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 CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2-19-cv-06106 (Hon. Mark A. Kearney)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AIRLINES FOR AMERICA IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America has no parent corporation and does not issue stock. No publicly held company owns more than 10% of the Chamber.

Air Transport Association of America, Inc., d/b/a Airlines for America, has no parent corporation and does not issue stock. No publicly held company owns more than 10% of Airlines for America.

Dated: January 15, 2021

/s/ Erik R. Zimmerman
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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files *amicus* briefs in cases, like this one, involving issues of national concern to the business community.

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[1] Both parties have consented to the filing of this brief. *Amici curiae* the Chamber of Commerce of the United States of America and Airlines for America (collectively, *amici*) previously participated as *amici curiae* in a case presenting similar legal issues, *White v. United Airlines, Inc.*, No. 19-2546 (7th Cir.). *Amici*'s brief in *White* was authored by Mark W. Robertson, Anton Metlitsky, and Jason Zarrow, who represented *amici* in *White* and who represent Appellee Federal Express Corp. in the present case. This brief is substantially similar to *amici*'s brief in *White*.

No person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Airlines for America (A4A) is the nation's oldest and largest airline trade association, representing passenger and cargo airlines throughout the United States. A4A works to foster a business and regulatory environment that ensures a safe, secure, and healthy U.S. air transportation industry—including stable and predictable legal rules to govern it. Thus, throughout its 75-plus year history, A4A has been actively involved in the development of the federal law applicable to commercial air transportation.

Congress has regulated the employment and reemployment rights of service members for more than 80 years. Throughout that period, it has always been understood—by the business community, by labor groups, and by the federal agencies that administer these laws—that Congress has never required employers to provide paid military leave to reservists. Instead, the military pays reservists for their service.

Plaintiff's interpretation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) would upend that understanding. *Amici*'s members would be required to provide paid military leave simply because they also provide paid jury duty and sick leave. Plaintiff's approach would impose a significant financial

obligation on all employers that have substantial numbers of reservists in their workforce, including federal, state, and local governments. This obligation would be devastating for businesses that can ill afford to pay people not to work, often on a recurring basis and for extended periods of time during which the reservists are also paid by the military. The district court correctly recognized that, had Congress intended that result, it would have said so expressly. *Amici* have a keen interest in defending that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Enacted in 1994, USERRA is the most recent iteration of a series of laws dating back to 1940 intended to protect the employment and reemployment rights of members and former members of the armed forces." *Gross v. PPG Indus., Inc.*, 636 F.3d 884, 888 (7th Cir. 2011). Although the statute is meant to benefit service members, "Congress carefully constructed" it to account for "the legitimate concerns of employers," as well. *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304-05 (4th Cir. 2006).

At issue here is 38 U.S.C. § 4316(b), the USERRA provision that entitles service members on military leave to the same non-seniority

rights and benefits as are generally provided to non-military employees during a comparable "furlough or leave of absence." The statute's command is simple: If an employee gets a benefit during a non-military leave of absence that is comparable to military leave, she must also get that benefit during military leave. Applying § 4316(b) to this case is also simple. As FedEx explains, "paid leave" is not a USERRA benefit, but rather a category that includes a variety of distinct benefits. *See* FedEx Br. 23-32. The specific benefit Plaintiff is seeking here is paid military leave. But since FedEx (obviously) does not provide that benefit to its employees on civilian leave, Plaintiff is not entitled to that benefit under § 4316(b). *Id.*

According to Plaintiff, however, the statute is far broader, requiring employers who provide short-term paid leaves (such as paid jury duty, sick leave, or bereavement leave) also to provide paid military leave. Plaintiff contends that Congress imposed that requirement not directly, but indirectly, through the interplay of two provisions in USERRA: (i) § 4316(b), which requires that employers provide employees on military leave the same "rights and benefits" that employees receive on comparable non-military leaves, and (ii) § 4303(2),

which defines "benefits," and which Plaintiff argues includes paid leave, even though "paid leave" is not among the many specific benefits listed. FedEx persuasively explains why that construction is irreconcilable with the statute's text, history, and structure. This brief focuses on two points.

