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

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

MISCELLANEOUS:

INTRODUCTION

The United States brought this case against Nevada, Nevada's Office of the Attorney General, and the Nevada Public Employees' Retirement System (collectively, Nevada) alleging that they violated the Uniformed Services Employment and Reemployment Rights Act (USERRA) by refusing to allow servicemember employees to purchase future pension (air time) credits at the rate the employees could have paid but for their military service. U.S. Br. 18-29.[1]

The district court granted Nevada's Motions to Dismiss the United States' Complaint. The court concluded that while USERRA protects a returning servicemember's *right* to purchase air time credits, it does not protect the *substance* of those credits, including their price, because the credits are not "accrued benefits" under 38 U.S.C. 4318(b)(2). ER-14-18. The court further held that even if air time credits are "accrued benefits" under Section 4318(b)(2), Nevada complied with the statute by not charging returning servicemember Charles Lehman an amount for the

[1] "U.S. Br. __" refers to the page numbers of the United States' Opening Brief filed with this Court. "Nevada Br. __" refers to the page numbers of Nevada's Response Brief filed with this Court. "ER-__" refers to the page number of the Excerpts of Record the United States filed with its Opening Brief.

credits that exceeded what he would have been permitted or required to contribute had he remained continuously employed at his civilian job at Nevada's Office of the Attorney General (AG's Office). ER-17-19.

This Court should reverse and remand because the district court erred in interpreting Section 4318(b)(2) and applying it to the facts of this case. As the United States argued in its Opening Brief, USERRA's broad purpose and Section 4318(b)(2)'s plain language instruct that air time credits are "accrued benefits" for which Nevada could not charge an amount that exceeded what a returning servicemember would have been required to pay but for his military service. U.S. Br. 18-19.

Contrary to the district court's conclusion otherwise, air time credits accrue when they become available for purchase—here, after five years of employment in a qualifying position—even though the purchase is a discretionary act by the employee. U.S. Br. 20-23. Moreover, Nevada violated Section 4318(b)(2) by charging Lehman the price of air time credits existing six months after his reemployment at the AG's Office (ER-162-164), rather than the price existing in August 2018, when he would have purchased the credits but for his military deployment. U.S. Br. 25-27. The district court further erred in imposing a requirement

found nowhere in the statute that a servicemember prove to some certainty that he would have purchased a pension benefit when he was first qualified to do so. U.S. Br. 27-29. And more to the point, even if such a requirement existed, Lehman satisfied that novel standard because 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.

Nevada's arguments on appeal reiterate the district court's mistakes while erring in additional ways. Nevada argues that the United States waived its argument on appeal that air time credits are "accrued benefits" under Section 4318(b)(2), that air time credits are not "accrued benefits" even under the United States' proposed definition of the term, and that the United States' proposed definition violates numerous principles of statutory interpretation. Nevada Br. 17-23.

Nevada further contends that the United States' contention that Section 4318(b)(2) requires that servicemembers be charged the price for air time credits that they would have paid "but for" their military service is inconsistent with the statute's plain language. Nevada Br. 25-29. Finally, Nevada argues that USERRA is fundamentally an anti-

discrimination statute, and that the United States' theory creates protections for returning servicemembers not available to other Nevada employees. Nevada Br. 27-28, 34-36. For the reasons set forth in the United States' Opening Brief and below, Nevada's arguments fail.

ARGUMENT

I. The district court erred in holding that air time credits are not "accrued benefits" under Section 4318(b)(2).

1. Section 4318(b)(2) of USERRA entitles reemployed servicemembers to "accrued benefits" that are contingent on their making payments to an employee benefit pension plan that may not exceed what the servicemember "would have been permitted or required to contribute had [he] remained continuously employed by the [civilian] employer throughout the period of [military] service." 38 U.S.C. 4318(b)(2).

