20-1649

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**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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BRYAN ADAMS,

*Petitioner,*

v.

DEPARTMENT OF HOMELAND SECURITY,

*Respondent.*

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On Appeal from the Merit Systems Protection Board
No. DE-4324-19-0288-I-1.

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# BRIEF OF *AMICUS CURIAE* RESERVE ORGANIZATION OF AMERICA IN SUPPORT OF *EN BANC* REVIEW

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## CERTIFICATE OF INTEREST

Counsel for the Reserve Organization of America certifies the following:

1. The full name of every party or *amicus* represented by me is:

Reserve Organization of America

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court and who are not already listed on the docket for the current case are:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal is:

None

Date: October 29, 2021

/s/ Scott A. Felder

Scott A Felder.

*Attorney for Amicus Curiae*
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## INTRODUCTION AND 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 ("RC") members, their families, and veterans of Reserve service. ROA regularly files briefs as part of this advocacy—including in cases before this Court.

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 and 80 percent of Confederate troops. 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

[1] No counsel for a party authored this brief, and no counsel or party other than *amicus* or its counsel made a monetary contribution intended to fund the preparation of this brief.

liberation of Kuwait in the Gulf War. And since September 11, 2001, more than half a million Reservists and National Guardsmen have answered the call to serve their nation.

Today, the United States' RCs have more than 1 million members and constitute nearly half of the total U.S. military force. RC servicemembers hail from all walks of life. They are public high school teachers, doctors, lawyers, police officers, and, like Petitioner, 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.

Recognizing that the only way to ensure a ready and strong national defense was to boost the recruitment, retention, and morale of noncareer servicemembers, Congress sought to eliminate disadvantages to civilian careers. Thus, during, and immediately after World War II, Congress enacted a suite of reemployment protections designed to ensure that servicemembers sent to fight overseas could return to their former civilian jobs. Congress progressively expanded these reemployment rights over the ensuing decades, culminating in the Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103-353, 108

Stat. 3149 (1994) ("USERRA"), which established protections for Reservists against adverse employment actions.

Building on the protections in USERRA, Congress passed the Reservist pay differential statute, 5 U.S.C. § 5538, in 2009. *See* Omnibus Appropriations Act, Pub. L. No. 111-8, div. D, tit. VII, § 751, 123 Stat. 524 (2009). Section 5538 entitles Reservists mobilized to active duty from the federal civilian workforce to differential pay to make up the difference between the Reservist's military and civilian compensation. *See* 5 U.S.C. § 5538. This differential pay is payable for the period "during which such employee is entitled to re-employment rights under [USERRA]." *Id.* at (b)(1).

Differential pay helps alleviate the substantial hardships of mobilization orders. But the Panel's decision in this case threatens to deny this crucial benefit to the vast majority of Reservists mobilized voluntarily (and, typically, individually, in order to leverage their mission-critical skills), rather than involuntarily as part of a unit.

This distinction is not supported by the law, and directly undermines Department of Defense ("DoD") policy to use voluntary mobilizations to support contingency operations as part of the RC's fully

operational role in the modern military. Accordingly, ROA respectfully urges the Court to grant the petition for *en banc* review to allow the Court to consider this important context before denying an important benefit to servicemembers.

## ARGUMENT

### I. MOBILIZED RESERVISTS SUPPORT CONTINGENCY OPERATIONS.

In *O'Farrell v. DoD*, 882 F.3d 1080 (Fed. Cir. 2018), this Court held that 10 U.S.C. § 12301(d) – the statute under which petitioner was mobilized – "undoubtedly qualifies as a 'provision of law'" and therefore a Reservist who was mobilized under that section was called to active duty to "support" a contingency operation "during a national emergency, which is all the relevant statutory provisions [10 U.S.C. § 6323(b)] require." *Id.* at 1087-88.

The Panel Opinion attempts to distinguish *O'Farrell* on the grounds that the "requirements to qualify for differential pay under § 5538(a) are stricter than those for entitlement to benefits under § 6323(b) [the statute at issue in *O'Farrell*], because § 5538(a) does not entitle a claimant to benefits when they are activated 'in support' of a contingency operation,

only when they are directly called to serve in a contingency operation." Panel Op. at 7. This alleged distinction cannot withstand scrutiny.

As a threshold matter, § 5538(a) does not even mention "contingency operations," much less require a Reservist to be "directly called to serve" in such an operation. Moreover, § 5538(a) explicitly applies to Reservists "order[ed] to active duty under section 12304b of title 10," which authorizes mobilization orders to "augment the active forces for a preplanned mission ***in support of*** a combatant command." *See* 10 U.S.C. § 12304b(a) (emphasis added). Because the statute expressly encompasses support operations, differential pay cannot be denied to voluntarily-mobilized Reservists on the thin reed that they "support," rather than "serve in," a contingency operation.

