No. 20-2703

In the United States Court of Appeals for the Third Circuit

GERARD TRAVERS, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:19-cv-6106 (The Honorable Mark A. Kearney)

BRIEF OF THE RESERVE OFFICERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF AND REVERSAL

JOHN PAUL SCHNAPPER-CASTERAS
Counsel of Record
SCHNAPPER-CASTERAS PLLC
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 630-3644
jpsc@schnappercasteras.com

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE* [1]

The Reserve Officers Association of the United States (ROA) was founded in 1922 and chartered by Congress in 1950. The ROA is composed of over 42,000 members: military officers, former officers, enlisted personnel, and families of all the uniformed services of the United States, primarily the Reserve and National Guard. ROA provides tools, resources, support, and advocacy for reservists—in and out of uniform—and their families, and it advises Congress and the Executive branch about the strength and readiness of the Reserve force. To that end, ROA has long been involved in the implementation of the Uniformed Services Employment and Reemployment Rights Act (USERRA): it maintains a staff, law center and knowledge repository dedicated to educating its members, the public, and employers about USERRA, and the rights of military servicemembers and veterans.

ROA has filed *amicus* briefs in a variety of significant appeals. *See, e.g.*, *White v. United Airlines, Inc.*, No. 19-2546 (7th Cir. 2020); *United States v. Alvarez*, 2011 WL 6179423 (U.S. 2011); *Staub v. Proctor Hosp.*, 2010 WL 2770106 (U.S. 2010); *McCarty v. McCarty*, 1980 WL 339736 (U.S. 1980); *Ramirez v. State Children, Youth*

[1] No party or counsel for a party in the pending appeal authored the proposed *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than the *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

& Families Dep't., 2016-NMSC-016, 372 P.3d 497 (N.M. 2014). Given its purpose, membership, and history, ROA offers its unique perspective to assist this Court and to promote just outcomes in USERRA litigation.

SUMMARY OF ARGUMENT

When servicemembers step off a plane or ship after deploying overseas, many will move from active duty to reserve status and embark upon a challenging transition from full-time military life into the civilian workforce. Along the way, they will receive guidance from the federal government, perhaps additional training from the private sector, and regular refrains of "thank you for your service" from the public at large.

But what reservists need and deserve most of all is equality — under the law and in the eyes of their employers. That fundamental rule is the bedrock of USERRA and courts' interpretation of it since 1994. USERRA prohibits, *inter alia*, discrimination when servicemembers are working and also vis-a-vis civilian employees when taking leave. It can and should be applied faithfully to a variety of circumstances, including the meaning and scope of key statutory terminology.

In this case, the equality rule confirms that this Court should apply the plain text of 38 U.S.C. §§ 4316(b)(1) and 4303(2), which is clear insofar as it defines "rights and benefits" broadly to encompass a wide array of the terms, conditions, or privileges of employment.

Assuming *arguendo* that subsections 4316(b)(1) and 4303(2) together are ambiguous with respect to whether paid leave and profit-sharing are "rights and benefits," then longstanding canons of statutory interpretation, which the Supreme Court developed especially in the context of servicemembers' rights, direct that USERRA be interpreted liberally in favor of servicemembers. Here that means "rights and benefits" should be interpreted to include the right to receive paid leave in the same manner as civilian employees do.

At the end of the day, upholding the basic precept of equality between civilians and servicemembers is not simply an exercise in bean counting paid leave or profit-sharing benefits. It reflects a basic level of respect that we owe those who sacrifice for the country and who continue to raise their hands for duty in the Reserves, knowing the added demands, disruption, and uncertainty that may bring. Moreover, the equality rule serves the important national interest in fostering a robust military reserve, that remains prepared to activate and defend the nation, while its members continue to work full-time in the civilian economy. In recent years, the country has asked much of reservists, calling up over one million, often to Iraq and Afghanistan, sometimes for multiple deployments, and amassing nearly 1,300 fatalities. When those troops finally return home, we cannot necessarily guarantee them an easy transition – but we must at least offer them equal treatment, as USERRA commands.