Determining the meaning of "accrued benefits" in Section 4318(b)(2) "begins and ends with the text," *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014), which "must [be] enforce[d] . . . according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). Furthermore, a statute like USERRA that protects servicemember rights 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 (1977) (citation omitted). "The principle of liberal construction . . . is designed to ensure that veterans may take full advantage of the substantive rights and protections provided by a statute." *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 819-820 (9th Cir. 2016).

USERRA defines the term "benefit" in relevant part as "the terms, conditions, or privileges of employment," including "rights and benefits under a pension plan," 38 U.S.C. 4303(2), but does not define the term "accrued." When, as here, "a term goes undefined in a statute," courts "give the term its ordinary meaning," and may consult dictionary definitions in this endeavor. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566-568 (2012); *accord Doe 1-10 v. Fitzgerald*, 102 F.4th 1089, 1099 (9th Cir.) (concluding that the "textual analysis" for a term undefined in a statute "begins by consulting contemporaneous dictionaries" (citation omitted)), *cert. denied sub nom. Fitzgerald v. United States Attorney's Off.*, 145 S. Ct. 378 (2024).

As the United States observed in its Opening Brief (at 19-20), the relevant and ordinary definition of "accrue" in this context is "come into

existence as an enforceable claim or right" (*Accrue*, *Black's Law Dictionary* (12th ed. 2024)), or "come into existence as a legally enforceable right" (*Accrue*, *Merriam-Webster's Dictionary*, https://perma.cc/NKL6-BNR4 (Apr. 29, 2025)).

Reading these definitions in concert, the term "accrued benefits" easily covers air time credits. Such credits are "rights and benefits under a pension plan" that "come into existence as an enforceable claim or right" or "legally enforceable right" after five years of qualified employment, when they can be purchased. *See* U.S. Br. 19. As the United States explained in its Opening Brief (at 20-23), the district court erred in two respects in rejecting the United States' position that air time credits are "accrued benefits," both of which ignore Section 4318(b)(2)'s plain language.

First, the court "relie[d] upon on a narrow and atextual reading of USERRA's text" in concluding that air time credits do not accrue at all because they are unlike core pension benefits that are purchased or earned indefinitely throughout one's career. U.S. Br. 22. Second, the court rendered Section 4318(b)(2)'s inclusion of permissible contributions ("permitted or required to contribute") superfluous in holding that air

time credits are not accrued benefits because they depend on an affirmative act by an employee at the employee's discretion. U.S. Br. 23-24.

2. Nevada resists the United States' straightforward, plain-language interpretation of "accrued benefits" for several reasons. None has merit and would strip the substance from the pension protections guaranteed by USERRA.

a. First, Nevada argues that the United States waived its argument on appeal that air time credits are "accrued benefits" by solely arguing to the district court that it is the *right* to purchase air time credits that is the accrued benefit. Nevada Br. 17-18.

Nevada's argument misses the mark. What Nevada labels "waiver" is more accurately described as the doctrine of judicial estoppel, which "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) (citation omitted). This Court will estop a party from making an argument when "1) [the party's] current position is clearly inconsistent with its previous position; 2) the party has succeeded in persuading a court to accept that party's

earlier position; and 3) the party, if not estopped, would derive an unfair advantage or impose an unfair detriment on the opposing party." *Perez v. Discover Bank*, 74 F.4th 1003, 1008 (9th Cir. 2023) (internal quotation marks and citation omitted). A current position is "clearly inconsistent" with a previous position if it "contradict[s]" the latter. *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1133 (9th Cir. 2012).

None of these factors warrants this Court estopping the United States from arguing on appeal that air time credits are accrued benefits under Section 4318(b)(2). In its Opposition to the Motions to Dismiss, the United States argued that "the purchase of 'air time' easily falls within the scope of USERRA's benefit protections." ER-94, 112. The United States subsequently elaborated that "[f]or accrued benefits, such as the right to purchase 'air time' at issue in this case, USERRA . . . limits the amount of [required] contributions to the amount the employee would have paid if the employee had been continually employed." ER-96, 114 (emphasis omitted).

