No. 19-2546

In the United States Court of Appeals for the Seventh Circuit

ERIC WHITE,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

UNITED AIRLINES, INC. and UNITED CONTINENTAL HOLDINGS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois
Case No.19-cv-00114 (The Hon. Charles R. Norgle, Sr.)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Legislative History

Other Authorities

INTRODUCTION

This appeal raises a straightforward question of statutory interpretation. The plaintiff, Eric White, is a United Airlines pilot who has spent the last twenty years serving his country as a member of the United States Air Force, first on active duty and now on reserve duty. As a reservist, he is periodically required to attend military drills, typically for two days at a time, for which he must take leave from work.

When he does so, White receives no pay from United, nor does he receive any credit under United's profit-sharing plan, because United's policy is to not provide such benefits for short-term military leave. United does, however, provide these benefits for other leave of comparable duration, such as leave for jury duty.

To end this disparate treatment, White brought suit under the Uniformed Services Employment and Reemployment Rights Act (or USERRA). Among other things, USERRA entitles reservists who are absent from employment while fulfilling their service obligations to receive all the "rights and benefits not determined by seniority as are generally provided by the employer" to similarly situated employees who take a leave of absence comparable to the military leave. 38 U.S.C. § 4316(b)(1). The question on appeal is whether the statutory phrase "rights and benefits," as used in this provision, includes paid leave or profit-sharing.

In a short opinion with virtually no analysis, the district court held that the answer is no and dismissed the complaint. But that answer flies in the face of the

statute's text, history, and case law—none of which the court examined in any meaningful way.

The statutory definition of "rights and benefits" is expansive. It covers all the "terms, conditions, or privileges of employment, including any advantage, profit, privilege, [or] gain"—with no express exceptions. 38 U.S.C. § 4303(2). And that is by design: Congress wanted the phrase to be "broadly defined to include all attributes of the employment relationship." H.R. Rep. 103–65(I), at 21 (1993). The plain meaning of this definition encompasses paid leave and profit-sharing.

There is no sound basis for judicially creating an atextual exception. Before it was amended in 2010, the statute had a textual exception for "wages or salary for work performed." But that exception did not cover wages for work *not* performed. And Congress then removed the exception to expand the statute's reach, resulting in a definition that covers wages for work performed *and* for work not performed.

When Congress enacted USERRA, it "intend[ed] to affirm the decision in *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave." H.R. Rep. 103–65(I), at 33–34; *see* 20 C.F.R. § 1002.150(b) (adopting this same rule). *Waltermyer* recognized that paid leave is a right or benefit and that short-term "military leave shares the essential features" of jury duty. 804

F.2d at 825. Every court to address the issue since has recognized the same. Only the court below has disagreed. This Court should correct that misstep and reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this case arises under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–35. The court also had jurisdiction under 38 U.S.C. § 4323(b)(3). On July 10, 2019, the district court entered an order granting the defendant's motion to dismiss and a judgment dismissing the case with prejudice. App. 94, App. 98. The plaintiff timely filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on August 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the district court err in holding that the phrase "rights and benefits" in section 4316(b)(1) of USERRA excludes paid leave and profit-sharing—even though it is defined to cover all "terms, conditions, or privileges of employment, including any advantage, profit, privilege, [or] gain," with no exceptions, 38 U.S.C. § 4303(2)?

II. Did the district court err in dismissing the complaint based on its alternative, two-sentence conclusion that jury duty and short-term military leave are not comparable as a matter of law—even though the court acknowledged that both are "sporadic and uncontrollable in timing," App. 97, United itself did not contest this issue, and courts have universally rejected this argument as a basis for dismissal?

STATEMENT OF THE CASE

A. Statutory background

1. Congress enacted USERRA to expand veterans' rights.

Congress has long recognized that when someone puts on a uniform to serve in our military, we owe them certain obligations in return. One obligation is the assurance that, when they have discharged their duties, they will be able to return to work without being penalized for serving their country—an obligation, in other words, "to compensate for the disruption of careers and the financial setback [from] military service." 140 Cong. Rec. S7670–71 (June 27, 1994) (Sen. Rockefeller).

To make good on this solemn obligation, Congress has repeatedly expanded and strengthened workplace protections in "a long line of federal veterans' rights laws enacted since the Selective Training and Service Act of 1940." *DeLee v. City of Plymouth, Ind.*, 773 F.3d 172, 174 (7th Cir. 2014). The most recent and comprehensive of these statutes is USERRA, which Congress enacted in 1994 to "strengthen existing employment rights of veterans of our armed forces." *Id.* at 174–75.

In the run-up to USERRA, Congress came to the conclusion that the existing statute was too "complex and difficult to understand," 139 Cong. Rec. H2203–02, H2209 (May 4, 1993), and that it was "sometimes ambiguous, thereby allowing for misinterpretations," H.R. Rep. No. 103–65, at 18. These misinterpretations took too narrow a view of the law, thwarting the ability of veterans and reservists to vindicate their rights. Congress felt the need "to restate past amendments in a clearer manner

and to incorporate important court decisions interpreting the law," while correcting the misinterpretations. 137 Cong. Rec. S6035, S6058 (May 16, 1991) (Sen. Cranston).

The result was USERRA. The statute seeks to "clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103–65(I) at 18. Its text identifies three core objectives: (1) "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service," (2) to "provid[e] for the prompt reemployment of such persons upon their completion of such service," and (3) "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a).

2. Section 4316(b)(1) requires that military leave be treated no worse than any comparable non-military leave as to all non-seniority-based "rights and benefits."

USERRA accomplishes its broad objectives by imposing a number of specific requirements on employers. These requirements range from "prohibiting an employer from discriminating against a servicemember because of his service (§ 4311)" to "requiring prompt reemployment of a returning servicemember (§§ 4312, 4313(a))," to "establishing a protective period during which an employer may not discharge a reemployed servicemember without cause (§ 4316(c))." *DeLee*, 773 F.3d at 175.[1]

[1] To underscore the importance of these requirements, Congress created a "broad remedial scheme" for USERRA. *Davis v. Advocate Health Ctr. Patient Care Exp.*,

The requirement at issue in this case is section 4316(b)(1), which "sets out the rights applicable while a military employee is away from work fulfilling service obligations." *Gross v. PPG Indus., Inc.*, 636 F.3d 884, 888 (7th Cir. 2011). It provides that "a person who is absent from a position of employment by reason of service in the uniformed services shall be (A) deemed to be on furlough or leave of absence while performing such service; and (B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. § 4316(b)(1).