The Panel opinion likewise faults the petitioner for not alleging a "connection between his service and the declared national emergency." Panel Op. at 7. This reasoning collapses in the context of DoD's classification of the RCs as an operational force on equal footing with the active components ("ACs").

When Congress first created the entitlement to Reservist differential pay, the RCs were considered a "strategic" force, serving as a

"force of last resort." In 2008, however, DoD issued a Directive that redesignated the RCs to operate as a fully operational force. U.S. Dep't of Def., Dir. 1200.17, Managing the Reserve Components as an Operational Force, para 4.a-b (Oct. 29, 2008) [hereinafter DoDD 1200.17] ("DoD Directive 1200.17 (2008)"). DoD directed the RCs to "provide operational capabilities and strategic depth to meet U.S. defense requirements across the full spectrum of conflict including under sections 12301, 12302, 12304, and 12306 of Reference (a)" and adopted the policy that "Active Components (ACs) and RCs are [now] integrated as a total force." *Id.*

As a result of this transformation of the force, a total of "40,375 [reservists] were serving on active duty on June 9, 2020," vastly exceeding the number of reservists mobilized at almost any point prior to September 11, 2001. C.R.S., *Reserve Component Personnel Issues: Questions and Answers* at 8, n.32 (June 15, 2020). Viewed in this historical context, the Panel's distinctions between this case and *O'Farrell* are illusory. In the modern operational reserves, all Reservists are involved in supporting contingency operations, and they should therefore be presumed to be eligible for differential pay, absent some particularized circumstance showing otherwise.

## II. THE PANEL ERRED BY EXCLUDING VOLUNTARY MOBILIZATION FROM THE SCOPE OF 5 U.S.C § 5538.

As part of the transition to an operational reserve, DoD's express policy is to rely on "[v]oluntary duty, per section 12301(d) . . . to meet mission requirements." DoD Directive 1200.17, para. 4.g (2008). Consistent with this change, "the Department of Defense changed its methodology for reporting reserve activations. Prior to that date, the report was based only on involuntary mobilizations under 10 U.S.C. §12302." C.R.S., *Reserve Component Personnel Issues: Questions and Answers* at 8, n.32 (June 15, 2020) (citing DoD, *Guard and Reserve Overseas Contingency Operations Activations* (June 9, 2020), produced by the Defense Manpower Data Center). "Since that date, the report has been modified to include those who have been activated voluntarily under 10 U.S.C. §12301(d)," reflecting the increased operational necessity for voluntary mobilizations. *Id.*

Given the importance of the RCs to DoD's operational capability, and DoD's reliance on an all-volunteer force, DoD policy is acutely focused on ensuring that Reservists are provided with "compensation, benefits, and incentives to sustain the all-volunteer force" that

"encourage Service members to continue to serve." DoD Directive 1200.17, enclosure, para. 2.d (2008).

Indeed, the increased utilization of Reservists on active duty by today's military has led to a recognition that "reservists have experienced financial losses when moving from their civilian jobs to fulltime military status." C.R.S., *Reserve Component Personnel Issues: Questions and Answers* at 26 (June 15, 2020). These losses occur "due to differences between the reservists' military and civilian pay, expenses incurred by reservists because of mobilization, and the decline in business experienced by self-employed reservists during and after release from active duty." *Id.* For example, "[w]hen Kevin Sherwood was called up for active duty," his "new military salary [wa]s about $40,000 less than what he earn[ed] with the FAA." Geoffrey Fowler, *More Employers Help Reservists, But Uncle Sam Balks, for Now*, Wall. St. J., (Apr. 30, 2002), https://www.wsj.com/articles/SB102010434445310160. "To help meet his family's bills, he cashed in 19 years of vacation time, some of that donated by co-workers." *Id.*

As Congress recognized when enacting the Reservist pay differential statute, "[i]n recognition of the potential significant financial

impact of long term mobilization, many private companies have chosen to continue to cover the difference in pay and benefits for their employee reservists called to active duty." S. Rep. 108-409, at 1-2 (2004).

Indeed, "Companies such as Boeing Aerospace, State Farm Insurance, and Safeway have elected to cover any pay differences," as did "a number of state governments." S. Rep. 108-409, 1-2 (2004). Congress passed the Reservist pay differential statute, in part to ensure that the federal Government was not doing less for its employees serving in the reserves and to "set an example for employers throughout the country." 149 Cong. Rec. S3506-01 (statement of Sen. Durbin, introducing a prior version of section 5538) ("I would like to discuss the financial burden faced by many of the men and women who serve in the military Reserves or National Guard and who are forced to take unpaid leave from their jobs when called to active duty . . . It is unfair to ask the men and women who have volunteered to serve their country . . . to also face a financial strain on their families.").