Said differently, the United States' view below was that the "accrued benefit" protected by Section 4318(b)(2) is the right to purchase air time credits at the rate the servicemember would have been charged

had he remained continuously employed by the civilian employer. Because this interpretation encompasses both the right to purchase credits *and* the substance (price) of the credits themselves, it is not contradicted by—indeed, it is perfectly consistent with—the argument the United States makes on appeal. *See* U.S. Br. 24.

Moreover, the record clearly indicates that the district court understood the United States' position to be that "accrued benefits" covers air time credits. At the hearing on the Motions to Dismiss, the court asked Nevada's counsel if "air time service would fall within the benefits protected under USERRA as the [United States] argues" if the court agreed with the United States' position. ER-38. The court subsequently observed in its order that "the United States argues that USERRA's protections must be interpreted broadly to cover air time" (ER-9), that "the United States bases its claims primarily on Section 4318, arguing that air time is protected under [Section 4318's] specific requirements for pensions" (ER-13), that "[t]he United States asserts that air time is covered under Section 4318(b)(2) as a statutory pension right" (ER-14), and that the United States "asserts that air time is a benefit contingent upon employee contributions under 4318(b)(2)" (ER-

18). And in dismissing the United States' Complaint, the court concluded that "air time credits are not protected under Section 4318 of USERRA." ER-20. The district court's *rejection* of the United States' earlier position, and the absence of any unfair detriment to Nevada from the United States' current position given the proceedings below, further counsel against judicially estopping the United States' argument on appeal.

b. Second, Nevada argues that air time credits do not qualify as "accrued benefits" even under the United States' proposed definition of the term as "[rights] that come into existence as an enforceable claim or right after five years of qualified employment," because this definition covers only the *right* to purchase such credits. Nevada Br. 18-19 (internal quotation marks and citation omitted).

Nevada's argument is meritless. Although Nevada correctly recognizes that the United States' proposed definition of "accrued benefits" combines 38 U.S.C. 4303(2), which defines "benefit" to include "rights and benefits under a pension plan," with the dictionary definition of accrue, which is "comes into existence as enforceable claim or right," it fails to view this definition in the context of the United States' argument. The United States alleges that Nevada violated 38 U.S.C. 4318(b)(2),

which entitles reemployed servicemembers to "accrued benefits" that are contingent on their making payments to a pension plan. Thus understood, the United States' definition easily encompasses air time credits, which as noted above are benefits that come into existence as enforceable after five years of qualified employment and that are contingent on their purchase for a set price. *See* pp. 4-6, *supra*.

Defining "accrued benefits" to cover pension benefits such as air time credits accords with USERRA's broad purposes. *See* 38 U.S.C. 4301(a). The right to purchase pension benefits without an accompanying guarantee of a set price has no benefit to a servicemember because it would allow his employer to ignore his periods of military service and charge him pension contribution rates without regard to his leave. For this reason, the statute explicitly recognizes that pension rights include purchase price guarantees. *See* 38 U.S.C. 4318(b)(2) ("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 described in subsection (a)(2)(B).").

This case starkly illustrates the importance of purchase price guarantees given that the value of air time credits rapidly decreases the further away an employee gets from the date they are first eligible to purchase the credits. For example, in the 32-month span from when Lehman was first eligible to purchase air time credits and when he actually had the opportunity to purchase the credits, the purchase price increased by $38,207.00. ER-164.