The definition of "rights and benefits," in turn, is supplied by section 4303(2). It reads as follows:

> The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or

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523 F.3d 681, 684 (7th Cir. 2008). It has no statute of limitations, 38 U.S.C. § 4327(b); *Middleton v. City of Chicago*, 578 F.3d 655, 662–63 (7th Cir. 2009); it has no exhaustion requirement; it forbids fees or costs to be assessed against "any person claiming rights under [the statute]," 38 U.S.C. § 4323(h)(1); *see Davis*, 423 F.3d at 685; and it allows suit in any district where an employer has a place of business, 38 U.S.C. § 4323(c)(2). Further, the statute "supersedes any State law (including 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" USERRA. *Id.* § 4302(b).

> practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2).[2]

Putting the two provisions together, the text of section 4316(b)(1) requires an employer to provide employees who take military leave with any non-seniority-based advantage, profit, privilege, or gain of employment that it provides to similarly situated employees who take other leaves of absence. *See Gross*, 636 F.3d at 888. The purpose of this requirement was thus to ensure that military leave would not be given second-class status as compared with any comparable non-military leave.

3. Congress intended for section 4316(b)(1) to codify the Third Circuit's decision in *Waltermyer*.

This purpose is clear not only through the text of the statute, but also through its history. As noted, Congress reviewed the case law when drafting USERRA and wanted "to incorporate important court decisions interpreting the law." 137 Cong. Rec. S6035, S6058. Therefore, "Congress emphasized when enacting USERRA that to the extent it is consistent with USERRA, the 'large body of case law that had

[2] Although not at issue in this case, USERRA defines "seniority" as "longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity employment." 38 U.S.C. § 4303(12).

developed' under the predecessor statutes to USERRA 'remained in full force and effect.'" *Gross*, 636 F.3d at 888 (quoting 20 C.F.R. § 1002.2).

When it comes to section 4316(b)(1), Congress intended to incorporate one case in particular—the Third Circuit's 1986 decision in *Waltermyer v. Aluminum Company of America*, 804 F.2d 821. That case involved a claim much like this one. The plaintiff was a reservist who was periodically pulled away from work for military training. *Id.* at 822. During those periods he took military leave, and his employer refused to provide him with holiday pay while he was on leave even though it provided that benefit to employees who took non-military leaves at the same time for jury duty, witness duty, vacation, sick leave, or bereavement leave. *Id.* He challenged this disparate treatment as unlawful under USERRA's predecessor statute. *Id.* at 823.

The Third Circuit ruled in his favor. It began by "recognizing that [he] is not entitled to preferential treatment." *Id.* at 824. The statute was not "designed to give reservists on leave all the incidents of employment accorded working employees, including regular and overtime pay," irrespective of whether non-working employees received such pay. *Id.* at 823. The statute sought to "prevent discrimination against reservists"—"not to grant them preferential treatment." *Id.* The court therefore "establishe[d] equality as the test" for analyzing such claims. *Id.* at 824.

Applying that test to the claim before it, the Third Circuit found that the plaintiff was entitled to summary judgment because he had established that military

leave was treated less favorably than comparable non-military leaves. *Id.* at 825–26. By treating jury duty and testifying in court more favorably than short-term military leave—even though, as the court found, "military leave shares the[ir] essential features"—his employer violated the equality principle. *Id.* at 825. The court thus held that he was entitled to paid leave for certain days "while he is on active duty." *Id.*

Congress agreed. "The reports of both the Senate and the House expressed an intention to codify *Waltermyer*." *Rogers v. City of San Antonio*, 392 F.3d 758, 768 (5th Cir. 2004). Here is how the House report put it:

> The Committee intends to affirm the decision in *Waltermyer v. Aluminum Co. of America* 804 F.2d 821 (3rd Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid. Thus, for example, an employer cannot require servicemembers to reschedule their work week because of a conflict with reserve or National Guard duty, unless all other employees who miss work are required to reschedule their work.

H.R. Rep. 103–65(I), at 33–34. The Senate report said much the same. Citing *Waltermyer*, the report explained that section 4316(b)(1) "would codify court decisions that have interpreted current law as providing a statutorily-mandated leave of absence for military service that entitles servicemembers to participate in benefits that are accorded other employees." S. Rep. 103–158, at 58 (1993).

4. The Department of Labor's implementing regulations carry out Congress's intent to codify *Waltermyer*.

Since USERRA was enacted, the Department of Labor has promulgated final regulations, after notice and comment, to implement the statute and carry out this Congressional command. The regulations provide that "[t]he non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace." 20 C.F.R. § 1002.150(a). The regulations also specifically incorporate *Waltermyer*'s test:

> If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

Id. § 1002.150(b). As a result, as this Court has explained, reservists "who are absent from employment while fulfilling their service obligations" are entitled to receive all the "'rights and benefits not determined by seniority as are generally provided by the employer' to similarly situated employees who take a leave of absence comparable to the military leave." *Crews v. City of Mt. Vernon*, 567 F.3d 860, 864–65 (7th Cir. 2009) (quoting 38 U.S.C. § 4316(b)(1)).

B. Factual background

Eric White is a pilot who has served his country as a member of the Air Force since 2000, first on active duty and now on reserve duty. App. 9. As an Air Force reservist, he is required to attend periodic military-training sessions to remain ready in the event that he is called back into active duty. *Id.*

While continuing to serve his country as a reservist, White has also long held a civilian job as a pilot for a commercial airline. *Id.* He was first hired by Continental Airlines in 2005, which was acquired by United Airlines' predecessor in 2010, and he remains employed at United as a First Officer today. *Id.*

During his employment, White has taken periods of short-term military leave, usually for a day or two at a time. *Id.* He has also taken long-term military leave, but that is not at issue in this lawsuit. *Id.*

When White has taken short-term military leave, he has received no pay from United, not even to cover the difference between his military salary and his civilian salary. *Id.* at 13. Nor has United (or United Continental Holdings, which co-sponsors the profit-sharing plan) credited his military leave for purposes of determining his awards under the company's profit-sharing plan. *Id.* Other pilots, however, receive more favorable treatment when they take similar forms of short-term non-military leave, like jury duty. *Id.* In those scenarios, United provides paid leave and profit-sharing credits. *Id.*

C. Procedural background

To remedy this disparate treatment, White brought this lawsuit against United Airlines and United Continental Holdings in January 2019. He alleges that, by treating short-term military leave less favorably than other comparable leaves, United is violating section 4316(b)(1). One claim alleges that United has failed to provide paid leave for short-term military leave despite providing paid leave for other comparable leaves. Another claim alleges that United has failed to provide profit-sharing credit despite providing profit-sharing for other comparable leaves. He sued on behalf of himself and two putative classes of other reservists, one for each claim.[3]

The district court dismissed the complaint in a four-page decision. It correctly understood that White "is not arguing for a per se requirement that all businesses pay for employees' short-term military leave," only for equal treatment. App. 96. Yet it believed that his argument is "contrary to the express language of the statute." App. 97. The court did not explain why it thought that was so. It provided no analysis of the "express language" of the key statutory definition ("rights and benefits"). Nor did it mention *Waltermyer* besides referring to it and other cases as "non-binding." App. 96.

