LAW REVIEW[1] 24030
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Ward v. Shelby County—The Saga Continues.
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to state and local governments.
1.2—USERRA forbids discrimination.
1.4--USERRA enforcement.
1.8—Relationship between USERRA and other laws/policies

Ward v. Shelby County, Tennessee, 2024 U.S. App. LEXIS 8721 (6th Cir. April 11, 2024).[3]

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "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 Spouses' 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 mailto:swright@roa.org.

[3] This is a decision of a three-judge panel of the United States Court of Appeals for the 6th Circuit, the intermediate federal appellate court that sits in Cincinnati and hears appeals from federal district courts in Ohio, Michigan, Tennessee, and Kentucky. This decision has been "recommended for full-text publication." That means that in a few weeks the decision, including the dissent, will be officially published in *Federal Reporter, 4th Series.*

This is the same case that I discussed in Law Review 22033 (June 2022), but we are at a later stage now. The plaintiff, Sedric Ward, is a Sergeant First Class in the United States Army Reserve (USAR) and a member of the Reserve Organization of America (ROA).[4]

Sedric Ward was employed as a corrections officer in the Shelby County Jail. He received considerable negative feedback from his supervisors about the times when he was absent from his civilian job for training and service in the USAR, although all those absences from work were protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Like more than 40 states, Tennessee provides, by state law, for limited periods of *paid* military leave for employees of the state and its political subdivisions (counties, cities, school districts, and other units of local government) who are members of Reserve Components of the armed forces.[5] Sedric Ward received paid military leave from Shelby County for some of the periods when he was away from his civilian job for USAR training and service.

In the majority (2-1) decision of the 6th Circuit panel, dated 4/11/2024, the facts are laid out as follows:

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[4] On 10/2/1922, more than 100 USAR officers attended a meeting at Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American forces in the recently concluded "Great War" as World War I was then known. General Pershing and those who attended at his invitation recognized that calling the recent war "the war to end all wars" was a dangerous conceit and that our country needed to maintain readiness to use military forces again. The attendees founded the Reserve Officers Association at that meeting. Captain Harry S. Truman was one of the founders. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to support the development and implementation of policies that will provide adequate national defense. In 2018, ROA members amended the organization's Constitution and expanded membership eligibility to include enlisted service members of all services. We adopted the "doing business as" name of "Reserve Organization of America" to emphasize that we represent and seek to recruit as members all military personnel, from E-1 to O-10.

[5] *See* Tennessee Code § 8-33-109. Tennessee provides up to 20 working days of paid military leave for state and local government employees. *See generally* our "State Leave Laws" section on the Service Members Law Center page of the ROA website, where you will find 54 articles about the state and territorial laws that provide paid military leave. I have placed a link to the Tennessee article at the end of this article.

Ward has been an Army reservist since 1987. In 1998, he began working at the Shelby County Jail, which is run by the Shelby County Sheriff's Office. Like most reservists, Ward often took leave while deployed and to attend drills and training. Some of that leave was paid by the County. In 2013, the County conducted an audit that allegedly revealed potential instances where employees at the jail had taken paid leave of various kinds—medical, military, or family—on fraudulent grounds. Ward was not among the employees whose leave was flagged as suspicious in that audit.

The Sheriff's Office asked the General Investigations Bureau to conduct a criminal investigation, which—unlike the audit itself—focused solely on leave taken by servicemember employees. As part of that investigation, Agent Jason Valentine told Ward to produce documents supporting the validity of his paid leave during the past several years. Ward had difficulty retrieving those documents but eventually slid some documents under Valentine's door. Yet the Bureau later issued a report in which it accused multiple servicemembers, including Ward, of taking fraudulent leave—in Ward's case, 36 days' worth.

In November 2014, at the urging of the local district attorney's office, a Tennessee grand jury indicted Ward for theft. He was booked and detained in the same jail in which he worked. The next day, the Sheriff's office suspended Ward without pay. The Sheriff's Office then conducted its own investigation, during which Eugenia Sumner demanded Ward produce, within three days, documents supporting his paid leave during the last several years. Ward could not meet that deadline—he testified that doing so was impossible within the military bureaucracy—and the County fired him. (One of the grounds for termination was

> "disobedience" of Sumner's "order" to produce those documents by her deadline.)
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> In November 2015, Ward provided the district attorney's office with documents substantiating his attendance at military functions on the dates relevant to his indictment. The district attorney's office moved to dismiss the charges against Ward that same day.[6]

All of these facts were established at trial, and the jury awarded a verdict, which the district judge approved, that included $1.5 million in back pay, attorney fees, and other relief. The district judge granted summary judgment to the plaintiff, Sedric Ward, on the waiver issue. Shelby County appealed to the 6th Circuit. As is always the case in federal civil cases, the appeal was assigned to a panel of three judges. In this case, the judges were Judge Eric L. Clay, Judge Raymond M. Kethledge, and Judge Andre B. Mathis, all active judges of the 6th Circuit.

Judge Kethledge and Judge Mathis joined in a per curiam decision, reversing the district court judgment for Ward and remanding the case to the district court for a trial solely on the issue of waiver. Judge Clay wrote an eloquent and scholarly dissent.

Did Ward agree to settle his claim for pennies on the hundreds of dollars?

The two-judge majority decision includes the following paragraph:

> Ward later appealed his termination to the Shelby County Civil Service Merit Board. During the pendency of that appeal, the County proposed a settlement: namely, if Ward signed a release of all his claims against the County, he could return to work at the

[6] *Ward,* at 2-3.

> Jail in a probationary capacity for six months and receive three weeks of backpay (worth about $2,500) up front. Ward consulted with a lawyer and signed an "Agreement and General Release" to that effect on August 3, 2016. But a month later—shortly before he was to return to work—Ward informed the County by email that he had changed his mind and had "decided not to return to the Sheriff's Office."[7]

Based on this alleged "settlement," Shelby County filed a motion for summary judgment, which the district judge denied. The County appealed on this basis, and the two-judge majority of the panel decided that the district judge erred in granting summary judgment on the settlement question. If the panel decision is upheld, the case will be remanded back to the district court for a trial, solely on the settlement question.

Judge Clay's dissent:

In his eloquent and scholarly dissent, Judge Eric L. Clay wrote:

> Sedric Ward, an army reservist and former employee of Shelby County, was the subject of criminal and internal investigations that unlawfully targeted service members, but not other county employees, for allegedly misusing their paid leave time. Based on these investigations, Ward was fired from his employment and was criminally indicted for theft of leave time from the county, although the charges were later dismissed. Ward then brought this suit, arguing that the targeted nature of the investigations violated his rights under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301 *et seq.*
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> After his suit survived the motion to dismiss stage and the summary judgment stage, a jury held for Ward, concluding that

[7] *Ward,* at 3-4.

Shelby County's investigations discriminated against service members in violation of USERRA and culminating in a $1,570,035.18 award. The jury award reveals that Ward was discriminated against and would not have been fired but for this discrimination, for which he is entitled to well over a million dollars, including for loss of his wages and pension. But the majority would give Shelby County a second bite of the apple. It undoes the jury's determination and remands, permitting a new jury to determine whether the release signed by Ward waived his USERRA rights. It is deplorable that the parties will have to return to court, attempt to gather all their witnesses once more, and expend considerable resources to unnecessarily litigate this issue. I therefore respectfully dissent.

To prevail on the defense of waiver against a USERRA claim, a defendant must first demonstrate that the plaintiff waived his or her USERRA rights through clear and unambiguous action. *See Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1108 (6th Cir. 2010). The defendant must then show that in exchange for the waiver, the plaintiff received a right or benefit that is "more beneficial to, or is in addition to," the plaintiff's rights under USERRA. *Id.* at 1107 (quoting 38 U.S.C. § 4302(a)). With respect to the requirement of a clear and unambiguous waiver, the majority opinion errs by applying ordinary contract principles to a statute extraordinarily protective of service members. Neither USERRA, nor its legislative history, nor other comparable statutes support its conclusion. And with respect to the requirement that a waiver must be more beneficial to or in addition to a plaintiff's USERRA rights, the majority opinion wrongly concludes that the service member's subjective judgment about the waiver is controlling.

