice and comment, *id.*, or to the deliberate-process privilege's application to documents generated "during" agency deliberations, *id.*

Unlike the government's examples, the differential-pay statute draws a temporal link alone as a matter of common sense. Congress provides differential pay to federal civilian employees activated under "any other provision of law during a war or during a national emergency." 10 U.S.C. §101(a)(13)(B). It is entirely rational to provide a pay incentive to activated reservists based solely on the fact that a war or national emergency is ongoing. Supporting roles are as vital to the national defense during such crises as direct ones. *See infra*,

Part II.A. As General John Pershing, Commander of the American Expeditionary Forces during World War I, observed: "Infantry wins battles, logistics wins wars." U.S. Army Materiel Command, *Army Materiel Command White Paper: Sustaining Army 2030* at i (Oct. 1, 2023), http://tinyurl.com/army2030 (all websites last visited Aug. 26, 2024).

3. The federal government's argument that an activated reservist's service must have some connection to a war or a national emergency fails for the additional reason that the differential-pay statute refers to provisions of law that authorize a *call* to service, not provisions defining the nature of the service to which the reservist is called. Once again, Congress could very easily have tied differential pay to the nature of a reservist's service rather than the nature of a reservist's activation orders. But, as demonstrated above, *supra*, 6–7, that is not the statute Congress enacted.

It makes little sense, moreover, to insist that an activation order—as distinct from the military operation precipitating that order—be issued both *during* and *in relation to* a war or national emergency to entitle a reservist to differential pay. This will involve tedious factual disputes that courts will have to resolve with necessarily arbitrary line drawing. Even then, given the vast and varied interconnectedness of the United State military, it may often be impossible to determine whether an order of activation is sufficiently connected to the additional strain on the military occasioned by a war or national emergency to render a call to service sufficiently *in relation to* that war or national emergency. Better to simply apply the bright-line statute Congress wrote. This Court accordingly should hold that a temporal connection is enough for a reservist's activation orders to

qualify as having issued "during a war or during a national emergency." 10 U.S.C. §101(a)(13)(B).

II. Context and common sense confirm that section 5538 benefits all reservists activated during a war or national emergency.

Although the Court can begin and end its analysis with the statute's plain text, understanding how our modern military functions gives added confidence that the most straightforward reading is also the best one. "The nature of military conflict has changed from full scale war of short duration to drawn out security, peace keeping, interdiction and combat operations," and "[w]ith a shrinking active duty force and an expanding mission, more emphasis will be placed on using guard and reserve personnel to fulfill mission requirements." Major Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 AIR FORCE L. REV. 287, 342 (2007). Today's sophisticated, global fighting force requires substantial support. The interpretations advanced by the Federal Circuit and the federal government overlook the key role that reservists play even when they are not on the front lines of a contingency operation. And by withholding from reservists the differential pay that Congress intended them to have, those errant interpretations threaten both reservists' livelihoods and the integrity of our national defense.

A. Supporting roles are as necessary to the national defense as direct involvement.

Wars are not won by front-line acts of heroism alone. They are won by support staff and logistics teams—truck drivers, air traffic controllers, healthcare administrators, and transportation officers. Troops are

of little use without bullets, food, bandages, and the people that get them from point A to point B. And when active army units deploy to contingency operations, army reserve units must backfill installation base operation activities previously conducted by those units. Kathryn Roe Coker, *The Indispensable Force: The Post-Cold War Operational Army Reserve*, 1990-2010, 187 (2013), http://tinyurl.com/coker2013.

Indeed, because robust sustainment capabilities are vital to the success of any contingency operation, *Sustaining Army 2030*, *supra*, at 4, the Department of Defense's Financial Management Regulation includes them when taking stock of contingency operation costs, which it defines as "those expenses necessary to cover incremental costs 'that would not have been incurred had the contingency operation not been supported.'" Brendan W. McGarry & Emily M. Morgenstern, Cong. Rsch. Serv., R44519, *Overseas Contingency Operations Funding: Background and Status* 16 (Sept. 6, 2019), http://tinyurl.com/R44519 (citing Dep't of Def., *Financial Management Regulation, Contingency Operations*, vol.12, ch.23 at 23–26 (Dec. 2017)). That includes expenses arising from both combat and combat support costs, "such as those for overseas basing, depot maintenance, ship operations, weapons system sustainment" as well as "readiness and munitions." *Id.* at 26.