First, Plaintiff misconstrues both § 4316(b)'s text and this Court's decision in *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986), on which § 4316(b) was based. *Waltermyer* does not hold that an employer that provides paid civilian leaves must also provide paid military leave. Rather, the decision holds that an employer that provides an additional benefit during a civilian leave—there, holiday pay—must provide that same benefit to employees taking military leave. *See* 804 F.2d at 825. That rule does not apply here for the reasons explained above. Indeed, *Waltermyer* expressly declined to adopt the rule Plaintiff advances here—it recognized that the employees there received full pay during jury duty, but did *not* hold that they must also receive full pay during military leave. *See id.* Section 4316(b) was intended to adopt *Waltermyer*; there is no basis to conclude that the 1994 Congress meant to expand that decision.

Second, Plaintiff's position is inherently implausible. If his construction of § 4316(b) were correct, USERRA would have departed dramatically from several critical aspects of the then-existing regulatory scheme, and in a way that imposed substantial practical consequences on numerous stakeholders—yet it would have done so silently. The existing legal regimes Plaintiff's construction would upend are discussed in detail below. But to take one example, USERRA applies to the federal government, which provides its employees paid jury duty and sick leave. The federal government also provides its employees—through a statute that is independent of USERRA, *see* 5 U.S.C. § 6323(a)—paid military leave subject to a limit of 15 days per year. Under Plaintiff's theory, USERRA would itself require the federal government to provide its employees paid military leave, rendering the separate statutory scheme for federal employees superfluous. Not only that, USERRA would often require the federal government to provide paid military leave far in excess of 15 days per year, rendering the 15-day limitation in the scheme for federal employees a nullity.

The consequences of Plaintiff's reading would be similarly stark for private employers who employ a large number of reservists or have only a few employees. Many reservists take significant amounts of "short-term" military leave on an annual basis—far more than any worker could take for sickness, bereavement, or jury duty. Plaintiff's rule would require any employer that offers paid sick leave, paid bereavement leave, or paid jury duty leave (which is to say, virtually every employer) to pay for all of that military leave—without even a setoff for the substantial pay that reservists get from the military. This dramatic financial consequence would force many employers to choose between rescinding the paid jury duty, sick leave, or similar benefits they offer, or offering paid military leave. Airlines would be especially hard hit because a substantial percentage of their pilots are also reservists, who are well paid and take significant amounts of military leave every year.

Had Congress intended USERRA to have such a substantial legal and practical effect, one would expect to see some indication of that intent when the statute was enacted. Presumably Congress would have made Plaintiff's rule explicit in the text, because Congress normally

does not make dramatic changes to existing regulatory schemes implicitly. At the very least, the legislative history would have mentioned the new rule Plaintiff advances. And the stakeholders that would be severely impacted by this supposed change in law—whether it be the business community, labor unions, companies in other fields, or federal or state governments—no doubt would have made their views known and sought to affect the legislation one way or the other.

Yet not only does the text lack any explicit statement adopting Plaintiff's rule, not a single Member of Congress or stakeholder even identified—let alone supported or opposed—the reading Plaintiff presses this Court to adopt. It is implausible to suggest that such a drastic change went unnoticed.

ARGUMENT

I. Plaintiff's position is inconsistent with § 4316(b)'s text and with *Waltermyer*.

Plaintiff contends that "paid leave" is a "benefit" under 38 U.S.C. § 4303(2), and that because FedEx provides paid civilian leaves like jury duty, sick leave, and bereavement leave, § 4316(b) also requires FedEx to provide paid military leave. But as FedEx persuasively demonstrates, *see* FedEx Br. 23-32, "paid leave" is not itself a benefit.

Rather, "paid leave" is a generic *category* that describes different *types* of benefits, including (for example) paid jury duty leave, paid sick leave, paid military leave, *see Pucilowski v. Dep't of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007), or "vacations," 38 U.S.C. § 4303(2).

Moreover, Plaintiff misunderstands how § 4316(b) works. While various types of paid leave can be "benefits" under USERRA, § 4316(b) protects "*other* rights and benefits," *id.* § 4316(b) (emphasis added)—that is, benefits other than "leaves of absence," *id.*—that employers provide *during* civilian leaves. In other words, § 4316(b) does not require that employers provide any particular leaves of absence. It instead requires that, if an employer provides an additional benefit during a civilian "leave of absence" comparable to military leave, the employer must provide that same benefit to employees on military leaves. *See id.*

That rule does not help Plaintiff, because as courts have routinely recognized, "paid military leave"—not paid leave generically—is the relevant benefit. *See Pucilowski*, 498 F.3d at 1344; *Gordon v. Wawa, Inc.*, 388 F.3d 78, 82 (3d Cir. 2004); *United States v. Missouri*, 67 F. Supp. 3d 1047, 1051 (W.D. Mo. 2014). And paid military leave is "an

additional benefit not available to non-military employees." *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1104 (Fed. Cir. 2008). Thus, for example, the Federal Circuit has held that paid military leave is a "benefit of employment" under USERRA, but not a benefit that the Postal Service provided to non-reservist employees, even though non-reservists received paid sick leave. *Id.*;[2] *see also Gross*, 636 F.3d at 889-90 (military leave is a distinct form of benefit not provided to non-military employees). The same is true here. FedEx does not provide civilian employees paid military leave, so USERRA does not obligate it to provide reservists paid military leave either.

