

Nos. 23-861, 23-868

IN THE
Supreme Court of the United States

NICK FELICIANO,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

CHARLES FLYNN,
Petitioner,

v.

DEPARTMENT OF STATE,
Respondent.

**On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

**BRIEF OF THE RESERVE ORGANIZATION OF
AMERICA AS *AMICUS CURIAE* SUPPORTING
PETITIONERS**

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TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Differential-Pay Statute Protects Reservists And Bolsters The Military's Operational Readiness.....	4
A. Congress Enacted Civilian-Employment Policies Like The Differential-Pay Statute To Ensure Military Effectiveness.....	4
B. The Differential-Pay Statute Protects Reservists And Helps The Military Achieve Its Objectives.....	8
II. The Proper Scope Of The Differential-Pay Statute Is An Exceptionally Important Question Worthy Of This Court's Review.....	10
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adams v. DHS</i> , 3 F.4th 1375 (Fed. Cir. 2021).....	11, 12
<i>Feliciano v. DOT</i> , No. 2022-1219, 2023 WL 3449138 (Fed. Cir. May 15, 2023)	11
<i>Flynn v. Department of State</i> , No. 2022-1220, 2023 WL 3449169 (Fed. Cir. May 15, 2023)	11
<i>King v. St. Vincent’s Hospital</i> , 502 U.S. 215 (1991)	12
<i>Monroe v. Standard Oil Co.</i> , 452 U.S. 549 (1981)	6
<i>Torres v. Texas Department of Public Safety</i> , 597 U.S. 580 (2022)	4, 5
 Statutes	
5 U.S.C. § 5538	2, 8, 10
10 U.S.C. § 101	10, 12
50 U.S.C. § 3815	13
Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524 (2009)	7
Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 (1948)	5

Selective Service and Training Act of
 1940, Pub. L. No. 76-783, 54 Stat.
 885 (1940)..... 4

Uniformed Services Employment and
 Reemployment Rights Act of 1994,
 Pub. L. No. 103-353, 108 Stat. 3149
 (1994)..... 4, 5

Vietnam Era Veterans’ Readjustment
 Assistance Act, Pub. L. No. 93-508,
 88 Stat. 1578 (1974)..... 5

Legislative Materials

86 Cong. Rec. 10573 (1940) 5

149 Cong. Rec. S3517 (2003)..... 6, 7

H.R. Rep. No. 105-448 (1998)..... 5

H.R. Rep. No. 108-409 (2004)..... 6, 7

H. R. Rep. No. 1303 (1966)..... 6

Administrative Materials

Continuation of the National
 Emergency With Respect to Certain
 Terrorist Attacks, 88 Fed. Reg.
 62,433 (Sep. 7, 2023)..... 11

Department of Defense, *2022
 Demographics Profile of the Military
 Community* (2023),
<http://tinyurl.com/2hv3vmrs>..... 9

Department of Defense, Comprehensive Review of the Future Role of the Reserve Component, Vol. 1 (Apr. 5, 2011)	10
Department of Defense, Dir. 1200.17, Managing the Reserve Components as an Operational Force (Oct. 29, 2008)	7
Department of Defense, Office of People Analytics, 2020 Status of Forces Survey Reserve Component Members (SOFS-R) (July 14, 2021), http://tinyurl.com/stawpfb	8
Presidential Statement on Signing Pub. L. No. 90-491, 4 WEEKLY COMP. PRES. DOC. (Aug. 17, 1968)	5
Proclamation No. 10668, 88 Fed. Reg. 75,473, 75,474 (Oct. 31, 2023)	13
Other Authorities	
Air Reserve Personnel Center, <i>In order to preserve the nation's combat readiness</i> , http://tinyurl.com/337w8p2j (last visited Feb. 26, 2024)	13
Brad McNally et al., <i>Now is the time to save the all-volunteer force</i> , Brookings (Jan. 19, 2023), http://tinyurl.com/e4mre7uy	8

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- Reserve Forces Policy Board, *Improving the Total Force: Using the National Guard and Reserves*, RFPB Report FY20-01 (Aug. 14, 2020), <http://tinyurl.com/5n929tz7>9, 10
- Thomas Novelly et al., *Big Bonuses, Relaxed Policies, New Slogan: None of It Saved the Military from a Recruiting Crisis in 2023*, Military.com (Oct. 13, 2023), <http://tinyurl.com/mrs83er5>8

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Reserve Organization of America (“ROA”) is America’s only exclusive advocate for the Reserve and National Guard—all ranks, all services. With a sole focus on support of the Reserve and National Guard, ROA promotes the interests of Reserve Component members, their families, and veterans of Reserve service. As part of this advocacy, ROA regularly files briefs in this Court and others on matters that implicate the interests of the Reserve Components.

