No. 25-935

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

STATE OF NEVADA, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument. This appeal raises an issue of first impression regarding the proper application of the Uniformed Services Employment and Reemployment Rights Act's provision protecting reemployed servicemembers' pension benefits. Oral argument would likely assist the Court in understanding the record and resolving the issue presented.

STATEMENT OF JURISDICTION

This appeal is from a final judgment in a civil case. The district court had jurisdiction under 28 U.S.C. 1331 and 38 U.S.C. 4323(b). That court entered final judgment on December 16, 2024. ER-4.[1] The United States filed a timely Notice of Appeal. ER-179-181. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States sued Nevada, Nevada's Office of the Attorney General (the AG's Office), and the Nevada Public Employees' Retirement System (NVPERS) (collectively, Nevada) alleging that they violated the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4318(b)(2). Specifically, the United States alleged that Nevada violated USERRA by refusing to allow servicemember employees to purchase future pension credits at the rate the employees could have paid but for their military service. Nevada filed two Motions to Dismiss in the district court, arguing that

[1] "ER-__" refers to pages in the Excerpts of Record filed with this brief.

USERRA's protections do not apply to the credits. ER-124-158.[2] The court ruled in favor of Nevada, concluding that while USERRA protects a returning servicemember's "right" to purchase such credits, it does not protect anything regarding the substance—for example, the price—of the credits themselves. ER-5-21. Accordingly, the court held USERRA does not require that servicemembers be able to purchase those credits at the price they would have been permitted to pay had they not been deployed. *Ibid.* Alternatively, the court found that even if USERRA did protect the price of the credits, Nevada complied with USERRA.

The United States raises the following issues on appeal:

1. Whether USERRA's mandate that reemployed servicemembers not be charged more for accrued pension benefits than they would have but for their military service entitled such servicemembers to purchase future pension credits at the price they cost when the credits accrued while the servicemembers were deployed.

2. Whether the United States sufficiently pled a USERRA violation when it alleged that Nevada charged returning

[2] NVPERS filed one motion (*see* ER-124-136), and Nevada and the AG's Office filed another (*see* ER-137-158).

servicemembers more for pension credits than Nevada would have charged but for the servicemembers' military service.

STATEMENT OF PERTINENT AUTHORITIES

Pertinent statutes, regulations, and rules are included in an addendum to this Brief.

STATEMENT OF THE CASE

A. Statutory Background

Over the past 80 years, Congress has relied on its army and navy powers to enact a series of statutes reflecting a "national policy to encourage service in the United States Armed Forces" by giving servicemembers "the right to return to civilian employment without adverse effect on their career progress." H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998). USERRA, which Congress enacted in 1994, is a continuation of this policy. *See ibid.* Like its predecessor statutes, Congress enacted USERRA "to encourage service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). "In short, USERRA recognizes that those who serve in the

military should be supported, rather than penalized, for their service." *Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023).

USERRA provides that support by giving servicemembers various employment rights and protecting various employment benefits. *See, e.g.*, 38 U.S.C. 4312 (right to reemployment), 4316 (right to seniority benefits for reemployed servicemembers), 4317 (right to health insurance for employees and their dependents while serving in the military), 4318 (protection of pension rights and benefits).

Relevant here, USERRA mandates that as to pension benefits, reemployed servicemembers "shall be treated as not having incurred a break in service with the [civilian] employer." 38 U.S.C. 4318(a)(2)(A); *see also* 38 U.S.C. 4318(a)(2)(B) (specifying that "[e]ach period served by a person in the uniformed services shall . . . be deemed to constitute service with the [civilian] employer . . . for the purpose of determining the accrual of benefits under the [pension] plan"). With respect to benefits that require an employee's contribution or payment, reemployed servicemembers are "entitled to accrued benefits" as long as the servicemember pays those contributions at an amount that "may [not] exceed the amount the person would have been permitted or

required to contribute had the person remained continuously employed by the [civilian] employer throughout the period of [military] service." 38 U.S.C. 4318(b)(2). Returning servicemembers must make these contributions within a set timeframe, starting from the point of reemployment to three times the servicemember's period of uniformed service, not to exceed five years. *Ibid.* And finally, USERRA instructs that where that contribution is based upon the servicemember's compensation, "the employee's compensation . . . shall be computed . . . at the rate the employee would have received but for [their military] service." 38 U.S.C. 4318(b)(3).