ARGUMENT

I. Subsections 4316(b)(1) and 4303(2) are Clear that Employees on Military Leave and Non-Military Leave Must be Treated Equally, Including with Respect to Paid Leave

The subsections of USERRA at issue here are clear and this Court can and should rest on a straightforward reading of 38 U.S.C. §§ 4316(b)(1) and 4303(2). *Amicus* agrees with and adopts Plaintiff-Appellant's compelling analysis of the statute, including the plain meaning of § 4316(b)(1) and the broad definition of the term "rights and benefits" under the statute at 38 U.S.C. § 4303(2). *Amicus* offers its experience and perspective on three related points:

First, as a matter of statutory interpretation, section 4316(b) establishes an equality rule that undergirds USERRA. That provision requires equality between reservists and civilian "employees having similar seniority, status, and pay." 38 U.S.C. § 4316(b)(1)(B), when they take military and non-military leave. Specifically, the statute states that workers on military leave are "entitled to such other rights and benefits . . . as are generally provided by the employer of the person to employees . . . who are on furlough or leave of absence[.]" *Id*. Subsection 4316(b)(1)'s equality rule is part of USERRA's core tenet of "equal, but not preferential" treatment for reservists, which this Court and several sister circuits all recognize. *See, e.g.*, *Crews v. City of Mt. Vernon*, 567 F.3d 860, 865 (7th Cir. 2009); *Dorris v. TXD Servs., LP*, 753 F.3d 740, 745 (8th Cir. 2014) (collecting cases and

situating the equal-but-not-preferential-treatment rule within the context of Supreme Court decisions). Simply put, "USERRA requires equal treatment for veterans," *Jolley v. Dep't of Hous. & Urban Dev.*, 299 F. App'x 966, 968 (Fed. Cir. 2008) (unpublished). Likewise, executive branch regulations recognize this element of USERRA.[2]

Second, the equality rule was a central feature of the law governing servicemembers even before USERRA, namely through the Veterans Reemployment Rights Act ("VRRA"), which was expressly re-codified and expanded by Congress when it passed USERRA. When Congress enacted § 4316(b), it stressed that it "would codify court decisions that have interpreted current law [VRRA] as providing a statutorily-mandated leave of absence for military service that entitles servicemembers to participate in benefits that are accorded other employees." S. Rep. No. 103-158, at 58 (1993) ("Senate Rpt.") (citing *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986)).[3]

In enacting USERRA in 1994, Congress embraced the Third Circuit's well-reasoned decision that upheld the rule of equality. The House of Representatives explained that § 4316(b) would "affirm the decision in *Waltermyer*" that reservists

[2] For example, the Department of Labor's implementing regulations reiterate that workers on military leave "must be given the most favorable treatment accorded to any comparable form of leave." 20 C.F.R. § 1002.150(b).

[3] *See generally* H.R. Rep. No. 103-65, at 33-34 (1993) ("House Rpt.").

on military leave must receive "the most favorable treatment accorded any particular leave." House Rpt. at 33-34. This Circuit in *Waltermyer* had acknowledged "equality as the test" for workers on military leave as compared to other workers on similar types of leave, holding that an employee who took military leave on a holiday was entitled to receive pay for that time on equal terms as workers who took jury duty that day and received pay. 804 F.2d at 824-26.[4] Congress invoked the equality rule in explaining its codification of *Waltermyer*: reservists on military leave must receive "the most favorable treatment accorded any particular leave" that other workers take, House Rpt. at 33-34, *i.e.*, they must receive the broadest range of "rights and benefits" offered to other workers on leave, including paid leave or pay.