This Court's decision in *Waltermyer*—the case everyone agrees § 4316(b) was enacted to codify—is fully consistent with that conclusion. The relevant benefit in *Waltermyer* was holiday pay (not generic paid leave or wages), and *Waltermyer* held that because employees who were absent for jury duty received holiday pay, an employee absent for military training was likewise required to receive holiday pay. 804 F.2d

[2] The paid military leave requirement for federal employees in 5 U.S.C. § 6323(a) does not apply to the Postal Service. *See Welshans*, 550 F.3d at 1102-03.

at 825. This Court limited its decision to an employee's "eligibility for holiday pay, not compensation for the other days not worked." *Id.*

Plaintiff's construction would thus not "affirm the decision in *Waltermyer*." H.R. Rep. No. 103-65(I), at 33 (1993). Rather, it would *extend* the decision to encompass a theory that the *Waltermyer* court declined to adopt. There is no basis to "extend the statute well beyond the limits set out" in the case on which it was modeled. *Foster v. Dravo Corp.*, 420 U.S. 92, 99-101 (1975).

II. Congress did not silently require employers that provide civilian leave also to provide paid military leave.

A. Had Congress intended to require paid military leave, it would have legislated expressly.

Beyond the text and precedent described above, Plaintiff's position suffers from an additional problem. In his view, the 1994 Congress adopted a substantial change from the pre-USERRA regulatory scheme in several respects and imposed significant new obligations on employers of every stripe—yet did so indirectly and implicitly. After all, Congress knows how to expressly provide for paid military leave, as it did for federal employees, *see* 5 U.S.C. § 6323, but it did not do so here. Indeed, Plaintiff does not appear to disagree—his position is that

Congress required paid military leave by implication, through the combination of § 4316(b) and USERRA's definition of "benefits." But courts have long understood that Congress does not make such dramatic changes implicitly. Had Congress intended the kind of substantial departure that Plaintiff posits, it would have done so through express language.

1. *Departing from the rule that paid military leave is not required would impose substantial costs on employers.*

A longstanding principle under USERRA's predecessor statutes was that "the law does not require the employer to pay the employee for the time he is absent for military training duty, or even to make up the difference between his military pay and his regular earnings for that period." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 563 n.14 (1981); *see also* 20 C.F.R. § 1002.2. One reason Congress did not impose such a requirement is that service members are paid for their service. And unlike jury duty, which pays a nominal amount in every jurisdiction, the pay reservists receive for their military service is often greater than

what they earn in their civilian jobs.[3] Congress thus determined that paid military leave was unnecessary. In enacting USERRA, Congress did not depart from the rule that paid military leave is not required: As this Court has explained, "paid military leave" is "a benefit that USERRA does not guarantee." *Gordon*, 388 F.3d at 82; *accord Miller v. City of Indianapolis*, 281 F.3d 648, 650 (7th Cir. 2002) (noting that USERRA "does not expressly require paid military leave"); *see* 20 C.F.R. § 1002.7(d).

Plaintiff's position, though, is that Congress *indirectly* required paid military leave when it enacted USERRA—and in particular when it enacted § 4316(b)—so long as the employer also provides any comparable paid leave, such as (according to Plaintiff) paid jury duty leave, sick leave, or bereavement leave. But that reading is inconsistent with the rule just described—especially considering that many states *require* companies to provide paid jury duty leave, sick leave, and the like, and many national companies provide such paid

[3] *See, e.g.*, *Clarkson v. Alaska Airlines, Inc.*, 2:19-cv-0005-TOR, ECF 78 at 10 (E.D. Wash.) (plaintiff-service member testimony that his "pay for a day of service with [the] Guard exceeded [his] typical pay for a day of service with Horizon [Airlines]").

leaves to employees on a uniform national basis. Indeed, state and local laws requiring employers to provide paid absences are ubiquitous:

- 36 states plus the District of Columbia require at least one form of paid absence;
- 13 states plus the District of Columbia require paid sick leave; and
- 9 states plus the District of Columbia require employers to provide jury duty pay.[4]

Numerous municipalities likewise require employers to provide various forms of paid leave.[5] Under Plaintiff's interpretation, employers operating in the many jurisdictions with *any* paid leave requirement would be forced to offer paid military leave. Plaintiff's approach could therefore create a de facto paid military leave requirement that would overcome Congress's otherwise clear and longstanding pronouncement on this issue.