USERRA provides these benefits to returning servicemembers even where the provision of said benefits conflict with a state law, policy, or practice. *See* 38 U.S.C. 4302. The statute specifically states that it "supersedes any State law, . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by" USERRA, including any "additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. 4302(b).

This statutory framework was enacted to ensure that, for the purpose of determining certain employment benefits, returning servicemembers are treated as if they had not left civilian employ. *See* H.R. Rep. No. 65, Pt. 1, 103d Cong., 1st Sess. 51-53, 83 (1993) (1993 House Report). The Department of Labor's implementing regulations confirm as much, stating that with respect to "contributory defined benefit plan[s]," the returning servicemember is entitled to "the same benefit as if he or she had remained continuously employed during the period of service," as long as the servicemember makes the relevant contributions. 20 C.F.R. 1002.265(b); *see also* 20 C.F.R. 1002.259 ("On reemployment, the employee is treated as not having a break in service . . . for purposes of . . . accrual of benefits."). The regulations further specify that with some types of plans—because of external events that may have occurred during a servicemember's military service like plan forfeitures, earnings, or losses—"the benefit may not be the same as if the employee had remained continuously employed." 20 C.F.R. 1002.265(c) (describing benefits in a "defined contribution plan"). But for plans where the amount of the benefit is determined by employee contributions, if the employee makes up the contribution, they are

entitled to the "same benefit" they would have obtained but for their military service. *See* 20 C.F.R. 1002.265(b) (describing benefits in a "contributory defined benefit plan").

B. Factual Background

1. Nevada gives public employees the right to purchase future pension credits.

Nevada state law provides that public employees may purchase up to five-years' worth of pension service credits (called "air time credits") after they have worked in a qualifying position for five years. Nev. Rev. Stat. § 286.300 (2025). The cost for such credits is set by state law, which determines the price actuarily, depending on the employee's age and rate of compensation at the time the employee purchases the credits. *Id.* § 286.300(2).

2. Nevada's Office of the Attorney General charges returning servicemembers more for future pension credits than it would but for the servicemembers' military service.

The United States alleged in its Complaint that Nevada violated USERRA by charging multiple returning servicemembers more for future pension credits than Nevada would have charged but for the servicemembers' military deployments. *See generally* ER-159-178.

For example, Nevada National Guard officer Charles Lehman began working as an attorney in the AG's Office in August 2013. ER-161. In May 2017, the National Guard called Lehman to active-duty service. ER-162. One year into Lehman's deployment, in August 2018, Lehman would have reached five years of employment with the AG's Office if he had remained in his civilian job. *Ibid.* This tenure would have entitled him to purchase up to five years of air time credits. *Ibid.* Because he was away from work serving in the military, he was unable to purchase the credits at that time. *Ibid.* If he had not been deployed, Lehman would have purchased five years of air time credits when he became eligible to do so in August 2018. *See* ER-162 ¶ 18.

Lehman requested and accepted reemployment with the AG's Office in October 2020. ER-162. Immediately upon his return to work, Lehman requested time-in-service credit for his time away while on active duty. *Ibid.* The AG's Office failed to immediately process this request, and it was not until April 2021 that it credited Lehman with the time he served while deployed. ER-163. With this credit, Lehman's file reflected he had worked at the AG's Office for over seven years. *See* ER-161-163. Less than a week after the AG's Office corrected Lehman's

file to credit him for his military service, he sought to purchase air time credits. ER-164.