First, there is the statute's requirement that a plaintiff must waive his or her USERRA rights through "clear and unambiguous action."

See Wysocki, 607 F.3d at 1108. According to the majority opinion, Ward waived his USERRA rights through clear and unambiguous action because the 2016 release he signed applied to "any and all claims whatsoever" against Shelby County, thereby covering claims based on USERRA. Majority Op. at 4 (citing Waiver, R. 1-1, Page ID #31).

But USERRA demands something more than such a rote abandonment of a service member's rights. That is obvious from USERRA's purpose and legislative history, which is where we must begin because USERRA's text is silent on the scope of waivers. *See In re Corrin*, 849 F.3d 653, 657 (6th Cir. 2017). In 1994, USERRA established "the most expansive protection[s] to servicemembers yet enacted." *See Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023) (quoting *Travers v. Fed. Express Corp.*, 8 F.4th 198, 201 (3d Cir. 2021). These protections, which are focused on service members' employment and re-employment rights, sought to encourage the pursuit of non-career military service and combat workforce discrimination. *Id.* Insofar as any ambiguities remained about the wide reach of USERRA's protections, Congress made clear that "[USERRA] is to be 'liberally construed'" in favor of the service members whom it seeks to protect. H.R. Rep. No. 103-65, pt. 1, at 19 (1993); *see* S. Rep. No. 103-158, at 40 (1993) (stating the same).

On the particular topic of waiver, Congress underscored USERRA's protective nature. While the House Report acknowledged that individuals could waive their rights under USERRA, it made clear that waivers are disfavored. *See* H.R. Rep. No. 103-65, pt. 1, at 20 (1993). Because of the remedial purposes of [USERRA]," the House cautioned that any waivers of USERRA rights were invalid unless they were "unequivocal," "specific," "clear, convincing," and "not under duress." *Id.*

The majority opinion wholly disregards USERRA's purpose and legislative history by concluding that a general release of "any and all claims" is enough, without further evidence in the record, to validly waive a USERRA claim. But a general release may fail to put an individual like Ward on notice that he is relinquishing specific statutory rights. *See Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 441 (7th Cir. 1997). Because Congress expressed a heightened concern over the waiver of USERRA rights—warning, for example, that such waivers must be "unequivocal," "specific," and "convincing," *see* H.R. Rep. No. 103-65, pt. 1, at 20 (1993)—a boilerplate waiver of "any and all claims" is not enough, by itself, to do away with USERRA's expansive protections.

In other settings involving heightened requirements for waiver, courts have routinely looked to the totality of the circumstances to determine whether a plaintiff would have known that a general release waived specific statutory protections. *See, e.g., Lewis v. Texaco Inc.*, 527 F.2d 921, 923-25 (2d Cir. 1975) (holding that a general release of a ship owner "from all claims for wages" did not cover seamen's federal statutory rights because nothing in the record established that the seamen were specifically aware that the general release covered these rights); *Hoffman v. Lloyd*, 572 F.3d 999, 1001-03 (9th Cir. 2009) (concluding that because California's Home Equity Sales Contract Act required releases to be knowing and intelligent, a general release did not waive the plaintiff's statutory rights without evidence that the plaintiff was aware of his specific rights under the statute upon signing); *see also Pierce*, 110 F.3d at 441 ("[A] company's conditioning of all severance packages upon the signing of a general release of any and all claims cannot defeat the inquiry in a particular case into whether the waiver of statutory rights was knowing ...."). *Kennedy v. Superior Printing Co.* is an apt illustration. 215 F.3d 650 (6th Cir. 2000). In that case, we noted that for a union to waive its

members' statutory rights, any waiver needed to be "clear and unmistakable." *Id.* at 653-54 (quoting *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998)). Applying this standard, we concluded that a general arbitration provision in a collective bargaining agreement did not clearly and unmistakably waive the right to a judicial forum for claims based on the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq. See id.* at 654. The clear and unmistakable standard we applied was based on the principle that "[n]ational labor policy casts a wary eye on claims of waiver of statutorily protected rights." *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 203, 300 U.S. App. D.C. 250 (D.C. Cir. 1993). Accordingly, to determine if a waiver was clear and unmistakable, courts could "not infer from a general contractual provision [alone] that the parties intended to waive a statutorily protected right." *Id.* at 202 (quoting *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983)).

The requirement that USERRA waivers must occur through "clear and unambiguous action" undoubtedly resonates with the "clear and unmistakable" standard we applied to unions in *Kennedy. See Wysocki*, 607 F.3d at 1108. And similar to the "wary eye" that national labor policy casts on waivers of statutory rights, USERRA's legislative history clearly reveals concerns about waiving USERRA's expansive statutory protections. *See* H.R. Rep. No. 103-65, pt. 1, at 20 (1993).

We must therefore examine general releases purporting to waive USERRA rights more closely. Our case law governing USERRA shows just as much, focusing on the totality of the circumstances, rather than on just the plain meaning of an abbreviated waiver's text, to decide whether a plaintiff waived his or her rights. In *Wysocki v. International Business Machine Corp.*, this Circuit held

that a plaintiff clearly and unambiguously waived his USERRA rights by signing a release that covered "all claims . . . of whatever kind" including those based on "veteran status." 607 F.3d at 1104. And rather than focus only on the plain meaning of the release, the Court looked to whether the plaintiff knew that the release applied to his USERRA rights. Based on the release's specific reference to veteran status, the fact that the plaintiff "was encouraged to see a lawyer," and that he "had ample time to consider the Release," it was clear that the plaintiff "understood that the Release eliminated his USERRA rights." *Id.* at 1108. Had only the plain meaning of the release mattered, this analysis would have been irrelevant, and there would have been no need to inquire into whether the plaintiff actually understood the nature and extent of the waiver.

The majority opinion claims that just because the release in *Wysocki* referred to veteran status, that "d[oes] not make that term magic words necessary for release of a USERRA claim." Majority Op. at 5. But the release's reference to "veteran status," while not magic words, was certainly important to the Court's analysis. It was the specificity of this language that "informed Wysocki that he was waiving his USERRA rights" through the release, when considered alongside the fact that he had significant time to review the release and was encouraged to see a lawyer. *Wysocki*, 607 F.3d at 1108. If the majority opinion's approach were correct, the *Wysocki* Court's analysis could have begun and ended with the fact that Wysocki's release covered "all claims, demands, actions or liabilities . . . against IBM of whatever kind." *Id.* at 1104. The *Wysocki* Court did not adopt such an approach, nor is it appropriate to do so in this case.

In support of its reliance only on the text of the agreement, the majority opinion cites *Nicklin v. Henderson* for the proposition

that a waiver must be interpreted by its plain terms. 352 F.3d 1077 (6th Cir. 2003). Not only did *Nicklin* not involve a waiver of USERRA rights, but the *Nicklin* Court explicitly looked to factors beyond the plain text of a release covering "any and all cases" to conclude that it was a knowing release of specific statutory rights. *See id.* at 1080-81. It considered factors such as the plaintiff's background and experience, the amount of time he was given to consider the release, and ultimately "the totality of the circumstances." *See id.* It follows that to decide whether a plaintiff clearly and unambiguously intended to waive his or her USERRA rights, we must look to context. And while the majority opinion bemoans that such an approach may "generate litigation" over settlements, Majority Op. at 4, we must weigh the possibility that settlements may be used to circumvent the full protections offered by remedial schemes like USERRA against any advantages such settlements offer. *See Davis v. Am. Com. Lines, Inc.*, 823 F.2d 1006, 1009 (6th Cir. 1987); *Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 606 (6th Cir. 2013).