Employers operating in jurisdictions without paid leave requirements, in turn, would scarcely be in a better position. These

[4] *See Travers v. Fed. Exp. Corp.*, 2:19-cv-06106-MAK, ECF 30-3 at 29-62 (E.D. Pa.) (reproduced at JA85-JA117).

[5] National Partnership for Women & Families, *Paid Sick Days – State and District Statutes* (Apr. 2020), http://www.nationalpartnership.org/our-work/resources/workplace/paid-sick-days/paid-sick-days-statutes.pdf.

employers could avoid being forced to pay for military leave only if they rescinded *all* of their existing paid leave policies. Similarly, employers operating in multiple jurisdictions (like many members of *amici*) could avoid being forced to pay for military leave only by forgoing nationally uniform paid leave policies and eliminating paid leave in some jurisdictions. For most employers, these ostensible choices are not truly choices at all—taking away paid leave from their employees would be an unpalatable approach that would put them at a competitive disadvantage in hiring and harm their employees in the process. As a practical matter, therefore, even employers in jurisdictions without paid leave requirements may be inclined to retain their existing paid leave policies, and thus be forced to pay for military leave.

Plaintiff's interpretation also would nullify employer policies that provide "a fixed number of days of paid military leave per year," 20 C.F.R. 1002.7(d), as is the case, for example, in some American Airlines work groups. Under Plaintiff's theory, so long as an employer provides paid civilian leave, it also must pay an employee's regular wages during however many days of short-term military leave a reservist takes, thus eviscerating any cap. But service members often

take far more cumulative military leave per year—and especially year over year—than anyone could take for jury duty, illness, or bereavement. In this case, even after excluding periods of "long-term" military service, Plaintiff alleges that his military service totaled 50 days in Fiscal Year 2006, and 62 days in Fiscal Year 2007. JA49-50.

Plaintiff's interpretation thus would have dramatic and far-reaching consequences—consequences that would not only destroy the well-established background rule that paid military leave is not required, but that would also impose tremendous costs on any employer, private or public, who employs reservists. These costs would be particularly devastating for small employers, who can hardly afford to pay workers for prolonged absences. Extended periods of paid military leave would be disruptive to small business operations and would require employers to scramble to find replacement staffing.

The costs of offering paid military leave would also be sizeable for large employers that have numerous highly-paid reservists among their ranks. For these employers, long periods of paid military leave for many employees would add up quickly.

Airlines provide a prime example. Airlines proudly employ a substantial percentage of commercial pilots who are also reservists—at some A4A member carriers, the figure is upward of 25%. Those pilots are well paid, routinely earning annual salaries of $100,000 per year or greater. And many pilots take significant amounts of military leave on an annual basis. In one case, by taking military leave in multiple periods of 14 days or less, a pilot reached a total of 260 days of "short-term" military leave in two years. *Scanlan v. Am. Airlines Grp.*, No. 2:18-cv-04040, ECF 81-3 ¶ 54 (E.D. Pa.). In another case, a pilot alleged that he took "dozens" of periods of short-term military leave from 2012 through 2018. *Huntsman v. Sw. Airlines, Co.*, 4:19-cv-00083-PJH Dkt. 1 ¶ 44 (N.D. Cal.). Requiring paid military leave for such substantial periods of time would impose a weighty burden on employers who have long relied on the established rule that paid military leave is not required.

Congress would have expressly addressed paid military leave if it had intended these far-reaching consequences. After all, the Supreme Court had already held that, absent a clear expression from Congress, it would not construe the statute that preceded USERRA "to impose an

additional obligation upon employers" and "guarantee[ ] that employee-reservists have the opportunity to . . . earn the same amount of pay that they would have earned without absences attributable to military reserve duties." *Monroe*, 452 U.S. at 564. It is implausible that Congress nevertheless sought to provide such a guarantee in USERRA without heeding the Supreme Court's guidance to speak expressly.