After crediting Lehman's military service, Nevada determined that Lehman was eligible to purchase air time credits because he would have reached five years of employment in August 2018 if not for his military deployment. ER-164. Nevada did so based upon its acknowledgement that USERRA requires servicemembers to "be treated as not having incurred a break in service with the employer . . . by reason of" the servicemember's military service. 38 U.S.C. 4318(a)(2)(A). However, Nevada required Lehman to pay the existing price for the credits at the time that he actually purchased them, in April 2021, rather than the price available in August 2018, when he would have purchased the credits but for his military service. ER-164. The difference between the price Nevada charged Lehman based on his actuarial factors in April 2021 and the lower price they would have charged him in 2018 but for his military service was $38,207. *Ibid.*

C. Procedural Background

On January 17, 2024, the United States filed a Complaint alleging that Nevada violated USERRA by failing to offer returning

servicemembers air time credits at the price that would have been available to them had they not served in the military. ER-166-169.

Nevada moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). ER-124-158. Relevant here, Nevada argued that USERRA does not require employers to allow servicemember employees to purchase air time credits at the price available when they first become eligible for the credits (*i.e.*, after five years of employment as non-servicemember employees can) if that time occurs while the employee is away serving in the military. ER-8-9. Nevada also argued that it fully complied with USERRA as to Lehman by permitting him to purchase air time credits upon his reemployment, and that USERRA requires no more because air time credits are a "wholly elective pension benefit." *Ibid.* Accordingly, Nevada argued, the United States failed to state a claim upon which relief could be granted. ER-124, 137.

The district court agreed. *See* ER-5-21. The court found that because USERRA protects "accrued benefits" under a pension plan, 38 U.S.C. 4318(b)(2), the statute protects the "vested *right* to purchase pension air time" credits (ER-9). But, the court held, USERRA does not protect the substantive credits themselves, including the price that an

employer may charge for those credits. *Ibid.* The court based this holding on its determination that air time credits are not themselves "accrued benefits" under USERRA because (in the court's view) the credits accrue at the employee's election and do not continue to accrue over the full course of an employee's tenure. ER-14-15. The court therefore concluded that the price of the air time credits falls outside of USERRA's protection. ER-14-18.

Alternatively, the court found that even if USERRA did govern the price charged for air time credits, Nevada still did not violate the statute. ER-18-20. The court reasoned that a servicemember's USERRA rights vest only *after* the servicemember has been reemployed. *Ibid.* Thus, the court found, Lehman did not actually have the right to purchase air time credits until he was reemployed in October 2020. *Ibid.* That is, if "Lehman [had] remained at the AG's Office continuously until 2020, the maximum permissible contribution Nevada could have imposed" would have been the price of the credits in 2020. ER-19. Any other holding, per the district court, would impose an unfair requirement that employers hypothesize when a servicemember might have purchased air time credits had they not

been away serving in the military. ER-16-18 & n.7. The court found that because Nevada used the rate available on the date Lehman was reemployed (despite the undisputed fact that Nevada actually used a rate available six months after his reemployment), there was no USERRA violation. ER-19.[3]

SUMMARY OF ARGUMENT

The United States alleged in its Complaint that Nevada charged Lehman nearly $40,000 more for future pension credits than it would have if he had not deployed for military service. That allegation is sufficient to state a cause of action under USERRA, which mandates that "[n]o . . . payment [for accrued pension benefits] may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the [civilian] employer throughout the period of [military] service." 38 U.S.C. 4318(b)(2).

The district court erred in finding that this USERRA mandate did not apply to Nevada's future pension benefits, known as "air time

[3] The court did not analyze Nevada's motions as to the other named and unnamed servicemembers whose USERRA rights the United States alleged Nevada similarly violated.

credits." In particular, the court erred in concluding that USERRA protects a "right" to future pension benefits but does not protect the benefits themselves. *See* 38 U.S.C. 4303(2) (establishing USERRA's broad definition of covered "benefits" or "rights and benefits"). The court also erred in assuming that even if USERRA's protections were limited to the "right" to purchase air time credits, that "right" did not include the right to purchase them at a price according to USERRA's mandates. The court thus imposed a limitation upon USERRA's protections that finds no support in USERRA's text or purpose.