Having "agree[d] with [United's] textual analysis," the district court sought to shore up its opinion with an alternative basis for dismissal that United had not urged.

[3] A third claim, brought under section 4318, is no longer being pressed.

Id. The court held—as a matter of law—that jury duty and short-term military leave are not "comparable," even though "both may be sporadic and uncontrollable in timing," because military duties are "voluntarily joined." *Id.* Here, too, the court did not attempt to square its holding with *Waltermyer* or the cases holding otherwise.

SUMMARY OF ARGUMENT

I. USERRA's text, history, and case law show that the phrase "rights and benefits," as used in section 4316(b)(1), encompasses paid leave and profit-sharing.

A.1. Section 4303(2) defines the phrase to mean "the terms, conditions, or privileges of employment, including any advantage, profit, privilege, [or] gain"—without exception. Paid leave and profit-sharing meet this definition. They're among the terms, conditions, and privileges of employment under the plain meaning of that language, and receiving money is commonly understood to be a profit or gain.

There is no textual reason for concluding otherwise. Section 4303(2) refers to rights and benefits that "accrue[]" from an employment practice or policy. *Id.* But that word does not modify the basic definition of "terms, conditions, or privileges of employment," and means only that the right or benefit must *arise from* an employment practice or policy. The definition also emphasizes that it "includ[es] wages or salary for work performed." *Id.* But that language does not carry with an implicit exception for wages for work *not* performed. The word "includes" is illustrative, not exhaustive. And the definition gives examples of "benefits" that involve wages for work not

performed, like "vacations." *Id.* These examples confirm what the rest of the statute and common sense make plain: being paid by one's employer is a benefit of the job.

2. So does the history. Until 2010, the definition had one exception. It covered all rights and benefits "*other than* wages or salary for work performed." That exception did not extend to wages for work not performed. If it had, the words "for work performed" would have been superfluous. And Congress has since eliminated that one exception anyway, replacing "other than" with "including."

The legislative history is likewise clear on this point. It shows that Congress wanted "rights and benefits" to be "broadly defined to include all attributes of the employment relationship," and "intend[ed] to affirm the decision in *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid." H.R. Rep. 103–65(I), at 21, 33–34. By codifying *Walterymer*, Congress recognized that paid leave is a right or benefit as to which the "most favorable treatment" rule applies.

3. The case law also supports reading the definition to include paid leave and profit-sharing for purposes of section 4316(b)(1), as *Waltermyer* illustrates. *Waltermyer* adopted "equality as the test"—"not preferential treatment"—for employees on military leave versus employees on comparable non-military leaves, and specifically

recognized that paid leave was one of the benefits as to which equal treatment was required. 804 F.3d at 824–25. Numerous courts since then have held the same.

B. In disagreeing with the consensus, the district court did not grapple with any of this text, history, or precedent. It said nothing about the statute's language, ignored the statutory and legislative history, and dismissed *Waltermyer* and the cases following it as "non-binding or slightly off-target authority." App. 96.

Rather than look to text, history, or precedent, the district court was taken by United's policy argument. Because "it is well established that Congress did not intend to create a universal requirement for private businesses to pay for reservists' absences," the court reasoned that Congress could not have "intended to create a statutory regime in which any company which offers paid leave for jury duty was also required to pay for service members' [comparable] leaves of absence." *Id.*

This is flawed reasoning. The plaintiff is not arguing for a universal paid-leave requirement or for any other preferential treatment. He is arguing, rather, for *equal* treatment—to receive all the rights and benefits of any comparable non-military leave. That may mean that some employers, like United, will need to change their practices to bring them in line with this equal-treatment rule. But that is what Congress intended, because it is the law that Congress wrote. Any policy concerns, moreover, are overstated and do not authorize judicial revision of the statutory text.

II. The district court also provided an alternative rationale that not even United had pressed. Relying solely on the fact that military service is "voluntarily joined," the court held that is not "comparable" to jury duty as a matter of law. App. 97. That was error. Courts, including *Waltermyer*, have universally rejected this reasoning as a basis for dismissal. At a minimum, it is a question for the factfinder.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's grant of a Federal Rules of Civil Procedure 12(b)(6) motion to dismiss," *Mueller v. City of Joliet*, 943 F.3d 834, 836 (7th Cir. 2019), accepting all "well-pleaded facts in the complaint as true and draw[ing] all reasonable inferences in the plaintiff's favor," *Burger v. County of Macon*, 942 F.3d 372, 374 (7th Cir. 2019). Further, because the primary question in this appeal "concerns statutory interpretation"—the meaning of "rights and benefits" under USERRA—it is a question of law that is likewise reviewed de novo. *See Mueller*, 943 F.3d at 836 (reversing district court's dismissal of USERRA claim on de novo review).

ARGUMENT

Section 4316(b)(1) of USERRA entitles military reservists "who are absent from employment while fulfilling their service obligations" to all the "'rights and benefits not determined by seniority as are generally provided by the employer' to similarly situated employees who take a leave of absence comparable to the military leave." *Crews*, 567 F.3d at 864–65 (quoting 38 U.S.C. § 4316(b)(1)); *see* 20 C.F.R. § 1002.150(b).

At issue in this appeal is whether paid leave (or a profit-sharing plan) qualifies as such as "right" or "benefit." The district court sided with United on that question, but it didn't stop there. It then reached out and went a step further, holding that White has not adequately alleged that the other forms of leave for which United compensates its employees are "comparable" to short-term military leave, for which it does not.

The district court was wrong in both respects. Because paid leave is a "right" or "benefit" and White has properly alleged that United provides that right or benefit for comparable non-military leaves, the court erred in dismissing his complaint.