Moreover, Nevada conceded the point it is contesting on appeal at the hearing on its Motions to Dismiss. The district court asked whether "air time service would fall within the benefits protected under USERRA as the [United States] argues" if the court agreed with the United States' position. ER-38. Nevada's counsel admitted that "if the [United States] is correct that . . . we should just look to the term 'benefit' under USERRA then, yes, we think this would qualify for at least that element of the statutory analysis." ER-38-39. Counsel further acknowledged that "USERRA would preempt state law" if the court determined the United States' interpretation of "accrued benefits" to be correct. ER-40. In sum, Nevada's argument on appeal that the United States's proposed definition of "accrued benefits" does not encompass air time credits, but

only the right to purchase such credits, contradicts its position below. If anything, it is *Nevada*, not the United States, who should be judicially estopped from making its argument on this issue on appeal. *See Perez*, 74 F.4th at 1008.

c. Finally, Nevada argues that the United States' proposed definition of "accrued benefits" violates numerous principles of statutory interpretation. In this respect, Nevada contends that this proposed definition fails to give the term "accrued benefits" a distinct definition apart from the terms "benefits," "rights and benefits," and "pension benefits" defined in Section 4303(2). Nevada Br. 19-20. Nevada further argues that the United States' interpretation renders the descriptor "accrued" superfluous, because Section 4303(2)'s definition of "benefit" already includes benefits that "accrue[] by reason of an . . . employer policy, plan, or practice." Nevada Br. 20-21 (alterations in original; citation omitted). Nevada concludes that because USERRA does not specifically define the term "accrued benefits," the district court correctly looked outside the statute to the Employee Retirement Income Security Act of 1974 (ERISA) in defining the term as a benefit that accumulates over time in exchange for an employee's ongoing service, which does not

cover air time because air time is untethered to actual service. Nevada Br. 22.

Nevada's and the district court's definition of "accrued benefits," not the United States' definition, violates fundamental principles of statutory interpretation. It is well-settled that "[w]hen a statute includes an explicit definition, [a court] *must* follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (emphasis added); *accord In re Yochum*, 89 F.3d 661, 666 (9th Cir. 1996) ("[I]n statutes that contain statutory definition sections, it is commonly understood that such definitions establish meaning wherever the terms appear in the same Act."). Because USERRA's definitions section defines "benefit," *see* 38 U.S.C. 4303(2), a court may not import a definition of that term from another statute such as ERISA. That USERRA does not use the specific term "accrued benefit" in Section 4303(2) is irrelevant because a court should give an undefined term such as the descriptor "accrued" its ordinary meaning and may consult dictionary definitions in this endeavor. *See* p. 5, *supra*. This is what the

United States' definition of "accrued benefits" does.[2]

Moreover, the United States' definition does not render the descriptor "accrued" superfluous. Under the series-qualifier canon of statutory construction, "'[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series.'" *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402 (2021) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012)). Applied here, this principle indicates that Section 4303(2)'s modifier "that accrues by reason of an . . . employer policy, plan, or practice" refers solely to the preceding list of "advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed)," none

[2] The two district court cases Nevada cites (*see* Nevada Br. 16-17) to support its view that the district court correctly looked to a commonly accepted definition under another federal employment law for guidance in defining "accrued benefits" are readily distinguishable because in neither case did USERRA define *any* part of the term at issue. *See* 38 U.S.C. 4303. Moreover, interpreting a statutory term according to its ordinary meaning by looking within the statute and to the dictionary rather than to the definition of the term in a different statute altogether also avoids the issue that statutory terms may have different meanings in different statutes. *See FAA v. Cooper*, 566 U.S. 284, 292-293 (2012) (observing that "actual damages" has different meanings in different statutes).

of which covers air time credits. Because the relevant definition of "benefits" here—"rights or benefits under a pension plan"—is on a list of items introduced by the phrase "and includes" that follows the clause listing the employee benefits that "accrue[]," it falls under the general category of "terms, conditions, or conditions of employment" at the beginning of the definition. Thus understood, the United States' argument that air time credits are "accrued rights or benefits under a pension plan" is consistent with fundamental principles of statutory interpretation.[3]

Indeed, the statute presumes that there is an entire category of pension rights that have "accrued" but that are contingent upon the servicemember making an affirmative act, at the servicemember's discretion, to claim those rights. Section 4318(b)(2) describes contributory pension plans where a servicemember must make a

