

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 *AMICUS CURIAE*
THE NATIONAL LAW SCHOOL
VETERANS CLINIC CONSORTIUM
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The National Law School Veterans Clinic Consortium (“NLSVCC”) submits this brief in support of the position of Petitioner Nick Feliciano. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. Working with like-minded stakeholders, NLSVCC’s mission is to gain support and advance common interests with the Department of Veterans Affairs (“VA”), U.S. Congress, state and local veterans service organizations, court systems, educators, and other entities for the benefit of veterans throughout the country. NLSVCC exists to promote the fair treatment of veterans and servicemembers under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process.

NLSVCC is keenly interested in this case in light of the important federally employed reservist pay issue it presents. It respectfully submits that this case poses the opportunity for the Court to recognize the critical and varied role reservists play in the modern military and uphold Congress’s intent to provide differential pay to federally employed reservists during a national emergency under 5 U.S.C. § 5538(a).

1. In compliance with Rule 37.6, no counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

The strength of America's national security depends upon the service of reservists in all branches of our armed forces. Reservists come from diverse educational and cultural backgrounds in communities throughout our country. Importantly, however, reservists are united in their love of this nation and their dedication to its protection. Their devotion to country is instrumental to safeguarding America's interests at home and abroad.

Congress created the differential pay statute in recognition of the sacrifices of federally employed reservists and the debt of gratitude America owes to these personnel. The federal government is one of the largest employers of reservists, and these reservists are committed to public service in both their military and civilian lives. Yet, many of these reservists suffer a significant loss of pay and risk financial insecurity when they are called to active-duty service. The differential pay statute addresses this substantial financial sacrifice by covering the difference between a reservist's civilian government salary and their military pay while on active duty. *See* 5 U.S.C. § 5538.

However, the Federal Circuit's improper interpretation of the differential pay statute undermines Congress's intent and instead subjects reservists and their families to the threat of financial insecurity. Now, when a federally employed reservist is called into active duty, they must undertake the impossible task of predicting whether, and for how long, their service will have a causal link to an ongoing national emergency. The Federal Circuit's wrongful ruling exposes reservists to the great risk that,

at the end of their active-duty service, they will come home to a family in financial crisis. This is the exact issue Congress desired section 5538 to remedy.

By subjecting federally employed reservists and their families to financial insecurity, the Federal Circuit's improper interpretation of the differential pay statute also undermines the government's goal of recruiting and retaining reservists. The primary factor that drives reservists out of military service is the impact of such service on their families' personal and financial lives. The impact of military service on a reservist's household is especially stark when active-duty deployments result in reservists forgoing their civilian salaries for substantially lesser military pay. The Federal Circuit's misguided interpretation will inhibit the government's efforts at recruiting and retaining reservists, thereby threatening the operational readiness of the U.S. military.

Finally, the Federal Circuit's improper reading of the differential pay statute ignores the plain meaning of section 5538. The statute clearly prescribes that when the President or Congress have declared a national emergency or war, a federally employed reservist called into active-duty service under "any" provision of law is entitled to differential pay. The Federal Circuit's requirement that a reservist must demonstrate some causal link between their military service and an ongoing national emergency is unsupported by the statute's plain language and is contrary to Congress's intent.

Consequently, this Court should correct the Federal Circuit's erroneous interpretation.

ARGUMENT

Statutory interpretation begins with an analysis of the statutory language; “[i]f the words of a statute are unambiguous, this first step of the interpretative inquiry is [the] last.” *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). Under 5 U.S.C. § 5538(a), a federally employed reservist is entitled to differential pay—i.e., pay that covers the difference between his or her government salary and reservist pay—when he or she is called or ordered to active duty under any “provision of law *during* a war or national emergency declared by the President or Congress.” 10 U.S.C. § 101(a)(13)(B) (emphasis added).

