

LAW REVIEW¹ 21076

November 2021

ROA Helps Enlisted Air National Guard Member who Is a Federal Employee To Receive Differential Pay for Active-Duty Periods.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees who are Reserve Component members

Adams v. Department of Homeland Security, 3 F.4th 1375 (Fed. Cir. 2021).³

The law that applies to this case

Section 5538 of title 5 of the United States Code (U.S.C.) provides as follows:

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 45 years, I have collaborated with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 38 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ This is a recent decision of the United States Court of Appeals for the Federal Circuit, the specialized Federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the Merit Systems Protection Board. The citation means that you can find this decision in Volume 3 of *Federal Reporter 4th Series*, and the decision starts on page 1375 of that volume.

(a) An employee who is 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 section 12304b of title 10 [10 USCS § 12304b] or a provision of law referred to in section 101(a)(13)(B) of title 10 [10 USCS § 101(a)(13)(B)] shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 [38 USCS §§ 4301 et seq.] with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)

(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) [5 USCS § 2302(a)(2)(C)(ii)] shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii) [5 USCS § 2302(a)(2)(C)(ii)]) with respect to which such employee has reemployment rights under chapter 43 of title 38 [38 USCS §§ 4301 et seq.]; and

(3) the term “basic pay” includes any amount payable under section 5304 [5 USCS § 5304].⁴

As I have explained in detail in Law Review 15067 (August 2015) and many other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵ on 10/13/1994 as a long-overdue update of and improvement upon the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA’s first section states: “It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.”⁶

To fulfill the aspiration to make the Federal Government the “model employer”, Congress has enacted several “over and above USERRA” benefits for Reserve Component (RC) members⁷ who are Federal employees. Section 5538 is one of the more important of those benefits. Some RC service members, especially enlisted service members, are paid at a substantially lower rate than they normally receive in their civilian jobs, including Federal civilian jobs. Under section 5538, a Federal civilian employee who leaves his or her job for military service and receives a smaller compensation while away is entitled to differential pay to make up the difference.

Under USERRA’s second section, USERRA is a floor and not a ceiling on the employment and reemployment rights of those who are serving or have served our country in uniform. That section provides:

- (a)** Nothing in this chapter shall supersede, nullify or diminish any *Federal* or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.⁸

Section 5538 is an example of another Federal law that provides greater or additional rights to RC members who are Federal civilian employees. Thus, section 5538 is not superseded by USERRA.⁹

⁴ 5 U.S.C. § 5538. Congress enacted this provision on 3/11/2009. Omnibus Appropriations Act, Public Law 111-8, Division D, Title VII, § 751, 123 Stat. 524 (2009). Congress amended this section into its present form on 8/13/2018: Public Law 115-232, Division A, Title VII, Subtitle A, § 605, 132 Stat. 1795 (2018).

⁵ Public Law 103-353, 108 Stat. 3149 (1994). Congress has amended and improved USERRA many times since 1994. The law is currently codified in title 38 of the United States Code, sections 4301 through 4335 (38 U.S.C. §§ 4301-35).

⁶ 38 U.S.C. § 4301(b).

⁷ There are eight Reserve Components of the United States armed forces. In descending order of size, they are the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, the Coast Guard Reserve, and the nascent Space Force Reserve.

⁸ 38 U.S.C. § 4302 (emphasis supplied).

⁹ 38 U.S.C. § 4302(a).

One of the major improvements made by the enactment of USERRA in 1994 was the creation of a specific enforcement mechanism for complaints that Federal executive agencies, as employers, have violated USERRA. That enforcement mechanism is set forth in section 4324 of USERRA.¹⁰

The facts of the *Adams* case

Bryan Adams is an enlisted service member in the Arizona Air National Guard. On the civilian side, he is a human relations specialist for Customs & Border Protection (CBP), a component of the United States Department of Homeland Security (DHS). During 2018, Adams was away from his civilian job for three periods of military service. Adams' military compensation during these three service periods was less than his regular civilian compensation. Accordingly, Adams applied for differential pay under section 5538, and CBP denied his request. This lawsuit resulted.

Bryan Adams is represented by attorney Brian Lawler.¹¹ Through Brian Lawler, Bryan Adams initiated an action against DHS in the Merit Systems Protection Board (MSPB).¹² After the MSPB ruled against Adams' claim, Brian Lawler appealed to the Federal Circuit. As is always the case in the Federal intermediate appellate courts, the case was assigned to a panel of three appellate judges. In this case, the three judges were Judge Todd M. Hughes, Judge Kimberly Ann Moore, and Judge Jimmie V. Reyna, all active (not senior status) judges of the Federal Circuit. Judge Hughes wrote the opinion, and the other two judges joined in a unanimous panel decision affirming the MSPB decision, but on grounds other than those relied upon by the MSPB. In his opinion, Judge Hughes wrote:

¹⁰ 38 U.S.C. § 4324.