Further, the court's bases for determining that USERRA does not cover Nevada's specific future pension benefits are flawed. First, Nevada's air time credits are "accrued benefits": they are "benefits under a pension plan," 38 U.S.C. 4303(2), and they "accrue" after five years of qualified employment, *see* Nev. Rev. Stat. § 286.300 (2025); *Accrue*, *Black's Law Dictionary* (12th ed. 2024). Nothing in USERRA limits its protections to benefits that continue to accrue or to increase in value over the course of an employee's full tenure. Second, the fact that Nevada law leaves it to the servicemember's discretion whether to purchase the credits once they accrue similarly does not remove them

from USERRA's coverage. USERRA's text reflects as much, in that it references benefits that are both received automatically and those received at a servicemember's discretion by instructing that a price a returning servicemember pays may not be more than what they "would have been *permitted* or required to contribute." 38 U.S.C. 4318(b)(2) (emphasis added).

The district court also erred in its alternative application of USERRA to the facts alleged, where it concluded that, even if USERRA did apply to air time credits, Nevada did not violate its mandate. This error is two-fold. First, Nevada did not charge Lehman the price set for air time credits at the time of his reemployment in October 2020 as the district court concluded; rather, it charged Lehman the higher price set for air time credits in April 2021. Secondly, and more critically, USERRA does not instruct employers to charge no more than a benefit would cost at the time of a servicemember's reemployment. *See* 38 U.S.C. 4318. It instructs employers to charge no more than would have been charged "had the person remained continuously employed by the

[civilian] employer throughout the period of [military] service." 38 U.S.C. 4318(b)(2).

This Court should reverse.

ARGUMENT

The district court erroneously interpreted and applied USERRA when it granted Nevada's Motions to Dismiss.

A. Standard of review

This Court reviews Federal Rule of Civil Procedure 12(b)(6) motions to dismiss for failure to state a claim—and the legal questions those motions raise—de novo. *Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000); *Arizona All. for Cmty. Health Ctrs. v. Arizona Health Care Cost Containment Sys.*, 47 F.4th 992, 998 (9th Cir. 2022). When considering whether a complaint sufficiently states a claim, "all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Ibid.*

B. The district court erred when it held that USERRA does not govern the price of Nevada's future pension credits.

1. USERRA protects servicemembers' entitlement to a broad range of employment benefits.

USERRA protects a wide array of employment benefits to this Nation's servicemembers. As to benefits generally, the statute defines "benefit," "benefit of employment," and "rights and benefits" collectively and broadly as:

> 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) (emphasis added). And, as to pension benefits in particular, USERRA expressly protects both the "right to pension benefits" and the "pension benefits" themselves. *See generally* 38 U.S.C. 4318 (detailing the protections of both).

Courts have acknowledged the breadth of USERRA's protection of "benefits," finding that Section 4303(2)'s list is not exhaustive, and highlighting that it includes "*any* 'advantage' or 'gain' 'that accrues by

reason of an employment contract or agreement.'" *Belaustegui v. International Longshore Union*, 36 F.4th 919, 926-927 (9th Cir. 2022) (emphasis added) (quoting 38 U.S.C. 4303(2)); *Travers v. Federal Express Corp.*, 8 F.4th 198, 205 (3d Cir. 2021); *see also* 1993 House Report 21 ("These rights are broadly defined to include *all* attributes of the employment relationship," and those listed are "illustrative and not intended to be all inclusive." (emphasis added)).

Further, to effectuate Congress's purpose in enacting veterans' rights statutes, the Supreme Court has instructed that statutes such as USERRA should be "liberally construed for the benefit of those who left private life to serve their country." *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-585 (1977) (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)); *see also Imel v. Laborers Pension Tr. Fund*, 904 F.2d 1327, 1331 (9th Cir. 1990) ("Congress has manifested extreme solicitude for the returning veteran and made clear that claims under [USERRA's predecessor statute] are to be governed by principles of equity." (internal quotations marks and citations omitted)).