Put another way, if Congress or the President has declared a national emergency, then a reservist called into active duty during that period under any provision of law is entitled to differential pay for his or her active-duty service. 5 U.S.C. § 5538(a); 10 U.S.C. § 101(a)(13)(B); *see also* Brief for Members of Congress as Amicus Curiae Supporting Petitioner at 3-4, 4-10, *Feliciano v. Dep’t of Trans.*, — U.S. — (2024) (No. 23-861), 2024 WL 1158910, at *3-*10.

The United States has been in a state of national emergency since September 14, 2001. *See* Continuation of the National Emergency With Respect to Certain Terrorist Attacks, 88 Fed. Reg. 62,433 (Sep. 7, 2023). Yet, here, the Federal Circuit imposes a heightened causal barrier that restricts a federally employed reservist’s ability to receive differential pay. *Feliciano v. Dep’t of Trans.*, No. 2022-1219, 2023 WL 3449138, at *1, 2 (Fed. Cir. May 15, 2023) (citing *Adams v. Dep’t of Homeland Security*, 3 F.4th 1375, 1378 (Fed. Cir. 2021); citing also

Norby v. Soc. Security Admin., 67 F.4th 1170, 1173 (Fed. Cir. 2023)). The Federal Circuit’s ruling impermissibly limits federally employed reservists’ entitlement to differential pay only when they were “called to directly serve in a contingency operation,” and requires proof of a connection between their service and the ongoing national emergency. *Feliciano*, 2023 WL 3449138, at *2; *Adams*, 3 F.4th at 1378.

The Federal Circuit’s heightened nexus requirement is not born from the plain language of 5 U.S.C. § 5538(a); as a result, its decision must be reversed. Moreover, and perhaps more disturbingly, its legal figment creates economic uncertainty and financial insecurity for thousands of federally employed reservists and their families, with a devastating effect on the military’s ability to recruit and retain these citizen-servicemembers. In imposing such a standard, the Federal Circuit critically misunderstands the reality of modern reservist service.

I. The Federal Circuit’s Imposed Standard Creates Economic Uncertainty and Financial Insecurity for Thousands of Federally Employed Reservists and their Families.

Congress intended the differential pay statute to minimize the financial burden that military activations create for federally employed reservists, their partners, and their children. Brief for Members of Congress as Amicus Curiae Supporting Petitioner at 6, *Feliciano v. Dep’t of Trans.*, — U.S. — (2024) (No. 23-861), 2024 WL 1158910, at *6 (explaining that Congress intended for the differential pay statute to provide “financial support” to reservists so that they may be called to active

duty “without the added burden of worrying about the financial well-being of their families”). Indeed, before the enactment of the statute, 41% of reservists reported losses of income during mobilization and deployment. S. Rep. No. 108-409, at 2 n.2 (2004) (citing U.S. DEP’T OF DEF., DEF. MANPOWER DATA CENTER, TABULATIONS OF RESPONSES FROM THE 2000 SURVEY OF RESERVE COMPONENT PERSONNEL: VOL 1 MILITARY BACKGROUND 326-327 (2002)).

Differential pay is one in a long line of statutes providing protections to federally employed reservists; it incentivizes their recruitment and retention and ameliorates the hardships of their service on their families. 5 U.S.C. § 5538(a); *see also* Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2(a)(1), 108 Stat. 3149, 3150 (1994) (codified at 38 U.S.C. § 4301(a)(1)) (Explaining that one purpose behind Congress’s USERRA was to “eliminate or minimize the disadvantages to civilian careers and employment which can result from” service in the reserves); Selective Service and Training Act of 1940, Pub. L. No. 76-783, § 8(b), 54 Stat. 885, 890 (1940) (An Act wherein Congress ensured that reservists “shall be restored” to positions of federal and private employment of like “seniority, status, and pay” after induction into military service); Vietnam Era Veterans’ Readjustment Assistance Act, Pub. L. No. 93-508, § 403, 88 Stat. 1578, 1593 (1974) (Demonstrating Congress’s intent to “promote the maximum employment and job advancement opportunities within the Federal Government” for veterans through special “readjustment appointments”).