This case raises issues that are critically important to ROA and its members. The Federal Circuit has, in many circumstances, barred federal civilian-employee Reservists from receiving differential pay when they mobilize into the military to serve their nation. The result is to disadvantage Reservists over other federal civilian employees, to deter military service, and to undermine the readiness and effectiveness of the Armed Forces.

The Court should grant the Petition in *Feliciano* to remedy the Federal Circuit’s interpretive error and to ensure that it does not continue to injure Reservists and hinder military readiness.

¹ No party’s counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the brief’s preparation or submission. Because this brief is filed more than 10 days prior to the filing deadline, it serves as timely notice to counsel of record for all parties.

SUMMARY OF ARGUMENT

United States military reserves date back to before the founding of the Republic when national citizen-soldier forces fought in the French and Indian War. State militias—which became the National Guard—played a major role in the Revolutionary War. During the Civil War, state militias supplied 96 percent of the Union army. About 400,000 Guardsmen served in World War I, representing the largest state contribution to overseas military operations during the 20th century. Nearly 300,000 Guardsmen served in World War II. More than 200,000 Reservists contributed to the liberation of Kuwait in the Gulf War. And since September 11, 2001, more than a million Reservists and National Guardsmen have answered the call to serve their nation, many several times over.

Today, the Reserve Components constitute a significant portion of the total U.S. military force. Reservists hail from all walks of life. They are public high school teachers, doctors, lawyers, police officers, and, like Petitioners, federal civilian employees. They are united not only by their undying devotion to this nation, but by their commitment to public service—many devoting their entire careers to working for the federal government.

This case concerns a statute designed to minimize the economic burdens these citizen-warriors would otherwise bear when mobilizing from their civilian jobs: the differential-pay statute. *See* 5 U.S.C. § 5538. The statute is part of a long line of laws—ranging from reemployment rights to nondiscrimination rules—

that were enacted to minimize the negative impact of military service on civilian careers.

The differential-pay statute acknowledges a basic economic reality: mobilized federal employees often earn less on active duty than they would have earned in their federal civilian positions. The statute is designed to ensure that these employees do not take a financial hit when they leave their typical day job to serve in the Armed Forces.

The differential-pay statute is an important part of Congress's scheme to promote the military's operational readiness. Over the last three decades, the Reserve Components have shifted from a force of last resort to an integrated fighting force that is vital to military operations. By removing what is often a substantial economic disadvantage to service, the differential-pay statute helps to recruit and retain Reservists for that fighting force. And it makes sure that Reservists will not hesitate to answer their nation's call for fear of missing a loan payment or allowing a bill to go unpaid.

The decisions below undermine Congress's intent in enacting the differential-pay statute and—consequently—the military's operational readiness. The Federal Circuit's cramped reading of the statute has no basis in its text or structure. Instead, the court relies on a vague (and demonstrably incorrect) hunch about the statute's purpose that turns Congress's scheme on its head. This Court should grant the Petition in *Feliciano* to remedy this error that carries significant practical consequences for our country's Armed Forces.

ARGUMENT

I. THE DIFFERENTIAL-PAY STATUTE PROTECTS RESERVISTS AND BOLSTERS THE MILITARY'S OPERATIONAL READINESS.

A. Congress Enacted Civilian-Employment Policies Like The Differential-Pay Statute To Ensure Military Effectiveness.

Congress has long sought “to smooth” servicemembers’ “reentry into civilian life.” *Torres v. Texas Dep’t of Pub. Safety*, 597 U.S. 580, 585 (2022). And for good reason. Defending the United States is a trying endeavor for the brave Americans who serve our nation. Because of the immense pressures soldiers face in the course of their service, Congress has made it a priority to at least “eliminat[e] or minimiz[e] the disadvantages to civilian careers and employment which can result from such service.” 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)).

Congress has used these civilian-employment policies “to encourage service in the Armed Forces in a variety of ways.” *Torres*, 597 U.S. at 585. For example, through the Selective Service and Training Act of 1940, Congress required federal and private employers to “restore[]” servicemembers to their prior position or a “position of like seniority, status, and pay” after being “inducted into” military service. *See* Pub. L. No. 76-783, § 8(b), 54 Stat. 885, 890 (1940). By

ensuring a “right to return to civilian employment without adverse effect,” *Torres*, 597 U.S. at 585 (quoting H.R. Rep. No. 105-448, at 2 (1998)), Congress sought to “provid[e] the Army and Navy with patriotic men who are willing and anxious to serve their country,” 86 Cong. Rec. 10573 (1940) (statement of Sen. Thomas); *see also* Selective Service Act of 1948, Pub. L. No. 80-759, § 1(b), 62 Stat. 604, 605 (1948) (explaining that reemployment helps “achieve[]” and “maintain[]” “an adequate armed strength” “to insure the security of th[e] Nation.”).