I. When an employer provides paid leave and profit-sharing, those are "rights and benefits" of employment under USERRA.

A. USERRA's text, history, and case law make clear that paid leave and profit-sharing qualify as "rights" or "benefits" of employment for purposes of section 4316(b)(1).

The first question is whether paid leave or profit-sharing qualifies as a "right" or "benefit" of employment under section 4316(b)(1). In answering this question, any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998) ("USERRA is to be liberally construed in favor of those who served their country."); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). This means that it is not enough for United to have merely a plausible interpretation of the statute. Instead,

United must show that it has the *only* plausible interpretation—in other words, that the statute unambiguously excludes paid leave and profit-sharing from the definition of "rights and benefits." United can do no such thing. All the tools of statutory construction point in the other direction: When an employer offers paid leave and profit-sharing, those are "rights and benefits" covered by section 4316(b)(1).

1. By its plain text, the statutory definition for "rights and benefits" includes paid leave and profit-sharing.

"As in any case of statutory construction, [the] analysis begins with the language of the statute," *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 943 (7th Cir. 2015), and with the "assumption that the ordinary meaning of that language accurately expresses the legislative purpose,'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). When the text "is unambiguous and the statutory scheme is coherent and consistent—as is the case here—the inquiry ceases." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (cleaned up). The Court "must enforce plain and unambiguous statutory language," in USERRA "as in any other statute, according to its terms." *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020).

The key statutory language on this issue—"[t]he definition of 'rights and benefits' in 38 U.S.C. § 4303(2)"—is "extremely broad." *Scanlan v. Am. Airlines Grp., Inc.*, 384 F. Supp. 3d 520, 526 (E.D. Pa. 2019); *see also Pucilowski v. Dep't of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007) ("The term 'benefit of employment' is given an 'expansive interpretation.'"). It is defined to mean "the terms, conditions, or

privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." 38 U.S.C. § 4303(2).

By its plain text, this definition sweeps wide. It "is intentionally framed in general terms to encompass the potentially limitless variations in benefits of employment that are conferred by an untold number and variety of business concerns." *Carder v. Continental Airlines, Inc.*, 636 F.3d 172, 182 (5th Cir. 2011). Hence, it captures all "terms, conditions, or privileges of employment," with no express limitations. 38 U.S.C. § 4303(2). Rather than include any language limiting this core meaning, Congress did the opposite: It filled the rest of the definition with "expansive or illustrative" words—like "including" and "any," followed by still more general terms—to underscore its breadth. *Id.*; *see Bloate v. United States*, 559 U.S. 196, 207 (2010) (noting that "including" is "an expansive or illustrative term"); *Bernal v. NRA Grp., LLC*, 930 F.3d 891, 894 (7th Cir. 2019) ("[T]he word 'including' generally 'introduces examples, not an exhaustive list.'" (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012)); *Smith v. Berryhill*, 139 S. Ct. 1765, 1774 (2019)

("Congress' use of the word 'any' suggests an intent to use that term expansively." (cleaned up)).[4]

The basic definition of "rights and benefits" is plainly satisfied here. When an employer offers paid leave—that is, when it pays employees who are not working—that is unquestionably a "term, condition, or privilege of employment" under the ordinary meaning of those words. *See e.g.*, *American Heritage Dictionary (*5th ed. 2020) ("Term" is "[o]ne of the elements of a proposed or concluded agreement; a condition."); *id.* ("Privilege" is "[a] special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste."); *see also Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) ("[U]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." (quotation marks omitted)). As one circuit has succinctly put it in a case also involving section 4316(b)(1): "Payment of an employee's salary while the employee is absent from work is a benefit provided during the absence." *Tully v. Dep't of Justice*, 481 F.3d 1367, 1370 (Fed. Cir.

[4] *See also Sauk Prairie Conservation Alliance v. U.S. Dep't of the Interior*, 944 F.3d 664, 671 (7th Cir. 2019) ("We generally read the word 'including' to 'introduce examples, not an exhaustive list.'" (cleaned up)); *Dahlstrom*, 777 F.3d at 943 ("[T]he Supreme Court has explained that the term 'including'" is "typically 'illustrative and not limitative.'" (quoting *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 577 (1994)); *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) ("To 'include' is to 'contain' or 'comprise as part of a whole.'"); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'").

2007). And the same goes for a profit-sharing plan, which employees receive as a privilege of their employment. The textual inquiry could thus end there.

The language that follows the basic definition only confirms that paid leave and profit-sharing count as "rights" or "benefits." It says that the definition "includ[es] any advantage, profit, privilege, gain, status, account, or interest" of employment. 38 U.S.C. § 4303(2). Receiving money from one's employer—either for performing work or while taking leave—is quite obviously an "advantage," "profit," "privilege," or "gain" of employment on any understanding of what those terms mean. *See, e.g.*, *American Heritage Dictionary* ("Advantage" is a "[b]enefit or profit; gain."); *id.* ("Profit" is "[a]n advantageous gain or return; benefit."); *id.* ("Gain" is "[s]omething gained or acquired"—*i.e.*, "a profit or advantage; benefit"—and "[a]n increase in amount or degree."). So too is participation in a profit-sharing plan.

Nothing in the rest of the statutory definition of "rights and benefits" alters these conclusions. The definition emphasizes, for example, that it includes any profit, privilege, or gain that "accrues" from an employment practice or policy. But the word "accrue"—which does not modify the basic definition of "terms, conditions, or privileges of employment"—means simply "[t]o come into existence as an enforceable claim or right; to arise." *Black's Law Dictionary* 23 (9th ed. 2009); *see Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013); *Weaver v. Ret. Plan for Employees of Hanson Bldg. Materials Am., Inc.*, 323 F. App'x 564, 566 (9th Cir. 2009). Thus, when the definition

uses the phrase "accrues by reason of an employment contract or agreement or an employer policy, plan, or practice," 38 U.S.C. § 4303(2), it is referring to any profit, privilege, or gain that *arises from* an employment contract, policy, or practice, "includ[ing] those in effect at the beginning of the employee's employment and those established after employment began." 20 C.F.R. § 1002.150(a). Or phrased more briefly: the "terms, conditions, or privileges of employment."[5]