[3] The absence of a comma separating the list of items introduced by the phrase "and includes" from the list of items that "accrue[]" is of no moment. As the Supreme Court has observed, "Punctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." *Barrett v. Van Pelt*, 268 U.S. 85, 91 (1925) (citation omitted).

payment in order to take advantage of USERRA's protections. *See* 38 U.S.C. 4318(b)(2) (entitling a servicemember to "accrued benefits pursuant to subsection (a) . . . only to the extent the [servicemember] makes payment to the plan with respect to . . . contributions or deferrals"). But the statute defines these benefits as "accrued" independent of the servicemember either making, or choosing not to make, contributions. Applied here, air time credits accrue after five years of qualified employment regardless of whether they are purchased at that time or later.

Moreover, it is the district court's and Nevada's interpretation of Section 4318(b)(2) that renders a term superfluous—specifically, the term "permitted" in the statute's requirement that payments to an employee benefit pension plan not exceed what the servicemember "would have been permitted or required to contribute had [he] remained continuously employed by the employer." *See* pp. 6-7, *supra*; U.S. Br. 22-23. Nevada's sole rejoinder is that the district court correctly distinguished air time credits from other discretionary benefits because they do not depend on years of service. Nevada Br. 22-23. Nevada's explanation of the work the term "permitted" is doing in Section

4318(b)(2) requires acceptance of the district court's interpretation of the term "accrued benefits" as benefits that accumulate over time in exchange for an employee's ongoing service. As we observed above, the district court's interpretation is incorrect. If one accepts the United States' correct interpretation of "accrued benefits," Nevada has no explanation of why Congress included the term "permitted" in Section 4318(b)(2) if it did not intend to cover an individual's discretionary contributions to an employee pension benefit plan such as purchase of air time credits.[4]

[4] The United States argued, in the alternative, that even if USERRA only covered the *right* to purchase air time credits and not the *substance* of those credits, that right still encompasses the right to do so at the price provided for by state and federal law. U.S. Br. 23-24. Nevada objects on the grounds that it did not charge anything for the right to purchase air time credits and that this right is not an "accrued benefit" because it is not contingent on the making of employee contributions. Nevada Br. 31-33. This Court need not address this argument given the strength of the United States' primary argument that air time credits are "accrued benefits" under Section 4318(b)(2). In any event, Nevada's response fails to understand the United States' argument that "accrued benefits" covers both the right to purchase air time credits *and* the substance of those credits, which includes the purchase price. *See* pp. 8-9, *supra*.

II. The district court erred in holding that even if air time credits are "accrued benefits" under Section 4318(b)(2), Nevada did not charge Lehman more than he would be permitted or required to contribute had he remained continuously employed at the AG's Office.

1. Section 4318(b)(2) instructs employers that when determining the amount a servicemember may contribute to obtain certain accrued benefits under an employee benefit pension plan, "[n]o such payment may exceed the amount the person would have been permitted or required to contribute had [he] remained continuously employed by the [civilian] employer throughout the period of [military] service *described in subsection (a)(2)(B)*." 38 U.S.C. 4318(b)(2) (emphasis added). Section 4318(a)(2)(B), in turn, provides that a period of military service "shall, upon reemployment under this chapter, be deemed to constitute service with the [civilian] employer or employers maintaining the plan . . . for the purpose of determining the accrual of benefits under the plan." 38 U.S.C. 4318(a)(2)(B). Read together, these provisions make clear that the phrase "but for his military service" the United States used in its opening brief is functionally equivalent to the phrase "had [he] remained continuously employed by the [civilian] employer" in Section 4318(b)(2) where, as here, the servicemember returns to that employer following his

military service.