Yet, the Federal Circuit’s imposed standard will hinder that purpose, including the government’s ability

to recruit and retain federally employed reservists. Its practical effect is not hard to imagine. Federally employed reservists ordered to active duty will not be able to predict whether they will receive differential pay because they will be unable to tell if, when, or whether they might be performing duties directly related to a national emergency. Further, they will be unable to predict if their status will change during the course of their active-duty service.

Moreover, even if the servicemember can predict whether their service will satisfy this causal nexus, they may face serious limitations in proving this relationship to a national emergency to the satisfaction of a civilian board or the Federal Circuit. For example, a federally employed reservist's ability to disclose his or her classified duties during an active duty call up is limited and often impossible.

Inevitably, this inability to predict whether they will receive differential pay during active duty will frustrate or foreclose accurate financial planning in their household. As a result, the federally employed reservist will be forced to leave for active duty unable to predict whether doing so will cause their families serious financial hardship or, at worst, financial crisis.

Further, and after all this, a federally employed reservist may perform active duty only to discover that, in the eyes of a civilian board or the Federal Circuit, their military duties lacked a direct connection to an ongoing national emergency—a requirement that was artificially created and hidden from the plain language of the differential pay statute.

Amidst such uncertainty, the Federal Circuit's legal figment will inevitably force reservists to choose between their service and their family's financial stability. Yet, this is the very scenario that Congress intended the differential pay statute to cure. When considering this problem at scale, it will exacerbate the military's recruiting and retention crisis.

Federally employed reservists also face several structural barriers when compared to their active-duty counterparts. Many feel they lack necessary assistance in transitioning back and forth between their military and civilian lives or in separating from the military entirely. Anges Gerbeben Schaefer et al., IMPROVING TRANSITION ASSISTANCE FOR RESERVE COMPONENT MEMBERS, RAND CORP., (Apr. 12, 2023), https://www.rand.org/pubs/research_reports/RRA2071-1.html. And, after leaving service, many will face unique difficulty in accessing VA benefits for disabilities they incur during their activations. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-24-105400, VA DISABILITY BENEFITS: ACTIONS NEEDED TO ADDRESS CHALLENGES RESERVE COMPONENT MEMBERS FACE ACCESSING COMPENSATION (Oct. 30, 2023).

Exposing a federally employed reservist and their family to any or all of these risks is contrary to Congress's intent and poses serious concerns for national security. *Amicus Curiae* respectfully urges this Court to reverse the Federal Circuit's decision and hold that the plain language of 5 U.S.C. § 5538(a) does not require a heightened, causal requirement.

II. The Federal Circuit Critically Misunderstands Federally Employed Reservist's Service in the Modern Era.

A. This Issue Impacts Thousands of Federally Employed Reservists.

The Federal Circuit's heightened requirement that reservists prove their contribution to a national emergency to be entitled to differential pay, rather than just serve during it, appears to be rooted in "[t]he notion that reservists and guardsmen are somehow less capable, less committed, or less professional." Major Gen. Arnold L. Punaro, A Report for the Transition to the next Administration by the Reserve Forces Policy Board on Improving the Total Force using the National Guard and Reserves, Office of the Sec'y of Defense Reserves Forces Policy Board 34 (Sept. 11, 2020), <https://rfpb.defense.gov/Portals/67/RFPB%20Improving%20the%20Total%20Force%202020%20Report.pdf> [hereinafter "RFPB Report"]; cf. *Feliciano*, 2023 WL 3449138, at *2; *Adams*, 3 F.4th at 1378 (requiring a reservist prove a nexus between his efforts and a national emergency to be entitled to differential pay).