2. *Plaintiff's position conflicts with the federal paid military leave scheme.*

Plaintiff's interpretation would also conflict with Congress's express scheme providing paid military leave to federal employees. *See* 5 U.S.C. § 6323.

Because USERRA is generally applicable to the federal government, *see* 38 U.S.C. § 4303(4)(A)(ii), virtually any service member who works for the federal government is protected by both 5 U.S.C. § 6323 and USERRA. Section 6323(a), in turn, provides federal employees called up to "active duty," "inactive-duty training," "funeral honors duty," or "field or coast defense training" with 15 days of paid military leave per year, with no offset for military pay. Section 6323(b) provides an additional 22 days of paid military leave for contingency operations, but this pay is offset by military pay.

If Plaintiff's interpretation of USERRA were correct, the entire scheme outlined in § 6323 would be superfluous. For more than half a century, the federal government has provided the same employees covered by § 6323 with paid jury duty and sick leave. 5 U.S.C. §§ 6322, 6307. Under Plaintiff's theory, those same employees would be entitled to paid military leave under USERRA, rendering unnecessary Congress's grant of paid military leave in § 6323.

Plaintiff's reading is also irreconcilable with Congress's decision to provide federal employees a limited amount of paid military leave. Congress provided employees with no more than 15 days of paid military leave in normal circumstances and an additional 22 days for contingency operations (with an offset for military pay). But under Plaintiff's theory, if an employee takes more than 37 days of paid military leave, USERRA would require the federal government to provide paid military leave that exceeds these statutory limits. As the district court recognized, Plaintiff's reading would simply "blot out" these express limits, JA8 (quoting *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1336 n.3 (Fed. Cir. 2003)), and thus depart dramatically

from the pre-USERRA federal military leave scheme that Congress enacted.

That result runs into several established principles of statutory interpretation. One is that Congress does not make drastic changes to existing regulatory schemes silently. *See* FedEx Br. 48. Another is the rule against superfluity. *See Corley v. United States*, 556 U.S. 303, 314 (2009). And a third is that "the specific governs the general," a rule that applies with special force when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," *RadLAX Gateway Hotel, LLC. v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks omitted). The specific problem here is paid military leave, and Congress's specific solution is the comprehensive scheme in § 6323.

Again, had Congress wanted to provide paid military leave for all service members, it could and would have done so. Or had Congress wanted to provide unlimited paid military leave for federal employees, it could and would have done that, too. But it did neither. Absent a clear congressional command, USERRA should not be construed in a way that "mandates federal agencies to provide employees with

unlimited military leave, irrespective of the detailed statutes granting federal employees specific periods of leave for training or active duty." *Butterbaugh*, 336 F.3d at 1336 n.3.

3. *Plaintiff's position would impose substantial new costs on states and municipalities.*

If adopted, Plaintiff's view also would impose costs on states and municipalities, despite the rule "that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16-17 (1981). USERRA fully applies to state and local government employers, *see* 38 U.S.C. § 4303(4)(A)(iii), and many states and localities provide paid civilian absences like paid jury duty leave. Thus, for those jurisdictions that do not currently provide paid military leave, Plaintiff's interpretation would create a massive new liability, straining already-thin budgets. And Plaintiff's reading would render superfluous the numerous state laws that expressly grant state employees paid military leave—laws enacted precisely because states understood that "USERRA does not address payment during military leave." Samuel W. Asbury, *A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 Gonz. L. Rev. 67, 72 (1994).

B. The lack of stakeholder commentary on a drastic new paid military leave requirement further defeats Plaintiff's reading.

Just as it is implausible that Congress would not have engaged in "at least some discussion" of such a "major change," FedEx Br. 51 (quoting *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992)), so too is it implausible that such a change would have gone unnoticed by the major stakeholders affected by Plaintiff's theory. But when USERRA was under consideration, these stakeholders never mentioned the possibility that § 4316(b) was intended to adopt Plaintiff's construction, let alone supported (e.g., labor unions) or objected to (i.e., employers) the substantial change in law that Congress supposedly enacted. In fact, stakeholder behavior even after USERRA was enacted is strong evidence that no one understood USERRA to impose the kind of obligation that Plaintiff says it does.

Had Congress actually adopted Plaintiff's rule, it would have a dramatic effect on employers, as explained above. *Supra* at 12-18. And the cost to employers is more than monetary. Because private employers cannot limit the amount of military service an employee performs, Plaintiff's rule would create a new incentive to take

additional military leave (double pay), which would present a threat to business continuity.