Which is why, when the definition goes on to list eleven such examples, the examples listed cover all manner of rights and benefits—from "benefits under a pension plan" or "a health plan" to "severance pay, supplemental unemployment benefits, [paid] vacations, and the opportunity to select work hours or location of employment." *Id.* Paid leave accrues from an employment practice or policy just as much as any of these examples do. *See Scanlan*, 384 F. 3d at 527 ("The right to be paid for work not performed while on military leave comes into existence and thus accrues as an enforceable claim in the exact same way as the right to holiday pay, severance

[5] In keeping with this definition, courts and Congress have routinely used the word "accrued" in the context of wages. *See, e.g.*, 41 U.S.C. § 353(c)(1) (referring to "accrued wages and fringe benefits"); 10 U.S.C. § 707a(b)(1)–(2) (referring to "accrued pay and allowances" and "the amount of pay and allowances that is deemed to have accrued"); 26 U.S.C. § 6331(a) (referring to the "accrued salary or wages of any officer [or] employee"); *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 247 (1977) (noting that the employer paid "accrued wages and accrued vacation pay" under a union contract); *Su v. M/V S. Aster*, 978 F.2d 462, 468, 472 (9th Cir. 1992) (noting that, under federal law, an employer owes workers "their accrued wages" that were "'earned and unpaid'" (quoting 46 U.S.C. § 10313(e))).

pay, or vacation pay, all for time periods when no work is performed."). The same is true for a profit-sharing payment, which is a "bonus[]" dependent on the profitability of the company. *See* 38 U.S.C. § 4303(2).

The statute also contains a parenthetical highlighting that the definition "includ[es] wages or salary for work performed." *Id.* Seizing on this parenthetical, United asserted below that the "plain language" of this parenthetical demonstrates an intent to exclude wages for work *not* performed—that the word "including" somehow "limits the inclusion of wages among the 'rights and benefits'" to "wages 'for work performed.'" ECF No. 32, at 7.

The statutory text does nothing of the sort. When examining a parenthetical that begins like this one—*i.e.*, "(including….)"—this Court and the Supreme Court have recognized that "the use of the word 'including' render[s] the parenthetical illustrative" rather than "definitional." *United States v. Coscia*, 866 F.3d 782, 792 (7th Cir. 2017); *see Chickasaw Nation*, 534 U.S. at 89 ("The use of parentheses emphasizes the fact that that which is within is meant simply to be illustrative, hence redundant—a circumstance underscored by the lack of any suggestion that Congress intended the illustrative list to be complete."). Moreover, "[t]his court has also noted the disfavored status of the *expressio unius* doctrine." *Dahlstrom*, 777 F.3d at 943; *see, e.g.*, *Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL–CIO*, 676 F.3d 566, 571 (7th Cir. 2012) (referring to "the much-derided maxim of *expressio unius est exclusio*

alterius"). So the language in this parenthetical in no way limits the basic definition of "right and benefits." To the contrary, it confirms the key point: that wages qualify. And the other examples—"bonuses, severance pay, supplemental unemployment benefits, [and] vacations," 38 U.S.C. § 4303(2)—leave no doubt that this is true even if the wages are received for not working. They are rights and benefits just the same. *See Scanlan*, 384 F. Supp. 3d at 526 ("[If] severance pay and [paid] vacations . . . are merely illustrations of the definition of rights and benefits and involve pay for work not performed, we are hard pressed to understand why compensation for time on military leave for work not performed would not also fit within the definition.").

2. USERRA's history confirms that paid leave and profit-sharing are "rights and benefits."

Because the text provides a clear answer, there is no need to go further. But if more confirmation were needed, the statute's amendment history provides it. The reason that section 4303(2) goes out of its way to note that "wages or salary for work performed" is included within the definition of rights and benefits is because this category used to be expressly excluded. Indeed, although the current version contains no exception to or limitation on the types of terms, conditions, or privileges that constitute "rights and benefits," that was not always so. Originally there was one exception—a parenthetical that read "*other than* wages or salary for work performed." 38 U.S.C. § 4303(2) (1996). But Congress eliminated that exception in 2010, removing "the words 'other than' from section 4303(2) and replac[ing] them with the word

'including.'" *Gross*, 636 F.3d at 889 n.3. Congress did so to overrule an Eighth Circuit decision holding that section 4311 did not bar wage discrimination. 156 Cong. Rec. S7656-02 (Sept. 28, 2010); *see Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002).

Given this backdrop, there is no basis for claiming that section 4303(2) should now be read to implicitly exclude wages for work not performed. As just noted, the pre-2010 definition excluded wages for work performed. The best reading of that pre-2010 statute is that it excluded *only* such wages—and not also wages for work not performed (like paid leave). Why? Because "[t]he force of any negative implication . . . depends on context," *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017) (quotation marks omitted), and the context in this case could not be clearer.

"When Congress provides exceptions in a statute"—as it once did (but no longer does) in section 4303(2)—the "proper inference" is "that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2010). Here, that inference is especially strong. If Congress had wanted to exclude wages or salary for worked performed *and* wages or salary for work not performed, it would written the parenthetical to say simply, "other than wages or salary." It did not do so. Instead, Congress added the words "for work performed." Those words had to mean something. To read the pre-2010 statute as containing an accompanying, implicit exception for wages or salary for work *not* performed would render the words "for work performed" superfluous. That

reading thus "runs aground on the so-called surplusage canon," *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017)—"one of the most basic interpretive canons," *Corley v. United States*, 556 U.S. 303, 314 (2009). As a result, Congress's pre-2010 use of the phrase "other than" signaled a clear intent to exclude only those wages or salary for work performed, and not also wages or salary for work not performed.

The 2010 amendment did not somehow flip these two categories, trading one exception for another. What it did instead—all that it did instead—is *expand* the definition by eliminating the exception altogether. Eliminating that (explicit) exception did not, through some bizarre act of alchemy, give rise to a new (implicit) exception for a benefit that had previously been covered. Nor was that its purpose. The amendment was designed to ensure that section 4311, which bars discrimination for employees who are working, would also cover wage discrimination—so that a reservist would not be paid less than a non-reservist for the work they perform based on the reservist's military status. 156 Cong. Rec. S7656-02 (Sept. 28, 2010). It was not meant to shrink the scope of section 4316(b), which is aimed at achieving equality for reservists and employees who are *not* working. Paid leave was therefore a "right" or "benefit" before 2010, and it remains a right or benefit today.

Nor is the 2010 amendment the only history that sheds light on the question. USERRA's legislative history provides additional evidence that, even before 2010, Congress intended to include paid leave within the definition of "rights and benefits."