But reemployment rights are only one arrow in Congress’s civilian-employment quiver. Congress has also “promote[d] the maximum of employment and job advancement opportunities within the Federal Government for” veterans through special “readjustment appointments.” Vietnam Era Veterans’ Readjustment Assistance Act, Pub. L. No. 93-508, § 403, 88 Stat. 1578, 1593 (1974). And it prohibits civilian employers from discriminating against employees and applicants based on “service in the uniformed services.” Pub. L. No. 103-353, § 2(a), 108 Stat. 3149, 3153 (1994) (codified at 38 U.S.C. § 4311).

Congress has also long recognized the importance of extending civilian-employment policies to Reservists. As President Johnson explained when he signed legislation granting Reservists reemployment rights, “members of the reserve components are . . . indispensable sinews in the military strength of our Nation.” Presidential Statement on Signing Pub. L. No. 90-491, 4 WEEKLY COMP. PRES. DOC. (Aug. 17, 1968).

As citizen-soldiers, Reservists face unique problems for which Congress has given special attention. For example, Congress has legislated to “protect” against “employment practices that discriminate against employees with Reserve obligations,” such as “weekend drills or summer training.” *Monroe v. Standard Oil Co.*, 452 U.S. 549, 557 (1981) (cleaned up). Legislators recognized that “[i]f these young men are essential to our national defense, then certainly our Government and employers have a moral obligation to see that their economic wellbeing is disrupted to the minimum extent possible.” *Id.* at 561 (quoting H. R. Rep. No. 1303 (1966)).

In 2003, Congress considered a significant new measure to minimize disruption to Reservists’ economic wellbeing: a differential-pay scheme. The bill proposed to pay federal-employee Reservists the difference between their military pay and their civilian pay during a mobilization in order to offset any negative financial consequences of service. It was introduced “with war looming with Iraq,” “hundreds of thousands of our troops poised for battle overseas,” and “nearly 170,000 Guard and Reservists mobilized and serving on active duty.” 149 Cong. Rec. S3517 (2003) (statement of Sen. Durbin). Thousands of these mobilized Reservists were federal employees, and many of them incurred significant financial losses because their military pay was less than their federal civilian pay. H.R. Rep. No. 108-409, at 2, 5 (2004). Legislators recognized that it was “unfair to ask the men and women who have volunteered to serve their country, often in dangerous situations, to also face a financial strain on their families.” 149 Cong. Rec. S3517 (statement of Sen. Durbin). Seeking to make

the federal government a “model employer” and an “example for large businesses,” *ibid.* (statement of Sen. Mikulski), the differential-pay bill sought to “alleviate the financial burdens created when federal employees are called to active duty and experience a reduction in pay,” H.R. Rep. No. 108-409, at 2.

After the differential-pay bill was introduced, the need for its enactment became increasingly acute. The 2000s saw the Reserves transform from a “force of last resort” into “vital contributors on a day-to-day basis around the world.” Lawrence Kapp et al., Cong. Rsch. Serv., *Reserve Component Personnel Issues: Questions and Answers* at 7, (updated Nov. 2, 2021) (“Reserve Component CRS Report”), <http://tinyurl.com/5n7kf9kd>. In 2008, the Department of Defense issued a Directive to redesignate the Reserve Components “as an operational force.” Dep’t of Def., Dir. 1200.17, *Managing the Reserve Components as an Operational Force*, ¶¶ 1, 4a–b (Oct. 29, 2008). These changes effectuated a monumental shift in military composition: “reservists contributed about 1 million duty-days per year” in the late 1980s, compared to “68.3 million days in FY2005” and “17.3 million days” in 2014—the most recent year of available data. Reserve Component CRS Report at 9 n.35. And while prior Reserve mobilizations were often involuntary, post-September 11 operations increasingly rely on *voluntary* mobilizations—spurring a need to eliminate obstacles to voluntary service. *See id.* at 8–9.