The Ninth Circuit has thus "repeatedly affirmed the principle that statutes concerning federal reemployment rights for military servicemembers are 'to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.'" *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 819 (9th Cir. 2016) (quoting *Fishgold*, 328 U.S. at 285); *see also Clarkson v. Alaska Airlines, Inc.*, 59 F.4th 424, 429 (9th Cir. 2023) (recognizing that USERRA "contains 'the most expansive protection to servicemembers yet enacted'" (quoting *Travers*, 8 F.4th at 201)).

2. USERRA's broad coverage includes protections for reemployed servicemembers' future pension benefits.

USERRA repeatedly instructs that servicemembers who return to civilian employment after serving in the military are to be treated as if they had no break in civilian employment. *See* 38 U.S.C. 4318(a)(2)(A), (a)(2)(B), (b)(2), and (b)(3). In addressing "pension benefits" in particular, USERRA governs the "accrual of benefits under the [pension] plan," and—most relevant here—dictates the price an employer can charge a returning employee for an "accrued benefit," stating "[n]o such payment [for an accrued benefit] may exceed the

amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service." 38 U.S.C. 4318(b)(2).

This dictate applies to Nevada's sale of air time credits to reemployed servicemembers. The credits are an "accrued benefit." 38 U.S.C. 4318(b)(2). They are "terms, conditions, or privileges of employment" and, more specifically, "rights and benefits under a pension plan," 38 U.S.C. 4303(2) (defining "benefit"), that "come into existence as an enforceable claim or right" after five years of qualified employment, *Accrue*, *Black's Law Dictionary* (12th ed. 2024).

Accordingly, when Lehman and others sought to purchase these benefits, USERRA instructs that Nevada could not charge them an amount that "exceed[ed] the amount [they] would have been permitted . . . to contribute" but for their military deployment. 38 U.S.C. 4318. By alleging that Nevada failed to comply with USERRA's instruction as to the price of Nevada's air time credits (*see* ER-161-169), the United States sufficiently pled a violation of USERRA and stated a claim on which it could obtain relief.

3. The district court's ruling that USERRA does not protect air time credits contradicts USERRA's text and purpose.

Despite USERRA's clear mandate, the district court erroneously concluded that while USERRA governs the *right* to purchase air time credits, it does not govern anything regarding the substance—for example, the price—of the credit itself. ER-9, 16-17. The court so concluded after finding that air time credits are not "accrued benefits" for two reasons. Neither reason bears scrutiny.

a. First, the district court concluded that air time credits are not "accrued benefits" because they are unlike so-called "core pension benefits" in that they "do not accrue at the five year mark, nor at any other time." ER-15-17. The court continued, adding that the credits do not accrue because there is no "price advantage [gained] through further years of employment." ER-16-17 & n.8.

This conclusion rests on a cramped interpretation of the word "accrue" and finds no support in USERRA's text. A simple analysis of the way air time credits work reveals that they accrue—that is, they "come into existence as a legally enforceable right"—after an employee reaches the five-year tenure mark. *Accrue*, *Merriam-Webster's*

Dictionary, https://perma.cc/NKL6-BNR4 (Apr. 29, 2025); Nev. Rev. Stat. § 286.300 (2025); *see Does 1-10 v. Fitzgerald*, 102 F.4th 1089, 1099 (9th Cir. 2024) (When a term "is not defined in the statute, our textual analysis begins by consulting contemporaneous dictionaries, because we are bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used." (internal quotation marks and citation omitted)).

The fact that employees are not able to purchase or earn additional air time credits indefinitely throughout their career does not exclude them from USERRA's broad coverage of "accrued benefits." In fact, USERRA's definition of "benefit" easily encompasses the air time credits' type of accrual. USERRA states that it covers benefits that accrue, not solely due to an employee's tenure as "core pension benefits" often do, but "by reason of an employment contract or agreement or an employer policy, plan, or practice." 38 U.S.C. 4303(2) (defining "benefit," "benefit of employment," and "rights and benefits"). Here, the AG's Office has a policy based upon Nevada law that enables employees to purchase the benefit of air time credits after they have worked at the

AG's Office for five years. ER-161. That easily brings the credits within USERRA's definition of an "accrued benefit" and within its protection.