For one thing, the history shows that Congress wanted that term to be "broadly defined to include all attributes of the employment relationship." H.R. Rep. 103–65(I), at 21; *see also id.* (stating that section 4303(2)'s list of rights and benefits "is illustrative and not intended to be all inclusive"). Paid leave is undeniably such an attribute. For another, the history shows that Congress, when it enacted USERRA in 1994, "intend[ed] to affirm the decision in *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid." *Id.* at 33–34.[6]

This sentence is important for two reasons. One, it makes clear that Congress sought to codify *Waltermyer*, which held that reservists on short-term military leave are entitled to holiday pay if employees on comparable non-military leaves receive holiday pay. Because *Waltermyer* "awarded holiday pay, that is wages for work not performed," *Scanlan*, 384 F. Supp. 3d at 526, its holding recognizes that "rights and benefits" include wages for time not working. Two, the sentence from the House Report reiterates this point by stating that military leave must be given "the most

[6] The Department of Labor's implementing regulations incorporate the same rule. *See* 20 C.F.R. § 1002.150(b) ("If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services.").

favorable treatment accorded any particular leave" that is comparable to the military leave, "regardless of whether the non-military leave is paid or unpaid." H.R. Rep. 103–65(I), at 34. Thus, if the non-military leave is paid and the military leave must be given the same treatment, the military leave must also be paid.

3. The case law recognizes that paid leave and profit-sharing are "rights and benefits."

The case law supports the same conclusion. The Third Circuit's decision in *Waltermyer*, just discussed, provides the starting point. There, the specific question before the court was whether an employee who took military leave on a holiday was entitled to be paid for that day because employees who took jury leave on that day were paid. 804 F.2d at 824–26. The court held that he was. In doing so, it recognized "equality as the test"—"not preferential treatment"—for employees on military leave versus employees on comparable non-military leaves. *Id.* at 824–25. "Viewed in this light," the Third Circuit explained, "relieving those on military leave from the work requirement" for entitlement to holiday pay, as the employer did for employees on comparable non-military leaves like jury duty, "merely establishes equality for National Guardsmen and reservists, not preferential treatment." *Id.* at 825.

Because the plaintiff "was not suing for compensation for other days not worked" besides holidays, the Third Circuit "limited its holding to the question of what it described as 'holiday pay.'" *Scanlan*, 384 F. Supp. 3d at 525; *see Waltermyer*, 804 F.2d at 825. But the logic of its reasoning is not so limited. As the dissenting judge in

Waltermyer rightly noted: "If a reservist and [a] juror are equal, then the reservist is not entitled to just holiday pay but to full pay for all days not worked, since employees absent for jury duty receive full pay." 804 F.2d at 827 (Hunter, J., dissenting).

Since Congress's codification of *Waltermyer*, a number of courts have agreed. As noted earlier, one circuit has taken the view that "[p]ayment of an employee's salary while the employee is absent from work is a benefit provided during the absence." *Tully*, 481 F.3d at 1370; *see also Pucilowski*, 498 F.3d at 1344 ("[W]e restate that [paid] military leave afforded by 5 U.S.C. § 6323(a) is a benefit of employment [under USERRA].").[7] And at least four other courts, when confronted with the same question at issue in this appeal, have followed the logic of *Waltermyer* and the text of the statute and held that "the failure to pay reservists on military leave the differential

[7] This Court has held that providing military employees with differential pay while on duty—that is, the difference between a military salary and the civilian salary the employee would have received had they been working—is not required by section 4311. *Gross*, 636 F.3d at 890. In doing so, however, the Court did not deny that paid leave is a "benefit"; it just concluded that differential pay is not a benefit required by section 4311. Because that section, unlike section 4316(b), seeks to bar discrimination against veterans *when working*, the Court "rejected [the argument] that § 4311 requires employers to provide its military employees benefits, *like differential pay*, that exceed those benefits offered to its other employees generally," and instead held that "a benefit of employment under § 4311 must be equally available to military and non-military employees" to come within its scope. *Id.* at 889–90 (emphasis added); *see id.* at 890 ("[W]e [have] acknowledged that nothing in the text of § 4311 or § 4303(2) (defining 'benefit of employment') limited 'benefit of employment' to those benefits extended to both military and non-military employees alike. Nonetheless, we ultimately concluded that such an interpretation made sense in light of § 4311's anti-discrimination purpose, which serves to protect military employees from discrimination, not provide them with preferential treatment." (citation omitted)).

between their regular civilian pay and their military pay states a viable claim under § 4316(b) (1) of USERRA when other employees are either paid the differential while on jury duty or their full regular pay while absent from work on sick leave or union leave." *See Scanlan*, 384 F. Supp. 3d at 524–28 ("We see no material difference between the allegations here and those in *Waltermyer*.").[8]

This Court should do so as well. It should hold that paid leave is a "right" or "benefit" that an employer must provide to reservists who take short-term military leave on equal terms with employees who take comparable forms of non-military leave. Or, at the very least, it should hold that a reasonable jury could so find. *See Clarkson*, 2019 WL 2503957, at *7 (denying motion to dismiss because it was "unable to decide this issue on the pleadings alone"); *cf. Dorris v. TXD Servs., LP*, 753 F.3d 740,

[8]*See also Huntsman v. Sw. Airlines*, No. 19-cv-83, ECF No. 59 (N.D. Cal. Nov. 27, 2019) (order denying defendant's motion for judgment on the pleadings for reasons stated at hearing); 11/27/19 Tr. in *Hunstman*, at 24–25 (hearing during which the court explained its reasons for denying the motion, telling defense counsel: "[Y]our argument is based upon the notion that if the policy that the employer has gives paid leaves of absence, . . . that does not amount to a benefit, even if it does afford paid leaves of absence. . . . I can't accept that on the basis of my interpretation of 4303(2). It is a benefit, in my view."); *Clarkson v. Alaska Airlines*, Inc., No. 19-cv-5, 2019 WL 2503957, at *7 (E.D. Wash. June 17, 2019) (denying motion to dismiss to allow for factual development); *Brill v. AK Steel Corp.*, No. 09-cv-534, 2012 WL 893902, at *6 (S.D. Ohio Mar. 14, 2012) (denying defendant's motion for summary judgment on this issue, explaining: "Defendant would not be providing anything it does not already provide to employees on jury duty/witness leave by paying Plaintiff his full salary for time spent on military leave. Actually, by paying an employee in this manner, Defendant would be complying with the statutory mandate to give the employee the most favorable treatment accorded any comparable form of leave.").

