

23-861 FELICIANO V. DEPARTMENT OF TRANSPORTATION

DECISION BELOW: 2023 WL 3449138

LOWER COURT CASE NUMBER: 2022-1219

QUESTION PRESENTED:

This case presents a question of critical importance to hundreds of thousands of Americans who serve their country both as federal civilian employees and members of the Armed Services' reserve components.

Congress enacted the differential pay statute, 5 U.S.C. § 5538, to eliminate the financial burden that reservists face when called to active duty at pay rates below their federal civilian salaries. To ensure that these reservists suffer no financial penalty for active-duty service, the differential pay statute requires that the government make up the difference. Federal civilian employees are entitled to differential pay when performing active duty "pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." That section, Section 101(a)(13)(B), enumerates several statutory authorities and includes a catchall provision: "any other provision of law during a war or during a national emergency declared by the President or Congress."

Recently, in a decision that departed from settled understandings of this language, the Federal Circuit held that reservists relying on Section 101(a)(13)(B)'s catchall provision to claim differential pay must show that they were "directly called to serve in a contingency operation." *Adams v. DHS*, 3 F.4th 1375, 1379 (Fed. Cir. 2021). Under that demanding, fact-intensive standard, the Federal Circuit has rejected claims for differential pay even by reservists like petitioner whose activation orders expressly invoked a presidential emergency declaration.

The question presented is:

Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

CERT. GRANTED 6/24/2024