As thousands of reservists can attest, the sacrifice involved in a supporting role is very real. One does not need to fire a single shot in battle to know the profound sense of loss that follows separation from family and community, interruption of career aspirations, and the like. But that sacrifice is essential to the national defense, most especially in a time of war or national

emergency. That, undoubtedly, is why Congress sought to support those who willingly embrace this sacrifice in service to their country.

B. The Federal Circuit's atextual interpretation threatens to harm not only the personal lives of reservists but also our national defense.

1. Since the founding era, the States and the nation have relied on the services of reservists. These forces have played a critical role in nearly every major American military conflict, ranging from the French and Indian War to the Gulf War. *See* Brief of Amicus Curiae Reserve Organization of America 2.

The modern Reserves were formed in the 20th century. *See* Lawrence Kapp & Barbara Torreon, Cong. Rsch. Serv., RL30802, *Reserve Component Personnel Issues: Questions and Answers* 6 (2021 update), https://crsreports.congress.gov/product/pdf/RL/RL30802. During this period, reservists were activated for service in several major conflicts or emergencies, including the Korean War, the Cuban Missile Crisis, the Vietnam War, and the Gulf War. *See id.* at 7–8.

In recent decades, the States and the nation have increasingly relied upon the service of reservists. Charles Cragin, a former Assistant Secretary of Defense for Reserve Affairs, has observed that:

> The role of our Reserve forces is changing in the United States. We have seen their traditional role, which was to serve as manpower replacements in the event of some cataclysmic crisis, utterly transformed. They are no longer serving as the force of last resort, but as vital contributors on a day-to-day basis around the world.

Id. at 7.

Reservists played a particularly prominent role in response to the September 11 terrorist attacks and the subsequent War on Terror. As described by Secretary of Defense Donald Rumsfeld:

> Within minutes of the September 11 attacks, National Guard and Reservists responded to the call to duty. They flew combat patrols, patrolled the streets, and provided medical assistance, communications, and security at numerous critical sites across the country. Perhaps the National Guard's most visible support to civil authorities was to provide security at America's airports until additional security measures could be established.

Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 801 (2004).

2. To date, over one million reservists have been voluntarily or involuntarily activated in support of the military operations that followed the September 11 attacks. *See* Cong. Rsch. Serv., RL30802, *supra*, at 8 & n.33. By some accounts, the mobilization of reservists following the September 11 attacks was one of the longest ongoing mobilizations ever. *Id.* at 27.

But the role of the Reserves is not limited to just military operations. Thousands of reservists were activated in response to the COVID-19 pandemic. *Id.* at 9. In South Carolina, for example, reservists and members of the South Carolina National Guard played a critical role in assisting overwhelmed healthcare providers during the pandemic. *See South Carolina National Guard to help hospitals due to coronavirus surge*, WLTX (Sept. 3, 2021), https://perma.cc/FRT2-3KGX. Similar stories from around the country demonstrate the valiant service

of individual reservists during that difficult period. *See, e.g.*, *U.S. Army Reserve COVID-19 Response*, DVIDS, https://perma.cc/3P84-ZLJM.

It was in recognition of their service and to induce further service that Congress passed several laws that extend benefits to reservists, including section 5538. That law 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." Br. for Members of Congress as Amici Curiae in Support of Petitioner, *Adams v. Dep't of Homeland Sec.*, 142 S.Ct. 2835 (2022) (No. 21-1134), 2022 WL 845883, at *4; *see also* Br. of Members of Congress as Amici Curiae in Support of Petitioner 3. The law is particularly significant because "[t]he federal government employs more reserve component members than any other employer in the United States." Comm'n on the Nat'l Guard & Rsrvs., *Final Report to Congress and the Secretary of Defense* 41 (Jan. 31, 2008), https://perma.cc/3S3Z-KKUW.