Applying these principles to Ward's case, there is at least a genuine dispute of material fact regarding USERRA's first requirement for waiver concerning whether Ward waived his USERRA rights through clear and unambiguous action. On the one hand, unlike the release that covered claims based on "veteran status" in *Wysocki*, Ward's release contained no specific text that would alert him to his rights as a service member, such as a reference to USERRA, military service, or veteran status. Although an attorney was present when Ward received the release, the parties dispute the extent of Ward's knowledge of his USERRA rights at the time he signed the release. Ward testified that he was aware that he was generally protected by USERRA, but the exact scope of Ward's knowledge is unclear from the summary judgment record. And insofar as Ward was simply aware that he

was protected by USERRA, that is different than specifically acknowledging that he was repudiating his USERRA rights.

The record before us fails to indicate that Ward waived his USERRA rights through clear and unambiguous action. It is inappropriate for us to settle any factual dispute in favor of Shelby County, as the majority opinion does, when significant questions persist regarding whether Ward was aware that he was specifically waiving his rights under USERRA's anti-discrimination provisions.

In any case, I would affirm the district court's conclusion that Ward did not waive his USERRA rights because Ward's release still fails the second requirement for a valid waiver, as discussed below.

Concerned that employers would circumvent USERRA's statutory protections, Congress erected another barrier to the waiver of USERRA rights. Through 38 U.S.C. § 4302(a), Congress took the step of requiring waivers to "establish[] a right or benefit that is more beneficial to, or is in addition to, a right or benefit" provided by USERRA. 38 U.S.C. § 4302(a). And through § 4302(b), it correspondingly prohibited any waivers that limited USERRA rights or benefits. *Id.* § 4302(b). In other words, because "[USERRA] is intended to be a floor and not a ceiling on reemployment rights," Congress sought to enshrine in the statute's text that any USERRA waiver must be more beneficial to a service member than USERRA's statutory minimum. *See* S. Rep. No. 103-158, at 41 (1993) (discussing the meaning of 38 U.S.C. § 4302(a)).

The majority correctly concludes that USERRA requires a court to consider a waiver's adequacy. And it also rightly points out that for a waiver's benefits to be inadequate, there need not be

evidence of a mistake, incapacity, fraud, misrepresentation, unconscionability, or duress. After all, it is doubtful that Congress would craft § 4302 as it did—and take pains to emphasize the protective and remedial nature of USERRA—only to leave a service member with just standard contract defenses for protection. *See, e.g.*, H.R. Rep. No. 103-65, pt. 1, at 19 (1993); S. Rep. No. 103-158, at 40 (1993). But the majority wrongly frames the benefits inquiry to be about whether a service member engaged in "considered judgment" about the waiver's benefits. In other words, the majority holds that if a service member, after due consideration, subjectively believed a waiver to be more beneficial than his USERRA rights, that waiver satisfies 38 U.S.C. § 4302(a).

But USERRA speaks in terms of benefits, it does not speak in terms of beliefs. *See* 38 U.S.C. § 4302. The relevant question under the statute is whether the benefits offered by a waiver are "more beneficial to, or [are] in addition to," those under USERRA. *See id.* § 4302(a). While a service member's judgment about the benefits offered by a waiver is certainly relevant to that analysis, it is not dispositive.

The majority plucks a single line from *Wysocki* to devise its new standard. In that case, we said that "the ability [of service members] to waive their USERRA rights without unnecessary court interference, if they believe that the consideration they will receive for waiving those rights is more beneficial than pursuing their rights through the courts, is both valuable and beneficial to veterans." 607 F.3d at 1108. But in *Wysocki*, we merely made that statement in passing while observing that waivers are, in the best-case scenario, useful. USERRA's protections were, of course, not established only for best-case scenarios. Importantly, after making that statement, the *Wysocki* Court examined Wysocki's

waiver to conclude that it "involved a valuable amount of consideration"—an objective assessment of the benefits of the waiver. *Id.* We need not, and indeed should not, overread *Wysocki* to limit us to an inquiry about what the service member believed.

An inquiry that turns entirely on a service member's subjective judgment is both under-and over-inclusive. It would result in upholding a wholly inadequate waiver simply because a service member misguidedly or naively—but perhaps after some contemplation—misjudged the waiver to offer greater benefits. This flies in the face of the purpose of USERRA, which was designed to be an absolute floor on employment and re-employment rights. *See* S. Rep. No. 103-158, at 41 (1993). But conversely, an inquiry that turns on a service member's judgment and beliefs is also over-inclusive, because it could invalidate a waiver that offers protections that objectively exceed those under USERRA, simply because a service member believed to the contrary. As the last line of defense against inadequate waivers, courts must consider whether waivers serve USERRA's remedial purpose and operate above USERRA's floor, accounting for but also regardless of a service member's judgment.

With that in mind, it is necessary to consider the benefits and rights available to Ward. The potential damages and recovery available to Ward when signing the waiver were considerable. At the time he signed the release, he had been terminated from Shelby County for sixteen months and suspended without pay for even longer. In addition to nearly two years of lost income because of his termination, he lost out on his ability to make pension contributions and on years of employment going toward his pension. And a grand jury relied on Shelby County's criminal investigation to indict Ward, upheaving Ward's life until his

charges were voluntarily dismissed by the prosecution over a year later. Yet in exchange for the waiver of all of his legal rights, Ward was provided with a mere three weeks of back pay and was not guaranteed any long-term employment with the county because the release promised him only a probationary six-month position. Furthermore, the record reveals that Ward did not sign the waiver because he thought these benefits exceeded the floor set out by USERRA, *see* S. Rep. No. 103-158, at 41 (1993), but because he "had been out of work 18 months" and had no other option. Ward Dep., R. 64-2, Page ID #832; *cf. RESNER v. ARCTIC ORION FISHERIES*, 83 F.3d 271, 274 (9th Cir. 1996) (upholding the district court's invalidation of a release of claims against a ship owner where the consideration was not based on the seaman's "informed evaluation of his damages but on the sum of his outstanding debts"). It is no wonder that within about a month of signing the release, Ward told Shelby County it was not in his best interest to accept its offer of a probationary position.

Even under the majority's test, Ward certainly did not waive his rights after "considered judgment." Majority Op. at 7. As the record demonstrates, he waived his rights out of desperation, having lost nearly two years of income and after facing the ramifications of being criminally charged for more than a year. But reading USERRA and its legislative history faithfully, a correct analysis would compare Ward's possible benefits under USERRA against his waiver's three weeks of back pay and the offer of a probationary six-month position. Given the special solicitude Congress demonstrates for service members through USERRA, Ward's waiver was clearly inadequate and undoubtedly not more beneficial to his rights under USERRA than his statutory protections. There is therefore no need to send this case back to the district court for further consideration by a jury, as the majority would have us do.

> In light of the above, the brief general release Ward signed was not valid. The release failed to satisfy USERRA's stringent requirements to waive its protections, given that the release's mere three weeks of back pay and probationary reinstatement for six months did not provide rights or benefits more advantageous to or in addition to Ward's USERRA rights. *See* 38 U.S.C. § 4302(a). As to the remaining motions on appeal, which remain pending after resolution of the waiver issue, I would conclude that the district court correctly affirmed the jury's verdict and damages award. I would therefore affirm the district court's judgment in its entirety. For those reasons, I respectfully dissent.[8]

ROA has filed an amicus brief urging the 6th Circuit to grant rehearing en banc and to affirm the district court judgment for Ward. I have attached a copy of that brief at the end of this article.

Q: This case (*Ward*) sounds a lot like *Lara v. Rock Valley Police Department,* 2023 U.S. Dist. LEXIS 36689, 2023 WL 2374979 (N.D. Ill. March 6, 2023), as described in your Law Review 24013 (February 2024). Are the two cases related to each other?

A: The cases are remarkably similar with regard to the facts but are completely unrelated. The cases involve different employers, in different states, at different times. But the phenomenon of using criminal procedures to reprise against employees for exercising their USERRA rights is by no means an isolated phenomenon.

Q: It is most unfortunate that Ward did not have access to competent legal counsel when this issue first arose. Are Reserve and National

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[8] Ward v. Shelby Cnty., 2024 U.S. App. LEXIS 8721, *13-28, 2024 FED App. 0083P (6th Cir.), 8-16, __ F.4th __.