745 (8th Cir. 2014) ("Applying this broad definition to the sparse record before us, a reasonable jury could find that the opportunity for seamless transfer of employment to a successor employer was an 'advantage' or 'benefit' of TXD employment.").

The same result obtains for the profit-sharing claim. Because profit-sharing is based on wages earned, had White received his wages while on short-term military leave, he would have received additional profit-sharing credit. But profit-sharing is also a "benefit" in its own right, in the same way that "bonuses" are, 38 U.S.C. § 4303(2), and so it must be provided equally for comparable types of military and non-military leave. *See Scanlan*, 384 F. Supp. 2d at 528 (holding that the plaintiff made out a plausible claim that his employer "violated § 4316(b)(1) of USERRA by not crediting participants who took short-term military leave with imputed earnings for those periods when calculating their profit sharing awards, while crediting participants with their full earnings while on jury duty, sick leave, and union leave").

B. The district court gave no persuasive reason for reading the definition of "rights and benefits" to exclude paid leave and profit-sharing.

In breaking from this consensus, the district court offered little in the way of reasoned analysis. The court concluded that it would be "contrary to the express language of the statute to hold that a business is required to pay a reservist wages for time not worked"—even if it does so for employees on comparable forms of leave. App. 97. But the court gave no explanation for that conclusion: It did not make any

effort to examine the statutory text. Nor did it grapple with any of the cases discussed above, dismissing them as "non-binding or slightly off-target authority." App. 96. The court did not even cite to *Waltermyer*, let alone attempt to distinguish it.

Instead, the district court explained its reasoning in two sentences—neither of which justifies the court's conclusion. *First*, the court stated that, "[i]f Congress had intended to create a statutory regime in which any company which offers paid leave for jury duty was also required to pay for service members' leaves of absence, it would have done so clearly." *Id.* That gets matters backwards. The Supreme Court has instructed lower courts that, in applying a veterans'-rights statute like USERRA, any "interpretative doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118. And Congress reaffirmed and codified that interpretive canon when it enacted USERRA. H.R. Rep. 103–65(I), at 19; S. Rep. No. 103–158, at 40. The district court didn't just ignore these commands—it did the opposite, putting the onus on the plaintiff to identity a clear statement from Congress to prevail.

Second, the district court relied on the fact that "it is well established that Congress did not intend to create a universal requirement for private businesses to pay for reservists' absences." App. 96. The court correctly recognized that White is not arguing otherwise. *See id.* ("Plaintiff is not arguing for a per se requirement that all businesses pay for employees' short-term military leave."). Yet the court saw fit to reject his interpretation of the statute anyway, on the belief that it would be "contrary

to any reasonable interpretation to hold that the language of the statute should be interpreted as what is essentially a de facto rule swallowing that previously clear pronouncement." *Id.*

In one sense, the district court was right. USERRA "does not expressly require paid military leave." *Miller v. City of Indianapolis*, 281 F.3d 648, 650 (7th Cir. 2002). The statute was not "designed to give reservists on leave all the incidents of employment accorded *working employees*, including regular and overtime pay," as opposed to non-working employees. *Waltermyer*, 804 F.2d at 823 (emphasis added). Nor does it require "employers to provide special benefits to employee-reservists not generally made available to other employees." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 561 (1981).

But the district court misunderstood what the statute does require. Section 4316(b)(1) "requir[es] employers, with respect to rights and benefits not determined by seniority, to treat employees taking military leave, equally, but not preferentially, in relation to peer employees taking comparable non-military leaves generally provided under the employer's contract, policy, practice or plan." *Rogers v. City of San Antonio*, 392 F.3d 758, 769 (5th Cir. 2004); *see Crews*, 567 F.3d at 865 ("[Section 4316 requires] 'equal, but not preferential' treatment for reservist employees." (quoting *Rogers*, 392 F.3d at 769)); *Sandoval v. City of Chicago*, 560 F.3d 703, 705 (7th Cir. 2009) ("[It] requir[es] employers to treat persons on leave for military service the same as persons who are on [a similar] leave for other reasons."). This means that, "[w]hile

compensation for time on military leave is not required when it would be preferential treatment, § 4316(b)(1) mandates payment when failure to pay such compensation constitutes unequal treatment for those on reserve duty." *Scanlan*, 384 F. Supp. 2d at 527; *see id.* ("[Section 4316] only requires employees on military leave to be provided with comparable rights and benefits to which those on non-military absences are entitled. If a right and benefit is not provided to an employee on a non-military related absence, the right or benefit is not due the employee on military leave.").[9]

To the extent that the district court was animated by a policy concern—that applying this equality principle could end up requiring paid leave for many reservists who do not currently receive it—that is the consequence of the statute that Congress enacted. When this Court interprets a statute, its role is "to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017). Rather than rewrite a statute based on its own sense of the proper "policy considerations," the Court "must assume that the language of [the statute] reflects Congress's choice." *Sulyma*, 140 S. Ct. at 778. "Congress sought by § 4316(b)(1)

[9] The court separately erred in dismissing the profit-sharing claim because the court's reasoning applies only to the paid-leave claim. The court offered no analysis that independently applies to the profit-sharing claim, and thus did not analyze whether profit-sharing is a "right" or "benefit." *See* App. 97. ("As to Plaintiff's second claim, the Court agrees with Defendants that because Plaintiff has not been denied a 'right and benefit' to which he was entitled, he cannot state a claim."). But, aside from being based on wages, profit-sharing credits are independently "rights" or "benefits" because they are akin to "bonuses," which are covered by section 4303(2).

to guarantee a measure of equality of treatment with respect to military and non-military leaves and to strike an appropriate balance between benefits to employee-service persons and costs to employers. USERRA does not authorize the courts to add to or detract from that guarantee or to restrike that balance." *Rogers*, 392 F.3d at 769–70. The balance that Congress struck, moreover, has a strong policy justification of its own. By failing to respect that balance, and refusing to ensure equal treatment of military leave and other comparable leaves, the district court's decision disserves USERRA's purposes. It allows employers to discriminate between impose the very kinds of financial hardships on reservists that Congress sought to reduce, and thus discourages employees from serving in the reserves, and thus Ensuring that employees are encouraged to serve in the reserves is particularly important given the current dependence of the military on members of the reserves. [10]