¹¹ Brian Lawler is a recently retired Marine Corps Reserve officer and a life member of ROA. His office is in San Diego, and he has a nationwide practice representing service members and veterans with claims under USERRA and other laws, including section 5538. He is the author of several of our "Law Review" articles, and he is one of two lawyers (along with Thomas Jarrard, Esq.) to whom I frequently refer clients.

¹² The MSPB is a quasi-judicial Federal executive agency that adjudicates disputes involving Federal executive agencies, as employers, and Federal employees, former Federal employees, and unsuccessful applicants for Federal employment under several laws, including USERRA. The MSPB has three members, including a Chair and Vice Chair, who are to be of the same major political party as the President, and a Member, who is to be of the other major political party. These members must be nominated by the President and confirmed by the Senate. As I have explained in Law Review 20032 (March 2020), the MSPB has been without a quorum (at least two members) since January 2017 and has been without any members since March 2019, as the terms of confirmed MSPB members have expired and the Senate has failed to act on presidential nominations to fill the vacancies. President Trump nominated three highly-qualified persons (two Republicans and one Democrat) to fill the vacancies, but the Senate never acted on these nominations. President Biden has nominated three other highly-qualified persons (two Democrats and one Republican) to fill these important vacancies, but the Senate has not yet acted on those nominations. MSPB cases, including USERRA cases, start before an Administrative Judge (AJ) of the MSPB, who conducts a hearing and makes findings of fact and conclusions of law. The losing party at the AJ level, either the individual plaintiff or the agency defendant, can appeal the AJ's decision to the MSPB itself. If the individual plaintiff loses at the AJ level, he or she can wait 35 days for the AJ's decision to become the final decision of the MSPB and then appeal that MSPB decision to the United States Court of Appeals for the Federal Circuit. That is the procedure used by Brian Lawler, on behalf of Bryan Adams, in this case.

Generally, an employee making a USERRA claim under 38 U.S.C. § 4311 must show that (1) they were denied a benefit of employment, and (2) the employee's military service was "a substantial or motivating factor" in the denial of such a benefit. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (citation omitted). However, when the benefit in question is only available to members of the military, claimants do not need to show that their military service was a substantial or motivating factor. *See Butterbaugh v. Dep't of Just.*, 336 F.3d 1332, 1336 (Fed. Cir. 2003) ("[W]e agree with the Board that, in contrast to cases such as *Sheehan*. . . the question in this case is not whether Petitioners' military status was a substantial or motivating factor in the agency's action, for agencies only grant military leave to employees who are also military reservists."); *see also Maiers v. Dep't of Health & Hum. Servs.*, 524 F. App'x 618, 623 (Fed. Cir. 2013) ("In *Butterbaugh*, we determined that claimants need not show that their military service was a substantial motivating factor when the benefits at issue were only available to those in military service.").

Because differential pay is only available to members of the military, we agree with Mr. Adams that the Board erred in its legal analysis by requiring that he show that his military service was a motivating factor in the agency's decision to deny differential pay. In order to establish a USERRA violation, Mr. Adams was only required to show that he was denied a benefit of employment. We therefore consider whether Mr. Adams was entitled to differential pay as a benefit of employment under the statutory provisions.¹³

In his opinion for the three-judge panel, Judge Hughes held that Adams was not entitled to differential pay for the three 2018 military periods under Judge Hughes' interpretation of section 5538. As a next step in the appellate process, Adams (through Brian Lawler) petitioned the Federal Circuit for rehearing en banc.¹⁴ ROA, through pro bono (no compensation) attorneys filed an amicus curiae ("friend of the court") brief in the Federal Circuit, urging that court to grant rehearing en banc in the *Adams* case. You can find a link to that brief at the end of this article. We will keep the readers informed of developments in this important case.

Please join or support ROA

This article is one of 2300-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many

¹³ *Adams*, 3 F.4th at 1377-78.

¹⁴ If this petition is granted, there will be new briefs and a new oral argument before all of the active (not senior status) judges of the Federal Circuit.

decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Organization of America
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Washington, DC 20002

Beginning on the next page is the amicus curiae brief that ROA filed in the Federal Circuit. ROA thanks attorneys Scott A. Felder, Theodore Howard, Wesley Weeks, and Lukma Azeez, of the DC law firm Wiley Rein LLC for the excellent pro bono work in drafting and filing this brief.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRYAN ADAMS,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

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

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.

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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 Reservists² 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 Personnel Center, *In order to preserve the nation’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.”).

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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.

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