Guard judge advocates available to advise and assist their fellow Reserve Component service members about issues of this nature?

A: No. For almost 25 years, from October 1982, when I left active duty, affiliated with the Navy Reserve, and started a civilian job as a Department of Labor (DOL) attorney, until April 2007, when I retired from the Navy Reserve, I spoke to Reserve and National Guard units hundreds of times, mostly on weekends other than my own drill weekends. I answered hundreds of detailed questions about USERRA and the predecessor reemployment statute, which was enacted in 1940 and replaced by USERRA on 10/13/1994. As best I can determine, there is no judge advocate in the Navy Reserve or any other Reserve Component doing anything like this today.

After I retired from the Navy Reserve on 4/1/2007, I have continued making some oral presentations in person about USERRA, but I determined that writing articles for publication on an on-line database available to all was a more productive use of my limited time.

Q: What has the Reserve Organization of America (ROA) done to get the word out to Reserve Component service members about their legal rights under USERRA and other laws?

A: I invite your attention to www.roa.org/lawcenter. You will find more than 2,100 "Law Review" articles about military-legal topics, including more than 1,500 articles about USERRA. You will also find a detailed subject index, to facilitate finding articles about specific topics. ROA initiated this column in 1997, and we add new articles each month. The articles are available for free to everyone, not just ROA members.

I am the author of more than 90% of the "Law Review" articles that ROA has added to its website in the last 27 years, but I turn 73 this month (May 2024), and I will not be around forever to author and update these articles. Accordingly, over the last three years I have

recruited and trained three understudies who are young enough to be my granddaughters. For exactly six years, from 6/1/2009 until 5/31/2015, I was ROA's Director of the Service Members Law Center (SMLC), as a full-time salaried employee of ROA.[9]

On our SMLC page on the ROA website, www.roa.org/lawcenter, we also have a 40-minute oral presentation, with PowerPoint slides, about USERRA. This presentation can be used to train Reserve Component service members during their drill weekends, or these service members can listen to and view the presentation on their own time. I have placed a link to this presentation at the end of this article.

Q: In the Department of Defense (DOD), there is an organization called "Employer Support of the Guard and Reserve" (ESGR). What is ESGR's role?

A: ESGR, through the volunteers that it has recruited and trained, does a reasonably good job of getting the word out to civilian employers about the need to make accommodations for employees and potential employees who serve part-time in the National Guard or Reserve, but ESGR volunteers are not permitted to advocate for service members. ESGR headquarters repeatedly tells the volunteers: "You are a neutral mediator—you are not an advocate. You are not permitted to quote the text of USERRA or USERRA case law about the rights of service members and the obligations of employers."

ESGR volunteers frequently address Reserve Component service members during their drill weekends, but ESGR volunteers are not qualified to address and do not try to address the details of USERRA.[10]

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[9] *See* Law Review 15052 (June 2015) for a detailed discussion of the accomplishments of the SMLC during that six-year period. Since 5/31/2015, I have continued many of the SMLC activities as a volunteer and ROA member. I hope that someday it will be possible to reinstate the SMLC as a funded ROA program. It will not be Sam as the Director because I turn 73 this month. I have a candidate in mind.

[10] For example, ESGR volunteers do not try to explain USERRA's five-year limit when they address units. *See* Law Review 22055 (September 2022). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what

Please join or support ROA.

This article is one of 2,100-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. We add new articles each month.

ROA is the nation's only national military organization that exclusively and solely supports the nation's reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve 32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).[11]

ROA is more than a century old—on 10/2/1922 a group of veterans of "The Great War," as World War I was then known, founded our organization at a meeting in Washington's historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded "Great War." 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

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counts and what does not count in exhausting an individual's five-year limit with respect to a specific employer relationship.

[11] *See* https://crsreports.congress.gov/product/pdf/IF/IF10540/. These are the authorized figures as of 9/30/2022.

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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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 eight[12] 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 https://www.roa.org/page/memberoptions. 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
1 Constitution Ave. NE
Washington, DC 20002[13]

[12] Congress recently established the United States Space Force as the eighth uniformed service.
[13] You can also contribute on-line at www.roa.org.

Here is a link to ROA's article about the Tennessee law that provides up to 20 working days of paid military leave for employees of the State of Tennessee and its political subdivisions (counties, cities, school districts, and other units of local government) who are members of Reserve Components of the armed forces.

https://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/StateLaws/TN-2022-LV.pdf

Here is a link to ROA's 40-minute oral presentation, with PowerPoint slides, about USERRA—ideal for presentation to a Reserve Component unit during the drill weekend:

https://www.youtube.com/embed/_XhVyECa7QY

Here (starting at the top of the next page) is the complete text of the Petition for Rehearing and Rehearing En Banc filed by Sedric Ward's four lawyers and then the complete text of the ROA amicus curiae brief in the 6th Circuit, urging that court to grant rehearing en banc in the *Ward v. Shelby County* case and to affirm the favorable district court decision:

Nos. 22-6054

In the United States Court of Appeals
for the Sixth Circuit

SEDRIC WARD,
PLAINTIFF / APPELLEE,
V.
SHELBY COUNTY, TN,
DEFENDANT/APPELLANT.

On Appeal from the United States District Court for the
Western District of Tennessee, Western Division, No. 2:20-cv-02407

(Hon. Jon P. McCalla)

PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

Table of Authorities

Introduction and Rule 35(B)(1) Statement

Rehearing en banc is appropriate to "secure and maintain uniformity of the Court's decisions" or to resolve a "question[] of exceptional importance." Fed. R. App. P. 35(b). This case meets that standard. This is an important case about a novel issue that affects not only veterans' rights, but how employers regard those rights.

As a military reservist, Sedric Ward brought this suit against his civilian employer asserting violations of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.* (USERRA) after an unusual and unfortunate series of events. The legal issue now at stake is whether a generic release agreement (which was subsequently rescinded) had the effect of specifically waiving Ward's rights under USERRA. That issue has long been governed by *Wysocki v. IBM*, 607 F.3d 1102 (6th Cir. 2010), which established a two-step test for a valid release of USERRA rights: (1) whether a release agreement "used clear and unambiguous language," showing that the employee is informed that they are waving their USERRA rights, *id.* at 1108; and (2) a "critical inquiry" examining whether the release provides "rights [] to [the employee that] were more beneficial then [sic] the rights that he waived." *id.* at 1107.

In this case, the dissenting opinion of Judge Clay lays bare how the panel's decision is irreconcilable with the heightened protections of USERRA and this

Court's precedent in *Wysocki*. We respectfully submit that the split-decision by the panel conflicts with *Wysocki* in two key ways: First, the majority held that a generic release (of "any and all claims") is sufficient to waive USERRA rights even if it does not mention "veteran status" (like *Wysocki*) or contain clear and unambiguous language to inform the servicemember they are waiving individual USERRA rights. As Judge Clay points out, *Wysocki* "did not adopt such an approach," Dissent at 12, and *Wysocki* itself would have turned out differently under the new test. Second, the majority decision fashioned a novel, subjective standard for whether a release is "more beneficial" than USERRA rights. This has no basis in *Wysocki* or the plain text of USERRA, which are straightforward and objective. "We need not, and indeed should not, overread *Wysocki* to limit us to an inquiry about what the service member believed." *Id.* at 14.

This proceeding also features a question of exceptional importance for over 70,000 members of the National Guard and Reserves across the Sixth Circuit who need the consistent protection of USERRA as they balance military and civilian life. Employers too depend upon clear, uniform guidance from this Court about the meaning of USERRA, as well as upon the continued application of *Wysocki*. Lastly, the ruling has nationwide implications, as *Wysocki* is the only court to have fully and faithfully addressed the issue of a USERRA waiver.

Statement of the Case

The panel's decision accurately presents the facts and procedural history, however, omits some relevant evidence presented to, and considered by the district court at summary judgment.