This view widely underestimates the skills and training possessed by reservists and their attractiveness to federal government employers. The United States federal government is one of the largest employers of reservists today. Laura Werber et al., UNDERSTANDING AND IMPROVING CIVILIAN EMPLOYER EXPERIENCES WITH GUARD AND RESERVIST DUTY, RAND CORP., 1, 16 (Apr. 11, 2024), https://www.rand.org/pubs/research_reports/RR852-1.html. Indeed, it employs approximately 19%—or 106,000—reservists. *Id.* And, in return, reservists are

“far more likely than [other] U.S. workers overall to work for the federal government.” *Id.*

Some federal employment programs require their employees to join the reserves. For example, military technicians are “federal civilian employees who provide support to reserve units” and are actually “required to maintain membership in the Selected Reserve as a condition of their employment.” Lawrence Kapp et al., RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS, CONG. RES. SERV. 1, 5 (Nov. 2, 2021), <https://crsreports.congress.gov/product/pdf/RL/RL30802> [hereinafter “RESERVE COMPONENT CRS REPORT”]; see also 10 U.S.C. § 10216 (explicitly recognizing military technicians as dual status employees). As of 2020, there were 13,855 military technicians in the reserves. *Id.*

This high rate of overlap recognizes that many reservists have specialized training in high-demand fields, such as medicine, law, computer analytics, cybersecurity and engineering that make them attractive federal government employees. Major Gen. Arnold L. Punaro, A REPORT FOR THE TRANSITION TO THE NEXT ADMINISTRATION BY THE RESERVE FORCES POLICY BOARD ON IMPROVING THE TOTAL FORCE USING THE NATIONAL GUARD AND RESERVES, OFFICE OF THE SEC’Y OF DEFENSE RESERVES FORCES POLICY BOARD 1, 36 (Sept. 11, 2020), <https://rfpb.defense.gov/Portals/67/RFPB%20Improving%20the%20Total%20Force%202020%20Report.pdf> [hereinafter “RFPB REPORT”]. Indeed, “[r]ich repositories of talent reside in the” reserve component, including “unique capabilities and professional expertise” from years of military service and civilian sector expertise, many of which would be too expensive to cultivate in active components. *Id.*

Access to differential pay ensures that these talents will remain with the reserve component and/or the federal government.

B. Federally Employed Reservists are Frequently Activated in the Post-9/11 Era.

The Federal Circuit’s causal standard contemplates that differential pay is owed only when a federally employed reservist’s duties support specific types of operations born from a particular national emergency. *Feliciano*, 2023 WL 3449138, at *2; *Adams*, 3 F.4th at 1378 (requiring a reservist prove a nexus between her efforts and a particular national emergency). This appears to be based on a Cold War understanding of reservist service, where reserve components were seen as “manpower replacements in the event of some cataclysmic crisis.” RESERVE COMPONENT CRS REPORT at 7. During that period, reservists were activated less than once a decade—and usually in direct support of a common, national emergency. *Id.*

However, now, and after the September 11, 2001 terrorist attacks, the traditional role of the reserves has been “utterly transformed” from a “force of last resort” to “vital contributors on a day-to-day basis around the world.” *Id.* Following the 9/11 attacks, over one million reservists were activated as part of the War on Terror. *Id.* at 8. Thousands were also activated to the Persian Gulf, Haiti, Bosnia, Iraq, Kosovo, West Africa, and counternarcotic operations in the Western Hemisphere. *Id.* Moreover, many reservists were activated in the continental United States to fill the billets of deployed active-duty personnel.

Indeed, by 2020, “[o]ver half of the Nation’s individual guardsmen and reservists have been mobilized for active duty more than once.” RFPB REPORT at 30. And “most mobilizations (89%) have resulted in deployments to combat zones.” *Id.* As of 2022, there are approximately 560,000 reservists serving our nation as invaluable components of “all peacetime and combat operations.” RFPB REPORT at 20; *see also* U.S. DEP’T OF DEFENSE, 2022 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 58 (2022), <https://demographics.militaryonesource.mil/> [hereinafter “DOD ONESOURCE REPORT”] (calculating the total number of federal reservists).