The district court's contrary finding relies upon a narrow and atextual reading of USERRA's text. It also ignores the Supreme Court's and Courts of Appeals' consistent instructions that the statute must be construed liberally in favor of the returning servicemember. *See, e.g.*, *Alabama Power Co.*, 431 U.S. at 584-585; *Imel*, 904 F.2d at 1331; *Ziober*, 839 F.3d at 819; *Clarkson*, 59 F.4th at 429. This error cannot stand.

b. Second, the court concluded that air time credits are not "accrued benefits" because they do not accrue automatically, but instead "depend on an affirmative act of discretion by an employee." ER-16-17. As a preliminary matter, the benefits do accrue automatically once an employee reaches the five-year tenure mark. At that point, the credits "come into existence as a legally enforceable right" and employees may enforce the right to purchase those credits. *Accrue*, *Merriam-Webster's Dictionary*, https://perma.cc/NKL6-BNR4 (Apr. 29, 2025); Nev. Rev. Stat. § 286.300(2). What depends upon the employee's discretion is whether (and how much) to take advantage of that benefit.

Further, USERRA's text contradicts the court's conclusion that discretionary benefits (if air time credits can be considered as such) are outside the statute's scope. USERRA plainly protects both automatic and discretionary benefits, stating that any contribution a servicemember makes after obtaining reemployment may not be more than they "would have been *permitted* or required to contribute had [they] remained continuously employed." 38 U.S.C. 4318(b)(2) (emphasis added). The district court's reading of USERRA renders the statute's inclusion of permissible contributions superfluous and this Court should reject it. *See Tulelake Irrigation Dist. v. United States Fish & Wildlife Serv.*, 40 F.4th 930, 936 (9th Cir. 2022) ("When construing a statute, courts should 'avoid any statutory interpretation that renders any section superfluous.'" (quoting *Central Mont. Elec. Power Coop., Inc. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1478 (9th Cir. 1988)).

c. Finally, even if USERRA only covered "the right" to purchase air time credits and excluded the substance of the credits, that right still encompasses the ability to purchase the credits at a specific price. Just as the "right to purchase air time credits" encompasses the right to

do so when Nevada law allows it, "the right" also encompasses the right to do so at the price provided for by both state and federal law. In detailing "the right to pension benefits," USERRA expressly protects servicemembers' right to obtain benefits as if they never left for military service, to do so when they have made any necessary payments, and to be charged only as much as they "would have been permitted or required to contribute had [they] remained continuously employed by the [civilian] employer." 38 U.S.C. 4318(a)(2) and (b)(2). Thus, even if the district court was correct about USERRA governing "the right" but not the credits themselves, it is indisputable that USERRA governs the price for the credits.

According to USERRA, Lehman should have been charged the price for the credits that he would have been charged but for his military service. *See* 38 U.S.C. 4318(b)(2). That price is the August 2018 price. The district court's disregard of this statutory mandate was error and should be reversed.

C. The district court erred in concluding that the United States failed to state a claim under USERRA by alleging that Nevada charged returning servicemembers more for future pension credits because of their military service.

1. The United States alleged sufficient facts to support a claim that Nevada violated USERRA.

USERRA states that an employer may not charge a reemployed servicemember more for air time credits than it would have charged but for the servicemember's military deployment. *See* 38 U.S.C. 4318(b)(2). But for Lehman's military deployment, he could have purchased air time credits in August 2018. *See* ER-162 ¶ 18. In August 2018, Nevada would have permitted Lehman to pay $101,184.40 for five-years' worth of air time credits. ER-162. The United States alleged that Nevada instead charged him $139,391 (a rate based upon an April 2021 actuarial calculation) and similarly overcharged other returning servicemembers. ER-164-166. Thus, as alleged in the Complaint, Nevada required servicemembers to contribute (or pay) more for an accrued benefit (*i.e.*, air time credits) than it would have if they had continuously remained in their civilian jobs. *See* ER-161-166. These allegations sufficiently plead violations of USERRA and support claims

upon which the United States can obtain relief. *See* 38 U.S.C. 4318(b)(2).