> Ward has been an Army reservist since 1987. In 1998, he began working for the Shelby County Jail, which is run by the Shelby County Sheriff's Office. Like most reservists, Ward often took leave while deployed and to attend drills and training. Some of that leave was paid by the County. In 2013, the County conducted an audit that allegedly revealed potential instances where employees at the jail had taken paid leave of various kinds—medical, military, family—on fraudulent grounds. Ward was not among the employees whose leave was flagged as suspicious in that audit.
>
> The Sheriff's Office asked the General Investigations Bureau to conduct a criminal investigation, which—unlike the audit itself—focused solely on leave taken by servicemember employees. As part of that investigation, Agent Jason Valentine told Ward to produce documents supporting the validity of his paid leave during the past several years. Ward had difficulty retrieving those documents but eventually slid some under Valentine's door. Yet the Bureau later issued a report in which it accused multiple servicemembers, including Ward, of taking fraudulent leave—in Ward's case, allegedly, 36 days' worth.
>
> In November 2014, at the urging of the local district attorney's office, a Tennessee grand jury indicted Ward for theft. He was booked and detained in the same jail in which he worked. The next day, the Sheriff's Office suspended Ward without pay.

Slip Op. 2 - 3 (attached as Ex. A).

Unsurprisingly, the suspension without pay, termination, and prosecution caused financial difficulties for Ward. Because of the pending criminal charges,

Ward was unable to find civilian employment (Trial Tr., R. 165 Page ID #2171:21-3), and fell behind in child support and car payments. (*Id*. at Page ID #2176:17-25). Ultimately, Ward derived some income through military duties and family aid. (*Id*. at Page ID #2176:9-12).

> The Sheriff's Office then conducted its own investigation, during which Eugenia Sumner demanded that Ward produce—within three days—documents supporting his paid leave during the past several years. Ward could not meet that deadline—he testified that doing so was impossible within the military bureaucracy—and the County fired him. (One of the grounds for his termination was "disobedience" of Sumner's "order" to produce those documents by her deadline.)

Slip Op. 3.

> In November 2015, Ward provided the district attorney's office with documents substantiating his attendance at military functions on the dates relevant to his indictment. The district attorney's office moved to dismiss the charges against Ward that same day.
>
> Ward later appealed his termination to the Shelby County Civil Service Merit Board. During the pendency of that appeal, the County proposed a settlement: namely, if Ward signed a release of all his claims against the County, he could return to work at the Jail in a probationary capacity for six months and receive three weeks of backpay (worth about $2,500) up front. Ward consulted with a lawyer and signed an "Agreement and General Release" to that effect on August 3, 2016. But a month later—shortly before he was due to return to work—Ward informed the County via email that he had changed his mind and had "decided not to return to the Sheriff's office."

Slip Op. 3. The email revocation stated in full:

> Good morning It's been almost 2 yrs. since I was relieved of duty from the Sheriff's Office, and I realized that I wouldn't feel right if I returned. So in my best interest I've decided not to return to the Sheriff's office.

R 64-2 Page ID #845.

Ward had developed serious concerns about returning to Appellant's workplace. Before he was terminated, Ward's job duties involved providing transportation outside the jail. (Trial Tr., R. 165 Page ID #2157:10). Appellant's settlement agreement did not include placing Ward back into this coveted position. Appellant only offered a probationary position (six months' probation) where Ward would have no protection from termination or retaliation. *Id*. Moreover, evidence at the summary judgement stage revealed that after Ward agreed to return to work, Detective Valentine initiated *another* criminal investigation against Ward and contacted his military chain-of-command to reinvestigate Ward's military service. (Valentine Dep., R. 80-4 Page ID #1239:4-24). Ward' revocation email was sent a week before Ward was to return to work and he received no benefits, nor any other compensation or consideration from Appellant.

Ward filed suit in 2020 and both "parties later filed cross-motions for summary judgment on the question whether Ward had released his USERRA claim in the settlement agreement." Slip Op. 3. At summary judgment the district court

considered, among other things, Ward's testimony regarding the circumstances surrounding the signing of the agreement and his knowledge of his rights and the benefits offered under the release.

> Q. Did you not resolve that matter with Shelby County?
>
> A. Well, I wanted my job back and my attorney presented me with paperwork saying this is what they will do if you want to go back to work, **either take it or leave it**. I had been out of work 18 months, so I signed it.

Ward Dep. R 64-2 Page ID #832:15-20. (emphasis added).

> Q. Okay. But before you were arrested, you were fully aware of your rights under USERRA, correct?
>
> A. No.
>
> Q. No? Did you read this document?
>
> A. I turned that documentation in, but I didn't know what was about to happen, no.

Ward Dep. R 64-2, Page ID #834:14-20.

The district court "denied the County's motion on that ground and granted Ward's, asserting that the release's scope—namely, "any and all claims whatsoever"—did not reach his USERRA claim. Slip Op. 1-2. The district court further held:

> Furthermore, Defendant does not adequately address the other aspects of a USERRA waiver inquiry. [Namely] whether the Release is exempted from the operation of § 4302(b) by § 4302(a), because the rights it provided to Wysocki were **more beneficial** than [*sic*] the rights that he waived." […] Here, there is no relevant factual dispute over whether Plaintiff's rights under the Release were more or less beneficial than the rights he purportedly waived under USERRA. Under the Release, Plaintiff would have received a lump-sum payment of three weeks of back-pay, along with a guaranteed reinstatement with probation. (ECF No. 1-1.) Conversely, Plaintiff asserts that the Release "comes nowhere close to satisfying Mr. Ward's 17 months of lost back pay, pension credits, and benefits following his April 7, 2015 termination to his purported reemployment offer of September 16, 2016." (ECF No. 80 at PageID 1104.) Plaintiff's USERRA rights are therefore indisputably more beneficial than the rights he received under the Release.

Order R 87 Page ID #1522.

"The parties thereafter went to trial, where the jury found in Ward's favor. The district court eventually entered a judgment ordering the County to pay Ward more than $1.5 million. This appeal followed." Slip Op. 3.

Argument

This Court should grant rehearing or rehearing en banc because the panel decision materially conflicts with well-established precedent interpreting USERRA's protections under 38 U.S.C. § 4302 (*Wysocki*) in two key ways (*infra* § I). Moreover, this appeal involves a question of exceptional importance for over 70,000 military reservists and members of the National Guard in the Sixth Circuit –

as well as for scores of employers – all of whom depend on the clear and even-handed application of USERRA (*infra* § II).

The panel decision conflicts with *Wysocki*.

The *Wysocki* decision stems from an exceptional and "specific [statutory] provision, 38 U.S.C. § 4302, regarding [USERRA's] relation to other laws, plans, and agreements." *Wysocki*, 607 F.3d at 1106. Section 4302 establishes that:

> (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.

38 U.S.C. § 4302 (emphasis added).

In passing the protections of § 4302, Congress made clear that while a waiver of USERRA rights may be permissible, they are disfavored. Towards that end, the House Report states that "[b]ecause of the remedial purposes of [USERRA]," a waiver of USERRA rights must be "unequivocal," "specific," "clear, convincing," and "not under duress." *See* H.R. Rep. No. 103-65, pt. 1, at 20 (1993). Moreover, as an

important guiding principle, "[b]ecause USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries." *In re Petty*, 538 F.3d 431, 439 (6th Cir. 2008); *Wysocki v. IBM*, 607 F.3d at 1107-08; *see also Clarkson v. Alaska Airlines, Inc*., 59 F.4th 424, 429 (9th Cir. 2023) (Congress established USERRA as "the most expansive protection[s] to servicemembers yet enacted") (citation omitted).[14] "Thus, when two plausible interpretations of USERRA exist—one denying benefits, the other protecting the veteran—we must choose the interpretation that protects the veteran." *Myrick v. City of Hoover*, 69 F.4th 1309, 1318 (11th Cir. 2023).