Yet, the Panel's decision does exactly what Congress sought to avoid by excluding voluntarily-activated Reservists from differential pay. Given the frequent use of voluntary mobilization, the decision has the

effect of excluding many Reservists, often those possessing the most mission-essential expertise, from receiving this important benefit. Not only does this send the wrong message to dedicated servicemembers, it violates "the interpretive canon that 'provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *See* Entitlement to Reservist Differential Pay Under the Pre-Amend. Version of 5 U.S.C. § 5538, 2010 WL 2851605, at *7 (O.L.C. June 28, 2010) (interpreting the applicability of the Reservist differential pay benefit); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, n.9 (1991) (interpreting a provision of the Veterans' Reemployment Rights Act, a USERRA precursor); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation [the Selective Training and Service Act of 1940] is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

The Panel's attempt to justify the distinction between voluntary and involuntary mobilization falls flat. The Panel opinion reasons that the phrase "any other provision of law" in 10 U.S.C. § 101(a)(13)(B) does not apply to § 12301(d) voluntary mobilization orders because "all of the identified statutes involve a connection to the declared national

emergency." *Id.* at 1380. Contrary to the Panel's reasoning, however, including voluntary mobilization is fully consistent with the structure of the statute.

When there is no declared national emergency, voluntary mobilizations are excluded. On the other hand, when there is an emergency, as there is today, it makes no sense to distinguish between voluntary and involuntary mobilizations. When there is an emergency, DoD indisputably needs the ability to tap every available member of its operational forces – including the RCs – to respond quickly to the emergency at hand, without worrying that Reservists will hesitate, or even decline, to volunteer for active duty because this Court has cut off their access to differential pay.

The problems with the Panel's approach stand stark against RC mobilizations in support of the DoD's response to the COVID-19 pandemic. On March 13, 2020, the President declared a national emergency due to the pandemic. *See* Proclamation No. 9994, 85 Fed. Reg. 15337 (March 13, 2020). On March 27, 2020, the President issued a further executive order providing additional authorities to DoD to mobilize RC servicemembers in light of the emergency. *See* E.O. 13912,

85 Fed. Reg. 18407 (Mar 27, 2020). By June 2020, DoD had mobilized nearly 6,000 Reservists[2] to assist in fighting the pandemic.[3]

To meet its operational needs in responding to the COVID-19 pandemic, the Services relied primarily on voluntary mobilizations under § 12301(d). For example, the Air Force asked Reservist "Airmen willing to volunteer for mobilization" to "contact their squadron commander . . . to self-identify their availability."[4]

In a national emergency, voluntary mobilizations provide the Services with much-needed flexibility and expertise. For example, when called to volunteer, Reservists may be performing key roles in civilian positions where it would not make sense to divert them to service with DoD. Indeed, at the start of the pandemic, DoD mobilized Reservists and

[2] This figure does not include National Guard activations under Title 32 of the U.S. Code for COVID19 response.

[3] *See* C.R.S., *Reserve Component Personnel Issues: Questions and Answers* (June 15, 2020).

[4] Air Reserve Personal Center, *In order to preserve the naton's combat readiness,* United States Air Force, https://www.arpc.afrc.af.mil/COVID-19-Mobilization/ (last visited Oct. 29, 2021).

Guardsmen to help with first responder tasks, only to find that they were pulling them from performing that role in another location.[5]

But by drawing an unwarranted distinction between voluntary and involuntary mobilizations—and denying voluntarily-mobilized Reservists differential pay—the Panel decision will discourage voluntary mobilizations, requiring DoD to rely on involuntary mobilizations, contrary to DoD's policy and preferred approach.

## CONCLUSION

For the above reasons, ROA urges the Court to grant the petition for rehearing *en banc*.

[5] *See* Adam Scher, *The Pentagon Must Prep Now For The Next Pandemic*, Defense One, https://www.defenseone.com/ideas/2021/08/pentagon-must-prep-now-next-pandemic/184697/ (Aug. 20, 2021) ("Almost immediately, DoD faced unanticipated second- and third-order effects. Both components are disproportionately composed of first responders and frontline healthcare workers who regularly serve local communities. In some instances, Guard and Reserve members were pulled from local communities where they were needed in their civilian capacity in order to serve as first responders elsewhere within the same state.").

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the word length requirements of Federal Circuit Rule 35(g) because it contains 2,428 words, excluding the portions excluded by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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Dated: October 29, 2021

## CERTIFICATE OF SERVICE

I certify that on October 29, 2021, I caused a copy of the foregoing to be served on counsel of record via CM/ECF.

/s/ Scott A. Felder
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