2. The district court's conclusion that Nevada properly charged complainant Lehman for air time credits at the October 2020 price fails as a matter of both fact and law.

Contrary to both the facts and the law, the district court found that even if USERRA applied to air time credits, Nevada did not violate USERRA because they charged Lehman the correct price. Specifically, the court found that because Nevada charged Lehman the actuarily-determined price available to him in October 2020, there was no USERRA violation. This conclusion has two flaws.

a. First, the district court inexplicably found there was no USERRA violation because Nevada offered air time credits to Lehman at the price that existed in October 2020, when the AG's Office reemployed him. ER-19. But the court in the next breath admitted this was not true, as Nevada actually charged Lehman the price existing in April 2021, after they belatedly corrected his service record. *See ibid.* (finding that the 2020 price was "the price Lehman was in fact offered (without considering [Nevada's] additional delays)"). The court provided no explanation for disregarding this six-month delay, a delay

that resulted in an additional increase in price for air time credits. *See* ER-34.

b. Second, even if Nevada had offered Lehman the October 2020 price, that would still violate USERRA. USERRA instructs employers that when determining the amount that a servicemember must contribute to obtain certain accrued benefits, "no such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the [civilian] employer throughout the period of [military] service." 38 U.S.C. 4318(b)(2). The price that Lehman "would have been permitted . . . to contribute" but for his military deployment is the August 2018 price, not the October 2020 price (or the April 2021 price that he was actually charged). ER-162-164.

The district court asserted that permitting Lehman to purchase the credits at the August 2018 price would be improperly grounded in "a fictitious assumption" that Lehman would in fact have purchased the credits as soon as he qualified to do so, an assumption that "USERRA does not impose." ER-18. However, it is the district court that has imposed a requirement not found in USERRA. USERRA does not state

that an employer must charge no more than it would have charged only if the servicemember can prove to some certainty that he would have purchased a pension benefit at a particular time but for his military deployment. *See* 38 U.S.C. 4318. Rather, it states that an employer must charge no more than it would have "permitted or required [the servicemember] to pay" but for his military deployment. 38 U.S.C. 4318(b)(2). That language—plus USERRA's repeated instruction that returning servicemembers are to be treated as if they never left civilian employ—inheres in it a dictate that the price available during the military deployment is the price to be made available upon reemployment. *See* 38 U.S.C. 4318(a)(2)(A), (a)(2)(B), (b)(2), and (b)(3).[4]

And, even if the United States had to demonstrate with some certainty that Lehman would have surely purchased air time credits when he was first able to, it has done enough to meet that burden at this stage in the litigation. The United States alleged in its Complaint

[4] This requirement that the price available during a servicemember's deployment remain available to them is not unlimited. USERRA requires that reemployed servicemembers make the required contributions (and thus purchase the pension benefit) between "the date of reemployment [and] three times the period of the person's service in the uniformed services, such payment period not to exceed five years." 38 U.S.C. 4318(b)(2).

that Lehman's military deployment caused him to not purchase air time credits in August 2018. *See* ER-162 ¶ 18. It also alleged that as soon as Lehman was able to do so, he took steps to purchase those credits. *See* ER-164. Accepting these allegations as true and construing them in the light most favorable to the nonmovant—as Rule 12(b)(6) requires—the United States has alleged facts that support the conclusion that Lehman would have purchased air time credits as soon as he was able, but for his military deployment. These allegations are sufficient to survive a motion to dismiss. *See Thomas v. County of Humboldt*, 124 F.4th 1179, 1186 (9th Cir. 2024) ("At the motion to dismiss stage, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to Plaintiffs." (alteration, internal quotation marks, and citation omitted)). The district court's disregard of these allegations ignores settled standards as to how courts are to evaluate motions to dismiss and warrants reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Order, and the case should be remanded for further appropriate proceedings. Additionally, this Court should make clear that USERRA does govern future pension benefits like Nevada's air time credits, as set forth above.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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