Applied here, Section 4318(b)(2) required that upon Lehman's reemployment in October 2020 at the AG's Office, he be allowed to purchase air time credits at their price in August 2018, when he would have purchased the credits but for his military deployment. The United States' Complaint alleged that Nevada instead charged him for such credits at the rate based upon an April 2021 actuarial calculation. As the United States argued in its Opening Brief (at 25), its allegation that Nevada required servicemembers to pay more for an accrued benefit—*i.e.*, air time credits—sufficiently pleaded a USERRA violation. The district court erred in concluding otherwise. *See* U.S. Br. 27-29.

The United States also argued in its opening brief (at 26-27) that the district court factually erred in concluding that Nevada offered air time credits to Lehman at the price that existed in October 2020 when he was reemployed and failed to explain its disregard for Nevada's six-month delay in charging Lehman for those credits. Rather than contest the merits of the United States' assertion, Nevada responds (Nevada Br. 29-31) that the United States disclaimed this argument below by conceding to the district court that the delay did not constitute a separate

USERRA violation. That the United States conceded this point is correct but of no moment. The United States' position throughout this litigation has been that the six-month delay further prejudiced Lehman and that the factual allegations underlying the United States' argument evinced that he was not dilatory in exercising his USERRA rights. See ER-120-121. The district court's failure to recognize Nevada's patent error underscores the court's misinterpretation of Section 4318(b)(2).

2. Nevada makes several attempts to undermine the United States' claim that Nevada violated USERRA by charging Lehman more for air time credits than Section 4318(b)(2) allows because of his military service. None has merit.

a. First, Nevada contends that the United States' argument that Section 4318(b)(2) requires that servicemembers be charged the price for air time credits that they would have paid "but for" their military service is inconsistent with the statute's plain language, which defines that price as one the servicemember would have paid had he remained continuously employed with his civilian employer. Nevada Br. 25. In this respect, Nevada argues that if Congress had intended that Section 4318(b)(2) use a "but for" standard, it "easily could have" drafted the statute in that way,

as it did with Section 4318(b)(3)(A). Nevada Br. 25-26.

The distinction Nevada identifies makes no difference. Courts "do not demand (or in truth expect) that Congress draft in the most translucent way possible," *Pulsifer v. United States*, 601 U.S. 124, 137 (2024), particularly where a plain reading of two statutory provisions in concert—Sections 4318(a)(2)(B) and (b)(2)—evinces Congress's intent. Indeed, as the United States observed in its Opening Brief (at 28), Sections 4318(a)(2)(A), (a)(2)(B), (b)(2), and (b)(3) *all* support its position that returning servicemembers are to be treated as if they had never left civilian employ. This straightforward point is lost on Nevada, which mistakenly alleges (Nevada Br. 26) that the United States "disregard[ed]" that these provisions "each have different language and scopes." Contrary to Nevada's attempt (*see* Nevada Br. 26) to draw a negative implication from the United States' decision not to address in its opening brief the district court's discussion of Section 4318(b)(3), which by Nevada's acknowledgement concerns compensation rather than accrued benefits, the United States does not rely on Section 4318(b)(3) for anything more than general support for its argument.

b. Nevada's other legal arguments on this issue warrant little discussion as they are non-responsive to the United States' arguments in its opening brief. Contrary to the district court's and Nevada's contention otherwise (*see* ER-17-18; Nevada Br. 27), Section 4318(b)(2) does not require that a servicemember prove to some certainty that he would have purchased a pension benefit *at a particular time* but for his military deployment. Instead, the statute states that an employer must not charge more than what it would have "permitted or required [the servicemember to contribute" but for his military deployment, 38 U.S.C. 4318(b)(2), and instructs that returning servicemembers are to be treated as if they never left civilian employ, 38 U.S.C. 4318(a)(2)(B). Read together, these provisions merely require that the servicemember be reemployed with the civilian employer to avail himself of the price of air time credits at the time the credits accrued while he was away on military service. *See* U.S. Br. 27-28.