Third, as a matter of administrability, the experience of *amicus* and its members illustrates why Plaintiff-Appellant's understanding of §§ 4316(b)(1) and

[4] This equality rule "merely establishe[d] equality for . . . reservists, not preferential treatment." *Waltermyer,* 804 F.2d at 825; *see Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 525 (E.D. Pa. 2019) (stating that *Waltermyer* held that "[p]aying plaintiff for those holidays" when he was on military leave "established 'equality . . . not preferential treatment'"). Because the plaintiff in *Waltermyer* "was not suing for compensation for other days not worked" other than holidays, the Third Circuit "limited its holding to the question of what it described as 'holiday pay.'" *American Airlines*, 384 F. Supp. 3d at 525. Still, *Waltermyer's* equality test naturally mandates reservists to receive paid leave in situation whether civilian workers would. "If a reservist and [a] juror are equal, *then the reservist is not entitled to just holiday pay but to full pay for all days not worked*, since employees absent for jury duty receive full pay." *Waltermyer*, 804 F.2d at 827 (Hunter, J., dissenting) (emphasis added).

4303(2) is reasonable and would have a modest impact on employers. When servicemembers transition from active duty to reserve life and enter (or re-enter) the civilian workforce, they often apply to a variety of employers that have different policies, some of which might provide certain types of paid leave and some of which might not. For example, federal law does not require employers to compensate employees for jury duty[5] – but should they elect to, then the paid leave they provide must be given equally to those on short-term military leave. Practically speaking, once an employer has opted to offer a right or benefit to civilian employees widely (who likely comprise the super-majority of most companies' workforces), there is simply no basis – in the experience of *amicus* – to suggest that applying it even-handedly to reservist employees would be burdensome or complicated. Indeed, many employers already provide reservists with paid leave for short-term military leave and, in some instances, for long-term military leave as well.

II. Even if Subsections 4316(b)(1) and 4303(2) are Ambiguous, Supreme Court Precedent Requires USERRA be Liberally Construed in Favor of Servicemembers

Assuming *arguendo* that §§ 4316(b)(1) and 4303(2) are somehow unclear, they must be liberally interpreted in favor of servicemembers. For over half a century, the Supreme Court has held that the federal law on reemployment rights for

[5] *See generally* U.S. Department of Labor, Jury Duty, https://www.dol.gov/general/topic/benefits-leave/juryduty (last accessed Nov. 16, 2020).

veterans and reservists (which now is USERRA) "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946). *Accord Boone v. Lightner*, 319 U.S. 561, 575 (1943) (adopting statutory interpretations that "liberally construe" veterans' laws "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."). The Court subsequently reaffirmed that this "guiding principle" of liberal construction "govern[s] all subsequent interpretations of the re-employment rights of veterans." *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977). Similarly, *King v. St. Vincent's Hosp*. stressed that when a court is presented with two plausible readings of the reemployment rights law, it should "read the provision in [the servicemember's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." 502 U.S. 215, 221 n.9 (1991) (citing *Fishgold*, 328 U.S. at 285).

Likewise, the Seventh Circuit held that "USERRA is to be liberally construed in favor of those who served their country." *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998). This canon of construction does not simply serve as a tie breaker between a pair of plausible arguments, rather, the Supreme Court has made clear, any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). The canon applies broadly, including to the

interpretation and reconciliation of separate subsections of veterans' rights statutes,[6] and it "remains in full force and effect" under USERRA, as Congress explicitly stated in enacting the law, House Rpt. at 19; *see* Senate Rpt. at 40.[7]

To the extent §§ 4316(b)(1) and 4303(2) might be seen as ambiguous, they should be construed liberally in light of the *Fishgold* canon to reflect a broad definition of "rights and benefits." Specifically, that means that paid leave is one of the rights and benefits that must be provided equally under § 4316(b)(1), and that short-term military leave is considered comparable to jury duty leave. The district court, by contrast, mistakenly refused to apply the *Fishgold* canon at all (even "to residual, end-stage ambiguity after considering legislative history") because it found the statute to be unambiguous. JA 23.

A liberal construction of §§ 4316(b)(1) and 4303(2) also aligns with Congress' expansive purpose in passing USERRA in order to strengthen, improve, and clarify servicemembers' rights. *See, e.g.*, 137 Cong. Rec. H2977 (May 14, 1991)

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[6] The Supreme Court mandated that courts "construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285; *accord King*, 502 U.S. at 221 (holding, in interpreting USERRA's predecessor statute, that a court must "follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context") (citations omitted).