In 2009, Congress responded to these changes by enacting the differential-pay statute. *See Omnibus Appropriations Act*, Pub. L. No. 111-8, § 751, 123 Stat. 524, 693–95 (2009). The statute provides that a

federal employee who is “absent” from their position “in order to perform active duty in the uniformed services pursuant to a call or order to active duty under [certain provisions] shall be entitled” to the difference between their military pay and their civilian salary. 5 U.S.C. § 5538(a).

B. The Differential-Pay Statute Protects Reservists And Helps The Military Achieve Its Objectives.

The differential-pay statute is an important tool for the Government to recruit and retain Reservists and to incentivize voluntary mobilizations. Such tools are essential to military readiness. The Reserve Components reported “dire recruiting numbers” in 2023. Thomas Novelly et al., *Big Bonuses, Relaxed Policies, New Slogan: None of It Saved the Military from a Recruiting Crisis in 2023*, Military.com (Oct. 13, 2023), <http://tinyurl.com/mrs83er5>. Defense analysts are actively calling for efforts to “recruit” and “retain members in the service, both active and reserve.” Brad McNally et al., *Now is the time to save the all-volunteer force*, Brookings (Jan. 19, 2023), <http://tinyurl.com/e4mre7uy>. Meanwhile, 37% of Reservists are not satisfied with their compensation. Dep’t of Def., Office of People Analytics, 2020 Status of Forces Survey Reserve Component Members (SOFS-R) at 16 (July 14, 2021), <http://tinyurl.com/stawpfkb>. One in five Reservists report that they are “unlikely to stay” in their position. *Id.* at 9.

Inhibiting Congress’s choice to minimize economic disadvantages to Reservists under these circumstances would hinder the military’s operational

effectiveness. Approximately one-million citizen-warriors serve in the Ready Reserve while maintaining their civilian employment. See Dep't of Def., *2022 Demographics Profile of the Military Community* at 57 (2023), <http://tinyurl.com/2hv3vmrs>. The Reserve Components bear a significant burden in carrying out the nation's overseas operations and "provid[ing] critical combat power and support." Col. (Ret.) Richard J. Dunn, *America's Reserve and National Guard Components: Key Contributors to U.S. Military Strength*, The Heritage Found. (Oct. 5, 2015), <http://tinyurl.com/33nrmuwv>. Reservists "have repeatedly deployed and operated . . . in Bosnia, Iraq, Afghanistan, Syria and numerous other contingency, humanitarian, and homeland support missions to include providing the majority of the COVID-19 (Coronavirus) pandemic response forces." Reserve Forces Pol'y Bd., *Improving the Total Force: Using the National Guard and Reserves*, RFPB Report FY20-01 at 9 (Aug. 14, 2020), <http://tinyurl.com/5n929tz7>. In fact, over one-million Reservists have been activated since September 11, 2001. *Id.* at 30. In that time, more than half of Reservists have been mobilized more than once, and 89% of the Reservists' mobilizations were to combat zones. *Ibid.*

The military derives substantial benefit by tapping into the abilities that Reservists develop in their civilian careers. Reservists "bring unique capabilities and professional expertise to the Total Force gained through years of experience" in "the civilian sector"—especially in professions that are typically too "cost-prohibitive to develop in the [Active Components] (i.e. doctors, nurses, lawyers, computer analysts, cyber experts, engineers, etc.)." *Id.* at 36.

And the Reserve Components “require[] significantly less overhead and infrastructure costs”—“typically less than one-third the cost of the Active Component.” *Id.* at 21. Yet, the Reserve Components’ “operational record consistently demonstrates exceptional performance.” *Id.* at 9.

The Reserve Components are an indispensable part of securing and protecting the national interest. As the Department of Defense itself found: “Unless we had chosen to dramatically increase the size of the Active Components, 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.” Dep’t of Def., Comprehensive Review of the Future Role of the Reserve Component, Vol. 1, at 1–2 (Apr. 5, 2011) (emphasis added).

The differential-pay statute is a key piece of Congress’s strategy to ensure the readiness of the Reserve Components—and thus the military as a whole.

II. THE PROPER SCOPE OF THE DIFFERENTIAL-PAY STATUTE IS AN EXCEPTIONALLY IMPORTANT QUESTION WORTHY OF THIS COURT’S REVIEW.

Congress provided that federal employees are entitled to differential pay where they are absent “pursuant to a call or order to active duty under,” 5 U.S.C. § 5538(a), a list of enumerated provisions “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)(13)(B) (emphasis

added). The plain meaning of this statute is clear: Because the President has declared a national emergency that has been ongoing since September 14, 2001, *see* Continuation of the National Emergency With Respect to Certain Terrorist Attacks, 88 Fed. Reg. 62,433 (Sep. 7, 2023), a Reservist called up under any “provision of law” is eligible for differential pay. This provision contains no additional caveats about the nature of a Reservist’s service—including whether it is voluntary or involuntary or the type of mission the Reservist undertakes while mobilized.