In *Wysocki*, this Court was asked to determine whether a servicemember had validly waived his USERRA rights through a release he signed as part of an agreement he negotiated with his former employer. Consistent with the protective and liberal construction of USERRA, as well as the heightened standards passed by

[14] USERRA is "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); *see also Travers v. Fed. Express Corp.*, 8 F.4th 198, 208 n.25 (3rd Cir. 2021) ("[A]ny interpretive doubt is construed in favor of the service member, under the pro-veteran canon."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("[W]e would ultimately read the provision in [plaintiff's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.").

Congress in § 4302, *Wysocki* established a two-step analysis to determine whether that agreement was exempted from the operation of § 4302. *Wysocki,* 607 F.3d at 1106. The first step requires an examination of whether the release "used clear and unambiguous language," which shows that the servicemember was "informed [] that he was waving his USERRA rights." *Id.* at 1108. And, if so, the second step is a "critical inquiry" examining whether the release provides "rights [] to [the servicemember that] were more beneficial then [sic] the rights that he waived." *Id.* at 1107. As applied to the facts of that case, *Wysocki* held that the agreement was a valid waiver under USERRA because the release satisfied the heightened standards of both steps. Step one turned upon whether the language in that agreement would alert the employee regarding his rights as a servicemember. The Court found "[t]he Release ***stated*** that it covered claims based on '***veteran status***.' This ***clear and unambiguous language informed*** Wysocki that he was waiving his USERRA rights." *Id.* at 1108 (emphasis added). In step two, the Court made an objective assessment and found that "Wysocki **received** over $6,000" and "from the record that Wysocki . . . signed the Release because he believed that the rights provided in the Release were more beneficial than his USERRA rights" and "Wysocki has not presented any argument or evidence to the contrary." *Id.* (emphasis added).

This precedent is straightforward and dispositive and has been consistently relied upon by courts, servicemembers, and employers for a decade and a half. Yet in the appeal at bar, the panel decision clashes with *Wyosocki* and veers towards impliedly overruling it by lowering the standards of both steps.

The panel decision clashes with *Wysocki*'s requirement of "clear and unambiguous language" to waive USERRA rights.

We respectfully submit that the majority was wrong to issue a decision that squarely conflicts with the first step of *Wysocki*'s test. Specifically, the panel found that the "relevant language here is that Ward agreed to release 'any and all claims whatsoever' as to his termination. Those words speak for themselves: to know that the release applied to Ward's USERRA claim, one needed to know only that it was a claim." Slip Op. at 4. The panel disagreed with the "district court's gloss [] that the 'veteran status' language in Wysocki 'was crucial to' our decision there." *Id.* at 5. The panel reasoned that the *Wysocki* court's choice "to highlight the term 'veteran status'—among all the belts and suspenders the release employed there—did not make that term magic words necessary for release of a USERRA claim." *Id.* Moreover, the panel expressed generalized concerns about a requirement that USERRA claims be specifically waived. "That kind of requirement would generate litigation" and a "great deal of legal order—in matters that never darken a

courthouse door—depends on those agreements being interpreted by their terms. That is how the release provision should have been interpreted here." *Id.* at 4.

The panel's reasoning simply cannot be squared with *Wysocki*. As Judge Clay stressed, a "reference to 'veteran status,' while not magic words, was certainly important to the Court's analysis." Dissent at 12. "It was the specificity of this language that 'informed *Wysocki* that he was waiving his USERRA rights' through the release, when considered alongside the fact that he had significant time to review the release and was encouraged to see a lawyer." *Id.* (citation omitted).

> If the majority opinion's approach were correct, the *Wysocki* Court's analysis could have begun and ended with the fact that *Wysocki*'s release covered "all claims, demands, actions or liabilities . . . against IBM of whatever kind." The *Wysocki* Court did not adopt such an approach, nor is it appropriate to do so in this case."

Dissent at 12 (citations omitted). "Ward's release contained no specific text that would alert him to his rights as a service member, such as a reference to USERRA, military service, or veteran status." *Id.*

Moreover, the "majority opinion wholly disregards USERRA's purpose and legislative history," which reflects Congress' "heightened concern over the waiver of USERRA rights—warning, for example, that such waivers must be 'unequivocal,' 'specific,' and 'convincing,' *see* H.R. Rep. No. 103-65, pt. 1, at 20 (1993)—a

boilerplate waiver of 'any and all claims' is not enough, by itself, to do away with USERRA's expansive protections." *Id.* at 10. Lastly, "while the majority opinion bemoans that such an approach may 'generate litigation' over settlements, [], we must weigh the possibility that settlements may be used to circumvent the full protections offered by remedial schemes like USERRA against any advantages such settlements offer." *Id.* at 12.

The panel decision conflicts with *Wysocki* by imposing a new subjective standard.

The panel also created a new standard with respect to the second step of *Wysocki*, which focuses on whether a settlement agreement provides something "more beneficial" than the USERRA rights being waived. The majority reasoned:

> But § 4302 does not make the courts guardians of servicemembers who choose to settle their USERRA claims. To the contrary, we said in *Wysocki*, servicemembers can "waive their USERRA rights without unnecessary court interference, if they believe that the consideration they will receive . . . is more beneficial than pursuing their rights through the courts[.]" An individual servicemember knows better than the courts do whether the certainty of a lump-sum payment up front, for example, is "more beneficial" to him than the possibility of a larger recovery later. Relatedly, a servicemember's ability to settle a USERRA claim "is both valuable and beneficial[.]" And that ability would be diminished if not eliminated if the servicemember's decision was subject to judicial review after the fact.

Slip Op. 6 (citations omitted).

This cannot be squared with the letter or the spirit of *Wysocki*, which was objective in enumerating step two of its test. As Judge Clay pointed out:

> the majority wrongly frames the benefits inquiry to be about whether a service member engaged in 'considered judgment' about the waiver's benefits. In other words, the majority holds that if a service member, after due consideration, subjectively believed a waiver to be more beneficial than his USERRA rights, that waiver satisfies 38 U.S.C. § 4302(a). But USERRA speaks in terms of benefits, it does not speak in terms of beliefs.

Dissent at 14. At best, the "majority plucks a single line from *Wysocki* to devise its new standard." Dissent at 14. If this Court desires to modify *Wysocki* so fundamentally, it can only do so by going *en banc* and overruling its precedent.

The proceedings raise a question of exceptional importance for servicemembers and employers across the Sixth Circuit and nation.

In addition to the fact that the panel decision cannot be reconciled with *Wysocki*, it also creates questions of exceptional importance: namely, under what circumstances can servicemembers waive their valuable USERRA rights?

As *amicus* the Reserve Organization of America stresses, this is a matter of considerable practical significance to over 70,000 members of the National Guard

and Reserves across the Sixth Circuit.[15] For nearly a decade and a half, servicemembers and employers alike have relied upon the clear guidance of *Wysocki*. Amidst all the other challenges of balancing military and civilian life, reservists need to know precisely when and how they will be waiving important federal protections. Employers nationwide also look to *Wysocki* for guidance, since it is only court to have fully addressed the issue of a USERRA waiver. But the panel decision creates a complex and uneven standard that will be difficult to administer and ultimately undermine federal rights. As Judge Clay highlighted, the majority's new standard will yield problematic and inconsistent results:

> An inquiry that turns entirely on a service member's subjective judgment is both under-and over-inclusive. It would result in upholding a wholly inadequate waiver simply because a service member misguidedly or naively—but perhaps after some contemplation—misjudged the waiver to offer greater benefits. This flies in the face of the purpose of USERRA, which was designed to be an absolute floor on employment and re-employment rights. *See* S. Rep. No. 103-158, at 41 (1993). But conversely, an inquiry that turns on a service member's judgment and beliefs is also over-inclusive, because it could invalidate a waiver that offers protections that objectively exceed those under USERRA, simply because a service member believed to the contrary. As the last line of defense against inadequate waivers, courts must consider whether waivers serve USERRA's remedial purpose and operate above USERRA's floor, accounting for but also regardless of a service member's judgment."

[15] Michael Maciag, *Military Active-Duty Personnel, Civilians by State*, Governing.com (Oct. 2017), https://www.governing.com/archive/military-civilian-active-duty-employee-workforce-numbers-by-state.html.

Dissent at 14-15.