[7] *Amicus* endorses Plaintiff-Appellant's more detailed survey of the legislative history, *see* Br. of Appellant at 19-33.

(Congress's "primary goals" for USERRA were "to clarify and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions."); *see also id*. (observing that the purpose was to "assure a smooth transition from military service to the civilian work force"). *Accord Leisek v. Brightwood Corp*., 278 F.3d 895, 898 (9th Cir. 2002) ("Congress enacted USERRA in order to 'clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions.'") (quoting *Gummo v. Vill. of Depew*, 75 F.3d 98, 105 (2d Cir. 1996) (quoting House Rpt. at 18)); *accord* USERRA of 1994, Pub. L. No. 103-353, 108 Stat. 3149, 3150 (1994) (stating USERRA's purpose is "to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services").

III. The Outcome of this Case is Important to Reservists Nationwide

The appeal at bar is significant to *amicus*, the tens of thousands of members of the ROA, and the hundreds of thousands more reservists across the Army, Navy, Marine Corps, Air Force, and Coast Guard for three core reasons:

First, safeguarding the fair and equal hiring and reemployment opportunities of servicemembers – including their benefits packages and terms of leave – is essential to maintaining a top-tier Reserve force. Recruiting and retaining the best personnel to serve in the Reserves requires protecting reservists as they engage in full-time work and obtain periodic re-employment in the civilian workforce. Indeed,

the Supreme Court recognized that servicemembers' reemployment rights "provide[] the mechanism for manning the Armed Forces of the United States." *Alabama Power*, 431 U.S. at 583. The plain text of USERRA confirms as much, since the statute aims:

> (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
>
> (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301(a). Likewise, "Congress has long recognized that the support of civilian employers is necessary if the uniformed services are to be able to recruit and retain noncareer personnel." 140 Cong. Rec. S13626–42, S13634 (Sept. 28, 1994) (Statement of Sen. Rockefeller).

It is also worth underscoring that the Reserve Component, undergirded by USERRA, is vital to the national interest. In the last two decades, the Reserves have been the backbone of the United States Armed Forces, deploying in a range of critical missions at home and abroad. The demands placed on reservists are weighty:

calling up over one million members,[8] on average for nine months per deployment,[9] often to active warzones like Iraq and Afghanistan.[10] Multiple reserve deployments per servicemember are common: for instance, between 2001 and 2015, 59,000 reservists had two deployments and 39,000 reservists had three or more.[11] The losses have been heavy too: "[n]early 1,300 of their number have made the ultimate sacrifice" since September 11th.[12] To be clear, in this case, Plaintiff-Appellant is only asserting that short-term military leave[13] is comparable to jury duty, and neither he nor *amicus* are asking the Court to hold that civilian employers must compensate employees for all long-term military leave.

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[8] Associated Press, *Reserve and National Guard Activations Top One Million Since 9/11* (Feb. 8, 2020), https://www.military.com/daily-news/2020/02/08/reserve-and-national-guard-activations-top-one-million-9-11.html.

[9] Jennie W. Wenger et al., *Examination of Recent Deployment Experience Across the Services and Components*, RAND Corporation at 3 (2018), https://www.rand.org/pubs/research_reports/RR1928.html?adbsc=social_20180320_2212921&adbid=975928167633334272&adbpl=tw&adbpr=22545453.

[10] *See, e.g.*, Mark F. Cancian, *U.S. Military Forces in FY 2020: Army*, Center for Strategic and International Studies (Oct. 15, 2019), https://www.csis.org/analysis/us-military-forces-fy-2020-army ("On average, about 25,000 Army Reservists and Guardsmen are mobilized at any time, mainly supporting operations in Iraq and Afghanistan").

[11] Wenger, *supra*, at 9.

[12] The Associate Press, *supra* (quoting ROA's Executive Director).