The Federal Circuit rejected this straightforward statutory text, instead relying on policy preferences that are at odds with Congressional intent. In *Adams v. DHS*, 3 F.4th 1375 (Fed. Cir. 2021), it held (wrongly) that Congress did not “intend[]” for the statute to cover “voluntary duty that was unconnected to the emergency at hand.” *Id.* at 1380. In *Feliciano v. DOT*, No. 2022-1219, 2023 WL 3449138 (Fed. Cir. May 15, 2023), the Federal Circuit used this flawed rationale to deny differential pay to a Federal Aviation Administration employee who “perform[ed] military duty in the Coast Guard to support various operations,” including “Operation Iraqi Freedom” and “Operating Enduring Freedom.” *Id.* at *1. In the Federal Circuit’s opinion, this “voluntary, active service” was not sufficiently connected to “the ongoing national emergency.” *Id.* at *2. And in *Flynn v. Dep’t of State*, No. 2022-1220, 2023 WL 3449169 (Fed. Cir. May 15, 2023), the court denied differential pay to a federal employee who “performed active duty . . . at the Office of Military Commissions at the Pentagon.” *Id.* at *1.

As Petitioners persuasively explain, the Federal

Circuit's interpretation of the differential-pay statute is wrong. The court ignores the plain text of the statute to conduct an *ad hoc* inquiry into whether a Reservist's service is sufficiently "connected" to a national emergency. And it misapplies canons of construction while ignoring the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991).

But perhaps most egregious is the Federal Circuit's distinction between voluntary and involuntary mobilizations. The court suggests that the phrase "any other provision of law" does not include voluntary service because it follows a list of provisions that provide for involuntary service. *See Adams*, 3 F.4th at 1380. But the statute provides differential pay for voluntary service "during a national emergency." 10 U.S.C. § 101(a)(13)(B). Far from being "implausible," *Adams*, 3 F.4th at 1380, that outcome makes good sense. Absent a national emergency, voluntary mobilizations may be excluded. But when there *is* a national emergency, the military needs the ability to tap every available member of its operational forces, including those possessing the most relevant and unique expertise. In such an all-hands-on-deck situation, Reservists should not be disincentivized from volunteering for service for fear of the financial repercussions that will occur if they do.

Absent a textual commitment, there is no reason to assume that Congress would have drawn a *sub silentio* distinction between voluntary and involuntary deployments. The United States ended involuntary military service half-a-century ago. *See*

50 U.S.C. § 3815(c) (providing that generally “no person shall be inducted for training and service in the Armed Forces”). With “50 years of an all-volunteer force,” Proclamation No. 10668, 88 Fed. Reg. 75,473, 75,474 (Oct. 31, 2023), it would make little sense to presume from Congress an atextual policy-driven distinction between volunteer and non-volunteer mobilizations by Reservists.

Indeed, the Federal Circuit’s reading of the differential-pay statute will actively thwart Congress’s intent. *See* Brief for Members of Congress as *Amici Curiae* at 11, *Adams v. DHS*, No. 21-1134 (filed Mar. 2022) (explaining that the Federal Circuit’s reading “frustrate[s] the intent of Congress”). The Government has activated Reservists “involuntarily *and voluntarily*” for significant operations, including “Operation Noble Eagle,” “Operation Iraqi Freedom,” and a host of “COVID-19 response efforts.” Reserve Component CRS Report at 8–9 & nn.32–33 (emphasis in original). In these emergencies, the Reserve Components were able to offer their unique skills to increase operational efficiency. During the COVID-19 pandemic, for example, the military asked for “volunteer[s]” with “specialized skills in the medical field, in logistics, and in command and control.” Air Reserve Personnel Center, *In order to preserve the nation’s combat readiness*, <http://tinyurl.com/337w8p2j> (last visited Feb. 26, 2024). The Federal Circuit’s atextual exclusion of voluntary mobilizations from the differential-pay statute will inhibit the Government’s ability to marshal specialized personnel in future emergencies.

This Court should grant the Petition in *Feliciano*

to correct the Federal Circuit's legal error and to undo that error's damage to the military's operational readiness.

CONCLUSION

The petition for a writ of certiorari in *Feliciano* should be granted.

Respectfully submitted.

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