The majority's generalized concerns about the utility of employment releases is both misplaced and also insufficient to override *Wysocki*. While perhaps a "great deal of the legal order . . . depends on those agreements being interpreted by their terms" Slip op. at 4, the legal order also depends on applying binding precedent and fairly interpreting federal statutes. In this case, Congress chose to adopt heightened protections for waiving USERRA rights – which may be different than a typical employment release in the civilian context. It is not the province of the judiciary to second guess the legislature in this regard.

Finally, it is worth noting that the majority could have readily avoided conflicting with *Wysocki* based on the facts and arguments presented to it – but chose not to. At summary judgment, Ward presented evidence that he did *not* knowingly waive his USERRA rights. Ward Dep. R 64-2 Page ID #832:15-20, #834:14-20. He also rescinded the release agreement just after signing it and received no compensation or benefit (meaning the basic elements of a binding contract were not satisfied). R 64-2 Page ID #845. Moreover, the majority accepted Appellant's argument about subjective intent analysis on appeal, even though that argument

had not been adequately presented, or supported by the evidence, at summary judgment. Order R 87 Page ID #1522.

For these reasons, the panel's conflict with *Wysocki* is as important as it was unnecessary.

Conclusion

This Court should grant this petition for rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with Rules 35(b)(2)(A) and 40(b)(1) of the Federal Rules of Appellate Procedure because it contains 3,897 words, excluding the parts of the document exempted by Rule 32(f). This document complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionally spaced typeface in Microsoft Word using Times New Roman, 14-point font.

Dated: April 25, 2024

/S/ THOMAS G. JARRARD

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants are registered CM/ECF users and will be served by the CM/ECF system, including:

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Here, starting at the top of the next page, is a copy of the complete text of the amicus curiae brief that the Reserve Organization of America (ROA) filed in the United States Court of Appeals for the 6th Circuit on 5/2/2024. In that brief, ROA urged the Court of Appeals to grant rehearing en banc and to affirm the favorable decision of the district court.

No. 22-6054

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDRIC WARD
Plaintiff-Appellee,

v.

SHELBY COUNTY, TN
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee, Western Division (McCalla, J.)
Case No. 2:20-cv-2407

BRIEF OF RESERVE ORGANIZATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative Materials

Executive Branch Materials

Other Authorities

INTEREST OF *AMICUS CURIAE*[16]

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 cases, like this one, that raise matters that implicate the interests of the Reserve Components. ROA urges the Court to grant Appellee's petition to preserve the procedural safeguards in the Uniformed Services and Reemployment Rights Act.

INTRODUCTION AND SUMMARY

Military reserve forces pre-date the founding of the Republic when citizen-soldier forces fought in the French and Indian War. State militias—later the National Guard—played a major role in the Revolutionary War. During the Civil War, state militias supplied 96 percent of the Union army. Hundreds of thousands of Guardsmen continued this tradition 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

[16] Counsel for *amicus curiae* state that no party's counsel authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *Amicus curiae* have requested leave of this Court to file this brief, and the parties consent to the motion.

the liberation of Kuwait in the Gulf War. After September 11, 2001, more than a million Reservists and National Guardsmen have answered the call to serve their nation, many several times over.

Today's Reserve Components constitute more than 40 percent of the total U.S. military force. Reservists hail from all walks of life. They are public high school teachers, doctors, lawyers, and police officers, united by their undying devotion to this nation and their commitment to service both in and out of uniform.

This case concerns the Uniformed Services Employment and Reemployment Rights Act ("USERRA") and, specifically, the protections it provides our Armed Forces. Enacted after the Gulf War, USERRA was crafted to ease servicemembers' transition to civilian life and shield our citizen-warriors from workplace discrimination due to their military obligations.

USERRA is an integral part of Congress's choice to maintain the nation's Armed Forces with citizen-soldiers. Indeed, there are few national duties more critical than ensuring that "those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone v. Lightner*, 319 U.S. 561, 575 (1943), will not face discrimination because of their service when they return to civilian employment.

The divided panel's interpretation diverges sharply from Congress's express aim in enacting USERRA, and risks gutting its purposes altogether. The panel

majority erred both in its analysis of waiver and in its misreading of Section 4302. *Amicus* submits this brief to clarify the proper standard for waiver under USERRA, and asks that the Court vindicate it and remove a considerable risk to our nation's ability to retain its vast and vital network of citizen-soldiers.

ARGUMENT

The Divided Panel Misinterpreted USERRA's Waiver Standard.

The Panel Majority's Decision Contravened USERRA's Structure and Purpose.

The divided panel held that a Reservist could waive his USERRA rights merely by signing a general, nonspecific release provision. Slip Op. 4, ECF No. 49-2. But USERRA sets a higher bar.

"Identifying the interests protected by" USERRA "requires no guesswork, since the Act includes an 'unusual, and extraordinarily helpful,' detailed statement of the statute's purposes." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014). Congress's express purpose in enacting USERRA was to provide maximum protections to servicemembers. It sought "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." 38 U.S.C. § 4301(a)(1). It promised "to minimize the disruption to the lives of" servicemembers. *Id.* § 4301(a)(2). And it vowed "to prohibit

discrimination against persons because of their service in the uniformed services." *Id.* § 4301(a)(3).

That express purpose is also embodied by the structure of the statute itself. For example, USERRA not only protects servicemembers, it affirmatively grants them "rights." *See, e.g.*, *id.* § 4312(a); *accord Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 447 (6th Cir. 2020) (recognizing that "rights-creating" language evinces congressional intent). To vindicate those rights, Congress equipped courts with sweeping equity powers and exempted servicemembers from all costs to bring an action. *See* 38 U.S.C. §§ 4323(e), (h). And Congress provided that USERRA "supersedes" any "contract" that "reduces, limits, or eliminates in any manner any right or benefit" provided under the statute, *id.* § 4302(b), except contracts that are "*more* beneficial" to the servicemember than the rights granted under USERRA, *id.* § 4302(a) (emphasis added). Thus, in an extraordinary move, Congress *preempted* common-law consideration principles by setting a higher standard that favors servicemembers in the bargaining process. *See* H.R. Rep. No. 103-65, pt. 1, at 20 (1993).[17] Far from permitting unrestrained freedom of contract,

[17] Separately, the majority holds that Section 4302's preemption of agreements that fail to provide "more benefits" is a subjective inquiry. *See* Slip Op. 6. That reading has no basis in the text. Nothing in Section 4302 suggests its sweeping language is subject to the beliefs of the servicemember. More telling, Section 4302 governs USERRA's interplay with conflicting federal and state law—not just private contracts. The Court's individualized, subjective standard is wholly unworkable when applied to public law and policy.

Congress erected guardrails to ensure servicemembers did not too easily squander their rights. Congress could not have been clearer in its intent to void any obstacles to its statutorily-conferred protections.

Congress's purpose is evident not only from the statute itself, but also from its "context, along with purpose and history." *See Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019). President Clinton proclaimed that USERRA would "clarify and strengthen" the rights of servicemembers "to return to the civilian positions they held before going on active duty." Statement on Signing the Uniformed Services Employment and Reemployment Rights Act of 1994, 30 Weekly Comp. Pres. Doc. 2011 (Oct. 13, 1994) ("President's Signing Statement").

Consistent with this purpose, Congress explained that it only permits waiver of USERRA claims where the waiver is "*clear, convincing, specific, unequivocal*, and not under duress." H.R. Rep. No. 103-65, pt. 1, at 20 (emphasis added). In other words, Congress demanded that any waiver of USERRA rights would only be made through informed, deliberate, and voluntary negotiation.

And for good reason: employees possess limited bargaining power relative to their employers. *See Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995). Furthermore, employees are typically less informed on employment policies and

practice than their employers. Congress thus expected courts to diligently probe the circumstances under which a servicemember forfeits his USERRA claims.[18]

Congress did not intend for generic waiver provisions to thwart USERRA's purpose. Instead, if a waiver conflicts with the protective aims of the statute, USERRA requires invalidation of the waiver. *Leonard v. United Airlines*, 972 F.2d 155, 159-160 (7th Cir. 1992) (invalidating plaintiff's waiver of predecessor statute as violative of the statute's purpose "to minimize the disruption in individuals' lives resulting from the national need for military personnel"). Congress did not carefully craft a law that balanced servicemember and employee rights only to have employers alter this balance through boilerplate release agreements.