Further, in response to the COVID-19 pandemic, reservists provided “unprecedented support” to “slow the spread of the virus and treat those affected.” RFPB REPORT at 33. The Army Reserves, for example, invented new medical teams called the Urban Augmentation Medical Task Forces comprising more than 1,200 soldiers that administered vital medical care and support to overwhelmed states. Master Sergeant Michael Sauret, *COVID-19: How the U.S. Army Reserve adapted to fight a new close-combat foe*, U.S. ARMY RESERVE (Apr. 20, 2020), <https://www.usar.army.mil/News/News-Display/Article/2155782/covid-19-how-the-us-army-reserve-adapted-to-fight-a-new-close-combat-foe/>. By 2021, over 10,000 reservists were activated to bolster the nation’s health, security, and economy against COVID-19. RESERVE COMPONENT CRS REPORT at 9.

The Department of Defense has made clear that “our domestic security and global operations since September 11, 2001 could not have been executed without the activation of hundreds of thousands of trained Reserve Component

personnel.” U.S. DEP’T OF DEF., COMPREHENSIVE REVIEW OF THE FUTURE ROLE OF THE RESERVE COMPONENT 1-2 (vol. I 2011). Put another way, federally employed reservists are ready to answer the call of duty globally, thereby enhancing the “effectiveness and sustainment of our All-Volunteer Force.” RFPB REPORT at 23.

Access to differential pay ensures that federally employed reservists are not financially harmed by these increasingly frequent activations.

C. Reservists Provide Good Value to the American Public, and that Value will Continue to Increase Amidst an Active Duty Recruiting Crisis.

Despite the skill and flexibility reserve components bring to the U.S. military’s operational force, they represent only a limited fraction of overall military spending and financial need. Indeed, as of 2018, the cost to support a reservist—including his or her training, healthcare, dependent education, family housing, and most military construction—is approximately only 28.6% of the cost to support an active-duty service member. RFPB REPORT at 25.

Further, while the DoD spent \$730.8 billion in military construction from 2011 to 2018, “[l]ess than 1% was appropriated specifically for the reserve components.” *Id.* at 30. Rather, reserve components constitute “38% of military personnel end strength,” and only account for “16% of the total defense budget (including procurement, Research, Development, Test, Evaluation and infrastructure costs).” *Id.* at 21.

Moreover, federally employed reservists' value will only continue to rise amidst the active-duty components facing their "most severe recruiting crisis since the [All Volunteer Force's] inception." Lieutenant Colonel Frank Dolberry and Charles McEnany, "*Be All You Can Be*"—*The U.S. Army's Recruiting Transformation*, AUSA (Jan. 22, 2024), <https://www.ausa.org/publications/be-all-you-can-be-us-armys-recruiting-transformation>. The "risk to the Army and to U.S. National Security" this crisis poses will unquestionably be mitigated by increased use of reserve components, and to less cost to the American taxpayer. *Id.*

Senator Richard J. Durbin, who introduced and adamantly supported the differential pay scheme until its enactment, described its objective as "provid[ing] our reservist employees with financial support so they can leave their civilian lives to serve our country" without imposing an undue financial burden. *See* Brief for Members of Congress as Amicus Curiae Supporting Petitioner at 8, *Feliciano v. Dep't of Trans.*, — U.S. — (2024) (No. 23-861), 2024 WL 1158910, at *8. Their receipt of differential pay is not conditioned upon proof that the reservist's service was causally related to a national emergency in effect at the time of their service. *Id.*

Access to differential pay ensures that federally employed reservists will continue providing good value to the American public.

D. Federally Employed Reservists Rarely Serve Alone.

The differential pay statute is an important tool to recruit and retain federally employed reservists. Indeed, as addressed above, 5 U.S.C. § 5538(a) was adopted in part because Congress intended to fully compensate reservists for their loss of federal pay for active duty during national emergencies. *See* Brief for Members of Congress as Amicus Curiae Supporting Petitioner at 8, *Feliciano v. Dep’t of Trans.*, — U.S. — (2024) (No. 23-861), 2024 WL 1158910, at *8. In addition, the statute also seeks to ameliorate the financial burden that military activations exact upon reservists, their partners, and their children. *Id.* That is because, in addition to full-time federal employment and reserve obligations, over half of all reservists also have spouses and/or dependents who rely on them for financial support. DoD ONE SOURCE REPORT at 154.