3. Congress is not alone in taking this type of action. Texas, for example, provides a form of differential pay to state employees who are called to active duty to serve in a reserve component of the United States Armed Forces. *See, e.g.*, Tex. Gov't Code §661.9041(a) ("The administrative head of a state agency shall grant sufficient emergency leave as differential pay to a state employee on unpaid military leave if the employee's military pay is less than the employee's state gross pay."). And in 2003, the Governor of New Jersey signed an executive order providing that "[d]uring active duty for the duration of their activation, [] State employees shall be entitled to receive a salary equal to the differential between the employee's State salary and the employee's military base

pay." Governor James E. McGreevey, Executive Order #50 (2003), https://nj.gov/infobank/circular/eom50.htm. Other States have similar laws.[2]

Differential pay is critical to reservists and their families. Approximately 40% of reservists have children. *See* U.S. Dep't of Def., *2022 Demographics: Profile of the Military Community* at 179, http://tinyurl.com/dod2022report. In Texas, for example, there are 100,508 National Guard reservists, almost 40,000 of whom are married, and 63,629 relevant children. *See* Mil. State Pol'y Source, *Texas*, https://statepolicy.militaryonesource.mil/state/TX. In South Carolina, there are 25,373 National Guard and reserve members and a corresponding 10,974 spouses and 16,416 children. *See* Mil. State Pol'y Source, *South Carolina*, https://statepolicy.militaryonesource.mil/state/SC.

4. Reservists have frequently experienced financial losses when activated. *See* Cong. Rsch. Serv., RL30802, *supra*, at 27. These losses are often attributable to the difference in pay between their military and civilian roles. *Id.* Differential pay thus provides some level of financial security to reservist families. After all, "[t]he most significant ramifications of large-scale mobilizations of reservists occur in the reservists' work and family life. The family lives of millions of Americans are disrupted when loved ones are called to duty." Andrew P. Sparks, *From the Desert to the Courtroom: The*

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[2] Ala. Code §31-12-5; Alaska Stat. §39.20.345; Conn. Gen. Stat. §7-461; Del. Code tit. 14, §1327(b); Del. Code tit. 29, §5105(b); Md. Code, State Pers. & Pens. §9-1107(d)(1); Mich. Comp. Laws §32.273a; Okla. Stat. tit. 72, §48; 30 R.I. Gen. Laws Ann. §30-6-5(a); Wis. Stat. §230.315(1).

Uniformed Services Employment and Reemployment Rights Act, 61 HASTINGS L.J. 773, 782 (2010).

Differential pay also assists in reservist recruitment. In recent years, several reserve components have seen decreases in personnel. *See* U.S. Dep't of Def., *2022 Demographics: Profile of the Military Community*, *supra*, at 65. This decline can be attributed to several factors, but wage competition is a significant component. For example, the National Guard faces stiff competition from private companies. *See* Doug G. Ware, *National Guard Struggles to Attract Recruits as Private Sector Offers Tough Competition for Talent*, STARS AND STRIPES (Jun. 21, 2023), https://perma.cc/G9L7-VNVM. Last year, one officer commented that "[t]his is the most challenging recruiting environment the Department of Defense has ever faced." *Id.*

The Federal Circuit's decisions in this case and others like it can only make this tough situation even more challenging for recruiters. Knowing that they will receive differential pay allows reservists to plan for their financial futures and have confidence that they can continue to provide for themselves and their families if called or ordered to active duty. The Federal Circuit, however, has created considerable uncertainty about which reservists will receive differential pay and for what periods.

And reservists deserve more certainty, not less. Even before *Adams*, reservists faced confusion regarding the benefits to which they are entitled. According to one Judge Advocate with the National Guard Bureau, there is "a massive number of individuals who may be eligible for benefits of which they are unaware." Major Jeremy R. Bedford, *Armed Forces Mobilizations Under 10 U.S.C. § 12301(d) and Federal Employees: Why OPM*

Guidance Is Incorrect, 42 CAMPBELL L. REV. 1, 4 (2020). "Due to the complicated nature of the law, and conflicting guidance provided by agencies, many reservists are potentially missing out on these benefits." *Id.* While challenges for reservists will remain, recovering the statutory bright-line test for eligibility is an important step in the right direction.

CONCLUSION

The Court should reverse the court of appeals' judgment.

Respectfully submitted.

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