The Divided Panel Disregarded the Pro-Veteran Canon.

The divided panel also erred because it overlooked the pro-veteran canon in interpreting USERRA. The pro-veteran canon reflects Congress's deep "solicitude" for those servicemembers who sacrifice their civilian life to stand guard for our nation. *United States v. Oregon*, 366 U.S. 643, 647 (1961). It directs that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

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[18] Although the panel majority cites *Nicklin v. Henderson*, 352 F.3d 1077 (6th Cir. 2003), that decision does not limit the waiver analysis to the language of the release and instead mandates a comprehensive analysis of the "totality of the circumstances" before finding waiver. *Id.* at 1080.

Congress was ever-mindful of the canon when it enacted USERRA and left no doubt that it should control when interpreting the statute. Congress expected that servicemember reemployment rights would be "liberally construed," consistent with the "body of case law" that had developed around the canon. S. Rep. No. 103-158, at 40 (1993) (stressing Supreme Court caselaw favoring veterans "remain[s] in full force and effect"); H.R. Rep. No. 103-65, pt. 1, at 19 (same). Both the House and Senate cited *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946)—a Supreme Court decision applying the pro-veteran canon to USERRA's predecessor statute. S. Rep. No. 103-158 at 40; H.R. Rep. No. 103-65, pt. 1, at 20.

Since *Fishgold*, the Supreme Court has time and again invoked the pro-veteran canon to benefit servicemembers who would otherwise have no procedural recourse to exercise their rights under USERRA and other statutes. In *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), the Court explained that, in the case of ambiguity, it would interpret the Veteran's Reemployment Rights Act using "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 220 n.9. Two years later, in *Brown v. Gardner,* 513 U.S. 115 (1994), the Court suggested that its obligation to resolve "interpretive doubt . . . in the veteran's favor" would trump even agency deference. *Id.* at 117-118. Then, in *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011), the Court held that a 120-day deadline to file an appeal with the Court of

Appeals for Veterans Claims could not be jurisdictional "in light of" the pro-veteran canon. *Id.* at 441. Most recently, in *Rudisill v. McDonough*, 144 S. Ct. 945 (2024), the Court confirmed that if a statute is "ambiguous, the pro-veteran canon would favor" the servicemember. *Id.* at 958.

The majority departs from this longstanding approach. Rather than construing the statute in the servicemember's favor, the Court drops the waiver bar to the lowest rung.

The Divided Panel Failed to Consider the Analogous Waiver Standard Under the National Labor Relations Act.

When Congress enacts legislation within a general area of law, it is presumed to "adopt[] the law on that subject as it exists whenever a question under the statute arises." *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 209-10 (2019). Courts routinely rely on this principle "to harmonize a statute with an external body of law that the statute refers to generally." *Id.* at 210. Here, Congress intended for USERRA to be linked to employment discrimination law, "so that the one develops in tandem with the other." *Id.*

As Judge Clay correctly recognized, "national labor policy casts a wary eye on claims of waiver of statutorily protected rights." Slip Op. 11 (Clay, J., dissenting). When analyzing waiver in other employment contexts, this Court requires that waiver of rights to a judicial forum be "clear and unmistakable."

Kennedy v. Superior Printing Co., 215 F.3d 650, 653-54 (6th Cir. 2000). This "clear and unmistakable" standard demands that, to affect a waiver of statutory rights, the "statute must specifically be mentioned" in the agreement. *Id.* at 654.

Despite the words being functionally identical, the divided panel interprets *Wysocki's* "clear and unambiguous" standard to be less exacting. As long as a release provision mentions "any and all claims," the majority will find waiver. Slip Op. 4. It is implausible that Congress intended that the waiver of a servicemember's statutorily-protected rights would face less scrutiny than other employment-connected waivers. The panel majority erred by failing even to consider this standard.

The Scope of Waiver Under USERRA is a Question of Exceptional Importance.

The Divided Panel Disturbs the Rights and Expectations of Hundreds of Thousands of Servicemembers.

As of 2022, the United States retained over 750,000 Reserve and National Guard personnel. *See* Department of Defense, *2022 Demographics Report: Profile of the Military Community*, at 58 (2023). Often without warning, Reservists are subject to deployment. *See, e.g.*, 10 U.S.C. § 12301. The Reserve Components bear a significant burden in carrying out the nation's overseas operations and "provid[ing] critical combat power and support." *See* 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).

When servicemembers return, not all civilian employers welcome them back. As the congressionally-chartered Commission on the National Guard and Reserves explained, "[a]s use of the reserve components has risen, reservists have become increasingly concerned that their service will harm their civilian employment." Commission on the National Guard and Reserves, Transforming the National Guard and Reserves into a 21st-Century Operational Force 257-58 (2008) (collecting data).

Compounding the issue, many National Guard and Reserve members do not understand their USERRA rights—assuming they have heard of USERRA at all. According to a 2010 Survey, only 47 percent of demobilized National Guard and Reserve members reported having a thorough understanding of the statute. *See* Department of Veterans Affairs, *National Survey of Veterans, Active Duty Service Members, Demobilized National Guard and Reserve Members, Family Members, and Surviving Spouses*, at 197-199 (2010).

In the face of information asymmetry in the workplace, the divided panel's decision leaves hundreds of thousands of servicemembers in the dark without protection from boilerplate waivers of their USERRA rights. Unchecked, many of these servicemembers will bargain away the benefits Congress expressly desired they receive.

The Court should reverse course.

The Divided Panel's Reading of USERRA Imposes Needless Confusion on Employers.

Employers will also be harmed by the Court's cramped interpretation of the statute. Upon enactment, President Clinton promised that USERRA would fix the "confusing and cumbersome patchwork" of amendments and "judicial constructions" that had "made the law difficult for employers to understand." *See* President's Signing Statement.

The majority upends this fix. Consider the hypothetical employer who wishes to enter into a release agreement with a covered employee. The Reservist employee purportedly need only agree to release "any and all claims whatsoever" to effectuate a waiver of his USERRA rights. Slip Op. 4. But under the Court's formulation, the employee—after a change of heart—can invalidate the agreement under Section 4302 and claim that he did not believe the benefits conferred were "more beneficial" than those provided by USERRA. *Id.* at 7. Indeed, to create a dispute of fact, the employee likely need only declare under oath that he did not believe the agreement was "more beneficial" than the rights provided under USERRA. *See Wysocki v. IBM Corp.*, 607 F.3d 1102 (6th Cir. 2010) (Martin, J., concurring). Thus, by shutting "the door to disputes later about whether an item was described clearly enough," Slip Op. 4, the majority opens the door to more fact-intensive disputes under Section 4302.

The harms are predictable: employers will be less likely to provide severance packages to servicemembers and more likely to avoid hiring them altogether.

Requiring that any waiver be "specific," "convincing," "clear," and "unequivocal" incentivizes employers to engage in robust and open dialogue with servicemember employees about the consequences of any release. Further, should a servicemember still raise Section 4302 as a sword against his executed release, the record is more likely to include substantial evidence of his contemporaneous benefits calculus.

The divided panel's diminished waiver standard coupled with its misreading of Section 4302 frustrates employer expectations.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Dated: May 2, 2024

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. Rule 32(g)(1) and 6th Cir. R. 32(a), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. Rule 29(b)(4) because it contains 2,592 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(f) and 6th Cir. R. 32(b)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Times New Roman, which is a proportionally spaced typeface.

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Dated: May 2, 2024

CERTIFICATE OF SERVICE

I certify that on May 2, 2024, this document was electronically filed with the clerk of the court for the U.S. Court of Appeals for the Sixth Circuit and served through CM/ECF upon all counsel of record in this case.

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