[13] *Miller v. City of Indianapolis*, 281 F.3d 648, 649 (7th Cir. 2002) ("The obligation of military reservists and the National Guard members consists generally of one 2–week period during the year and one weekend day per month.").

Public national security documents confirm the centrality of the Reserves. *See, e.g.*, Department of Defense Instruction, 1235.12, *Accessing the Reserve Components (RC)* at 2 (updated Feb. 28, 2017) ("It is [Department of Defense] policy that [the] [Reserve Component] provides an operational capability and strategic depth in support of the national defense strategy."). National security scholars likewise stress that "[t]oday the United States is relying on its National Guard and Reserves to an almost unprecedented degree," utilizing them for "the full range of military missions," including: "[t]he earliest days of major combat; [s]tability and reconstruction; [h]omeland defense and civil support; [p]artner capacity building; [and] [c]oordination with militaries all over the world."[14]

Second, were employers able to chip away at the equality rule, by carving out certain "rights and benefits" on the basis of parsimonious statutory interpretations, it would be problematic for reservists, potentially distracting on an individual level and detracting from retention writ large. Servicemembers juggling a civilian career, family, and reserve duties need not be nickeled and dimed for brief leave benefits, while their civilian counterparts use them breezily. Not only would that be unfair and unwarranted, but moreover, "[i]t would be a tragedy if the men and women who

[14] *See* Center for Strategic and International Studies, *Future of the National Guard and Reserves in the 21st Century*, https://www.csis.org/programs/international-security-program/isp-archives/defense-and-national-security-group/future (last accessed No. 16, 2020).

have risked their lives for their fellow Americans were penalized as a result of their services in our Armed Forces." 137 Cong. Rec. H2980 (May 14, 1991) (Statement of Rep. Smith). In the long run, degrading the equality rule – today in the form of paid leave, tomorrow perhaps by some other right or benefit – would undermine recruiting and retention.

Third, the Supreme Court has long recognized the "special solicitude" that Congress has "for the veterans' cause." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); *accord United States v. Oregon,* 366 U.S. 643, 647 (1961) ("[t]he solicitude of Congress for veterans is of long standing."). This stems from a deep civic bond between servicemembers and the democratic government they serve. Expanded rights for reservists were enacted out of a "sense of obligation"—a solemn recognition of the need "to compensate for the disruption of careers and the financial setback that military service meant for many veterans." 140 Cong. Rec. S7670–71 (June 27, 1994) (Statement of Sen. Rockefeller). USERRA "reflect[ed]" the "great debt of gratitude" owed to those who served, and "signif[ied]" Congress's "respect" for "the people who served us so well." 137 Cong. Rec. H2965 (May 14, 1991) (Statement of Rep. Mazzoli). *Accord Sanders*, 556 U.S. at 412 (interpreting a veterans claims statute in light of the fact that a veteran "has performed an especially important service for the Nation, often at the risk of his or her own life.").

In the end, this case matters to ROA because it speaks to the most basic of obligations to servicemembers. When our troops finally return home, after long deployments overseas, and perhaps multiple interruptions to their family life and career, we cannot guarantee them an easy transition back or wipe away what they have seen and sacrificed. But we can and must offer them at least the dignity of equal treatment in the workplace, on behalf of a grateful nation and as required by USERRA.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

JOHN PAUL SCHNAPPER-CASTERAS
Counsel of Record
SCHNAPPER-CASTERAS PLLC
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 630-3644
jpsc@schnappercasteras.com

Counsel for Amicus Curiae

November 16, 2020

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all counsel for *amicus curiae* are members of the bar of the United States Court of Appeals for the Third Circuit.

/s/ John Paul Schnapper-Casteras
John Paul Schnapper-Casteras
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,439 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times font.

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was run on the electronic version of this brief using Kaspersky Threat Intelligence Portal online, General Access version, and that no virus was detected.

/s/ John Paul Schnapper-Casteras
John Paul Schnapper-Casteras
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/ John Paul Schnapper-Casteras
John Paul Schnapper-Casteras
Counsel for Amicus Curiae