Given these effects, businesses and labor unions surely would not have remained silent if anyone had understood the statute the way Plaintiff does. *Amici*'s members, and air carriers in particular, would have been opposed to such a rule for many of the reasons just discussed. The same would be true of any employer that employs a significant number of reservists, or any small business that can ill afford to pay a reservist for not working over an extended period of time. And *amici*, as leaders in the business community, at the very least would have studied the issue carefully had there been any notion that paid military leave would be required of their members.

On the other side of the issue should have been labor groups and unions arguing in favor of the adoption of a new paid military leave requirement. But in fact, not one of these stakeholders so much as mentioned paid military leave, because everyone understood that paid military leave was not required. *See, e.g.*, *Coleman v. Interco Inc. Divs.' Plans*, 933 F.2d 550, 552 (7th Cir. 1991) ("[I]n the event that [Congress's] hypothesized intention had been expressed, the legislative

history would probably contain a record of protest from the business community against such a disruption of established and economical methods of doing business.").

This common understanding is reflected in collective bargaining in the years following USERRA's passage. As Congress was well aware, benefits for unionized employees in the airline industry (who make up the vast majority of airline employees) are collectively bargained pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq*. And *amici*'s member carriers bargained with unions representing their flight crews over whether and how much paid military leave to provide even after USERRA was passed. At American, for example, the Allied Pilots Association voluntarily bargained away a preexisting paid military leave benefit in exchange for substantial "cost savings" that were used to secure other benefits for pilots. *See Scanlan v. Am. Airlines Grp.*, No. 2:18-cv-04040, ECF 98 at 21 (E.D. Pa.). Yet none of this bargaining would have happened if either side believed that federal law *required* paid military leave by virtue of the fact that the carriers also provided other types of paid absences.

And it is not just private employers who, under Plaintiff's interpretation, were in the dark—federal stakeholders also have never shared that interpretation. The Department of Labor, which administers USERRA, has concluded that differential pay—i.e., the difference between a reservist's military and civilian wages—is "neither required by nor addressed in USERRA." 70 Fed. Reg. 75,246, 75,249 (Dec. 19, 2005); *see also* 20 C.F.R. § 1002.7.[6] But that would not be true under Plaintiff's theory—because many employers offer differential pay during jury-duty leaves (i.e., the difference between the employee's regular wages and the jury-duty stipend), they would be required under USERRA to offer differential pay during military leave as well.

Meanwhile, the Office of Personnel Management, which oversees the leave policies for the federal government, has stated that federal employees are entitled to paid military leave only to the extent provided expressly in 5 U.S.C. § 6323, even though the federal government would

[6] There is also nothing about paid military leave in the USERRA rights posters that DOL provides to employers to satisfy their obligations under 38 U.S.C. § 4334. *See* U.S. Dep't of Labor, *Your Rights Under USERRA* (Apr. 2017), https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

have to provide additional paid military leave under Plaintiff's theory.[7] *See supra* at 18-21; *see also White v. United Airlines*, 416 F. Supp. 3d 736, 739 (N.D. Ill. 2019) (noting that the Department of Justice has recognized that "USERRA requires only an unpaid leave of absence" (internal quotation marks omitted)).

On Plaintiff's theory, every major stakeholder affected by his reading of the statute—in addition to every member of Congress—simply missed the fact that Congress was drastically altering the existing regulatory scheme by enacting § 4316(b). That is as wrong as it sounds. This Court should reject Plaintiff's reading of the statute, which is inconsistent with the statutory text and this Court's precedents, and which would impose enormous financial consequences on employers, contrary to the settled rule that "USERRA does not guarantee" paid military leave. *Gordon*, 388 F.3d at 82.

CONCLUSION

The decision below should be affirmed.

[7] *See* OPM, *Pay & Leave*, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/military-leave/.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,969 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also 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 a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

This brief further complies with Third Circuit Rule 31.1(c) because the text of the electronic copy of this brief filed with the Court is identical in all respects to the text in the paper copies, and a virus check was performed on the electronic version using Carbon Black Cloud Version 3.6.0.1941, and no virus was detected.

Dated: January 15, 2021

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to Third Circuit Rule 46.1 that I was admitted to the Bar of the United States Court of Appeals for the Third Circuit on December 14, 2020 and remain a member in good standing of the Bar of this Court.

Dated: January 15, 2021

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CERTIFICATE OF SERVICE

I certify that on January 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the appeal are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Dated: January 15, 2021

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