[10] Even setting this aside, any policy concerns with enforcing the statute as written are overblown. Under 1% of employees in the U.S. are reservists. *See* U.S. Dep't of Defense, *2016 Demographics: Profile of the Military Community* 59 (2016), https://perma.cc/TMG6-XLVP; Bureau of Labor Statistics, *Employment Situation Summary Table A. Household data, seasonally adjusted (2020)*, https://perma.cc/LT8S-9JRF. And many reservists are not entitled to paid short-term military leave because their employers do not pay employees who take comparable non-military leaves, while many other reservists already receive full pay or differential pay for military leave because many large corporations already provide these benefits. Lockheed Martin, for example, "offer[s] a wide variety of benefits," including "[p]aid time off for jury duty and military obligations." *Working Here at Lockheed Martin: Benefits & Amenities*, https://www.lockheedmartinjobs.com/working-here. At any rate, an employer's obligation is modest. Military duty for a reservist "consists generally of

II. The district court's alternative holding—that short-term military leave is not "comparable" to jury duty as a matter of law—is incorrect in multiple ways and provides no basis for dismissal.

After agreeing with United that paid leave and profit-sharing are not "rights" or "benefits," the district court proceeded to spend two sentences addressing an issue that United itself had not even contested (and that was not addressed by either party). Despite having no briefing on the question, the court opined that it "disagree[d] with the contention that jury duty is comparable in nature—in the way that Congress intended—to reservist duties. Although both may be sporadic and uncontrollable in timing, all citizens (including those in reserve military roles) are subject to jury duty simply by nature of living in America, whereas military duties—which no doubt are honorable and likewise essential to our society—are voluntarily joined (in present times)." App. 97. This alternative rationale constitutes reversible error in multiple ways and provides no basis for dismissing the complaint.

To begin with, it is not actually an alternative ground for dismissal because it does not address the other forms of non-military leave that the plaintiff has alleged are comparable to short-term military leave, including sick leave. App. 29–34. Even setting that aside, however, the district court's reasoning is mistaken. It squarely conflicts with the Third Circuit's decision in *Waltermyer*, which Congress codified in

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one 2-week period during the year and one weekend day per month," *Miller*, 281 F.3d at 649, and reservists often do not take leave to perform their weekend drills.

section 4316(b)(1), and which analyzed this very issue and held that "military leave shares the essential features of those exemptions designated for employees not in the reserve," including jury duty and sick leave. 804 F.2d at 825. The Third Circuit explained why it reached that conclusion in words that are equally applicable to this case: "[T]he common thread is the lack of choice by the employees. . . . [T]he guardsmen have no individual voice in selecting the weeks they will be on active duty. Military superiors set the time for training which is both compulsory and short." *Id.* The district court's reasoning cannot be reconciled with this decision.

Nor did the district court even analyze the right factors. According to the Department of Labor's implementing regulations, the "most significant factor" in "determin[ing] whether any two types of leave are comparable" is "the duration of the leave," while "other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered." 20 C.F.R. § 1002.150(b) The district court did not discuss duration or purpose at all, except to concede that jury duty and short-term military leave are comparable in that both are "sporadic." App. 97. As for voluntariness, the court asked the wrong question: The question is not whether an employee chose to serve in the military; it's whether "the employee [may] choose *when to take the leave*." 20 C.F.R. § 1002.150(b) (emphasis added). As to that question—the relevant question—the district court acknowledged that both jury duty and short-term military leave are "uncontrollable in timing."

App. 97; *see also Brill*, 2012 WL 893902, at *6 ("Although military leave is arguably voluntary in the sense that service is not compulsory, the timing of specific leaves for annual training or weekend drills is involuntary, as is timing for jury duty."); *Duffer v. United Continental Holdings, Inc.*, 173 F. Supp. 3d 689, 703–05 (N.D. Ill. 2016) (following "*Waltermyer* and *Brill*" in "concluding that military leave is comparable to jury duty and sick leave").

The district court also erred because it decided this question based on the pleadings alone (and with no briefing to boot). As many courts have recognized, "[t]here are genuinely disputable issues as to the material facts of whether involuntary non-military leaves, not generally for extended durations, for jury duty [and] bereavement . . . are comparable to each plaintiff's military leaves." *Rogers*, 392 F.3d at 771–72. In *Rogers*, for instance, the military leaves were of the same sort as those alleged here—"weekend and two-week military duty sessions." *Id.* at 772. Likewise for the cases in which district courts have confronted the same question and (with the exception of the court below) uniformly reached the same conclusion. *See, e.g.*, *Clarkson*, 2019 WL 2503957, at *7 (denying motion to dismiss and holding that the comparability question "would be more appropriately considered on a motion for summary judgment so the Court can consider relevant evidence outside the

pleadings"); 11/27/19 Tr. in *Huntsman*, at 25 ("[T]here is a factual issue, of course, as to whether or not the leaves are comparable, and that's for the trier of fact.").[11]

Consistent with these cases, and with the basic rule that factual determinations are not "generally appropriately made on a motion to dismiss," *Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996), the district court should not have resolved this question at the pleading stage. The complaint properly alleges that "jury duty leave and sick leave are comparable to short term military leave in terms of the duration, purpose, and/or the ability of the employee to determine whether to take the leave." App. 30. The complaint supports this allegation by pointing to the fact that employees who take military leave, jury duty, or sick leave are "commonly [on leave for] several days, and usually not more than a couple weeks"; that short-term military leave, like jury duty and sick leave, is "ordinarily involuntary"; and that jury duty and short-term military leave serve a similar purpose: "to perform service for our government and engage in public service for the benefit of our society." App. 27–

[11] If this case involved *long-term* military leave, the answer might be different. *See Tully*, 481 F.3d at 1370–71 (emphasizing the "significant difference" between "the typically brief duration of an absence for court duty and Mr. Tully's two and a half year absence for active service in the Army," and noting that "Mr. Tully has not shown that if he had taken a leave of absence from the agency for two and a half years for reasons other than military service the BOP would have paid his salary for that entire period"); 20 C.F.R. § 1002.150(b) ("[A] two-day funeral leave will not be 'comparable' to an extended leave for service in the uniformed service.").

28. These allegations are more than sufficient to withstand a motion to dismiss. *See* 20 C.F.R. § 1002.150(b) (setting forth the factors to determine comparability).

United itself recognized as much by not contesting this issue in its motion to dismiss, and the district court should have taken the point. At a minimum, the issue requires factual development and should not be decided at the pleading stage.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,702 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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