In 2020, reservists reported experiencing up to 34% more stress in their personal and military lives as compared to prior years, with married reservists reporting the highest levels of increased stress. U.S. DEP’T OF DEF., 2020 STATUS OF FORCES SURVEY RESERVE COMPONENT MEMBERS (SOF S-R) at 28 (2021), <https://www.opa.mil/research-analysis/quality-of-work-life/status-of-forces-survey-reports-briefings/2020-status-of-forces-survey-of-reserve-component-members-leading-indicator-briefing/> [hereinafter “2020 Forces Survey Report”].

As of 2022, 33% of reservists “[struggled] to make ends meet or [experienced] material hardship.” U.S. DEP’T OF DEF., ANNUAL REPORT ON THE FINANCIAL LITERACY

AND PREPAREDNESS OF MEMBERS OF THE ARMED FORCES 10 (2023), <https://finred.usalearning.gov/assets/downloads/FINRED-2023-FinancialLiteracy-R.pdf> [hereinafter “FINANCIAL LITERACY ANNUAL REPORT”]. Thirty-seven percent reported facing uncomfortable financial situations, with lower enlisted, married reservists, and reservists with children reporting greater rates of financial difficulty. FINANCIAL LITERACY ANNUAL REPORT at 5, 8.

Indeed, surveys conducted by the United States Army—which employs nearly 60% of all reservists, DOD ONE SOURCE REPORT at 58,—find that the impact of military life on a service member’s family represents five of the top six reasons soldiers decide to leave the military. U.S. DEP’T OF THE ARMY, DEP’T OF THE ARMY CAREER ENGAGEMENT SURVEY THIRD ANNUAL REPORT 15 (June 2023), https://talent.army.mil/wp-content/uploads/2023/09/DACES-Third-Annual-Report_Final.pdf. The “high operations tempo” and resultant “stresses on family life” federally employed reservists face contributes heavily in their determination to exit the military—“especially when there are higher-paying jobs outside the service.” Will Selber, *Disaffection and Despair: Behind the Military’s Recruitment Woes*, THE BULWARK (May 3, 2024), <https://www.thebulwark.com/p/disaffection-despair-all-volunteer-force-crisis>.

Section 5 U.S.C. 5538(a) was adopted in part to respond to these pressures. Senator Durbin described that the underlying objective of differential pay is to provide reservists the financial support of their government salary to alleviate “the added burden of worrying about the financial well-being of their families.” See Brief for Members of Congress as Amicus Curiae Supporting

Petitioner at 8, *Feliciano v. Dep't of Trans.*, — U.S. — (2024) (No. 23-861), 2024 WL 1158910, at *8. Former Senator Barbara Mikulski, a co-signatory, described the differential pay statute as remittance for the “support and debt of gratitude” the United States owes to its reservists. *Id.* It is similarly unconstrained by the reservist’s duties; rather, “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.” *Id.* at *9.

Access to differential pay ensures that federally employed reservists and their families are not financially harmed by their active-duty service.

CONCLUSION

The Federal Circuit impermissibly limits federally employed reservists’ entitlement to differential pay by requiring proof of a connection between their service and the national emergency. This heightened nexus requirement is not born from the plain language of 5 U.S.C. § 5538(a); its decision must be reversed.

Moreover, and perhaps more disturbingly, this standard creates economic uncertainty and financial insecurity for thousands of federally employed reservists and their families, with a devastating effect on the military’s ability to recruit and retain these citizen-servicemembers. This result is contrary to Congress’s intent and poses serious concerns for national security.

Amicus curiae respectfully urges this Court to reverse the Federal Circuit’s decision and hold that the

plain language of 5 U.S.C. § 5538(a) does not require a heightened, causal requirement.

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