No more persuasive is Nevada's contention (Nevada Br. 28-29) that the United States' alternative argument that a returning servicemember should have the opportunity to prove that he would have purchased air time credits when he was first able to "would inject difficult questions of

subjective intent" into Section 4318(b)(2). The same can be said of *any* statute with a "but for" causation standard that requires that an individual prove that he would exercise his discretion in a particular manner; Nevada provides no reason why this challenge should override the statute's plain language in this instance. As the United States argued in its Opening Brief (at 28-29), the allegations in its Complaint that Lehman's military deployment caused him to not purchase air time credits in August 2018 and that Lehman took steps to purchase those credits as soon as he was able to do so, accepted as true and viewed in the light most favorable to the United States, are sufficient to state a claim that Lehman would have purchased air time credits as soon as he was able but for his military deployment. Lehman's steps occurred six months after he returned to the AG's Office from military deployment because Nevada mistakenly failed to credit him for his service time for that long. ER-164. To this Nevada has no response.

c. Finally, Nevada reiterates the district court's policy justification that "USERRA is fundamentally an anti-discrimination statute" and that the United States' theory of how benefits accrue creates protections not available to other Nevada employees by giving servicemembers a set rate

that does not reflect time value of money, advancing age, and increased compensation. Nevada Br. 27-28, 34-36; ER-19-20.

This argument is unavailing. As Nevada acknowledges, a policy argument cannot overcome a statute's plain text. Nevada Br. 34 (citing *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009) and *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014)). Applied here, this principle warrants rejecting *Nevada's* position, not the United States' position. The United States concedes that Nevada would indeed save money on its pension plans if it was permitted to ignore USERRA's protections for servicemembers. But, as discussed above, Section 4318(b)(2)'s plain language makes clear that air time credits are "accrued benefits" and that a civilian employer may not charge a returning servicemember more for those credits than he would have paid but for his military service. *See* pp. 4-6, 19-20, *supra*. This interpretation controls even if it advantages returning servicemembers over other civilian employees.

In any event, USERRA is not "fundamentally an anti-discrimination statute," as preventing discrimination against servicemembers is only one of the three (and in fact the last listed of the three) purposes the statute lists. *See* 38 U.S.C. 4301(c). In line with these

purposes, which "recognize[] 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), the statute provides affirmative benefits and advantages to servicemembers who take military leave that do not exist for civilians. *See* U.S. Br. 4 (listing USERRA sections that provide servicemembers with rights to reemployment, seniority benefits, and health insurance while not working). In construing a predecessor statute to USERRA that gave servicemembers the right to apply for reemployment within a stated period of time and to a job without loss of seniority, the Supreme Court observed that the statute "was designed to protect the veteran in several ways," including allowing him "to gain by his service for his country an advantage which the law withheld from those who stayed behind." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946).

Indeed, USERRA itself makes clear that the category of seniority-based benefits—such as the right to purchase pension plan benefits commensurate with age and years of service—will benefit servicemembers on military leave more than other employees on vacation leave by setting forth an entirely separate set of rules and regulations for

non-seniority based benefits that incorporates a non-discrimination principle. These benefits are guaranteed to servicemembers only insofar as they "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)(B).[5] Servicemembers are torn from their civilian jobs during their time of service and, without statutory protections, are forced to lose seniority in the defense of America. An essential purpose of USERRA is to ensure that servicemembers are made whole by their employers for their seniority lost protecting our country. It is simply a cost of doing business in America, which this Court should confirm by adopting the United States' position in this appeal.

[5] Because this Court's *Clarkson* decision addressed Section 4316(b)(1)'s non-seniority benefits, *see* 59 F.4th at 430-431, its holding that an employer is "only required to provide equal treatment, not preferential treatment, to employees taking military leave," *id.* at 437, does not support Nevada's argument, contrary to Nevada's contention (*see* Nevada Br. 34-35) otherwise.

CONCLUSION

For the reasons stated in this brief and the United States' Opening Brief, this Court should reverse the district court's Order, remand this case for additional proceedings, and make clear that USERRA governs future pension benefits like Nevada's air time credits.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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