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.*,

Defendant-Appellee

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLANT

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INTRODUCTION

The United States of America submits this brief in accordance with the Court's March 16, 2026, Order to file a supplemental brief "addressing whether, if 38 U.S.C. § 4318 requires that Charles Lehman be provided the right to purchase five years' worth of pension service credits pursuant to Nevada Revised Statutes § 286.300(2) at the August 2018 actuarial price, a setoff would be required to account for the value of Lehman's having held the funds past August 26, 2018, and if so, what the appropriate method of calculation of the setoff would be, and where the burden of proof as to the amount of any such setoff would lie."

As discussed below, such a setoff is irreconcilable with the text of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and expressly prohibited by the Department of Labor's implementing regulations. Under USERRA's pension provisions, if a servicemember elects to make contingent benefit contributions upon reemployment, payments for such contributions "may [not] exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed." 38 U.S.C. 4318(b)(2). The Department's regulations track this statutory mandate and confirm that employees do not pay interest or any other form of penalty, including one accounting for the time value of money, when making up contributions upon reemployment. *See* 20 C.F.R. 1002.263.

BACKGROUND

The State of Nevada offers its employees the opportunity to purchase up to five "airtime credits," each adding a year of employment to the employee's pension. Nev. Rev. Stat. 286.300(2); ER-161.[1] The right to the credits vests at five years of state employment and is contingent on paying the actuarial cost of the credits, as determined by the employee's age and salary. ER-162. The cost of the credits is the heart of the benefit: employees get to purchase future pension benefits at a price determined by actuarial standards using their age and employment at the time of the election to purchase the credits. Without USERRA's price guarantee, taking military leave would eviscerate this benefit. As demonstrated below, delaying the time for the election to purchase raises the price at which the credits can be purchased, thus eliminating the benefit altogether.

[1] "ER-__" refers to pages in the Excerpts of Record filed with the United States' opening brief on May 7, 2025.

In May 2017, Charles Lehman was called to active duty, requiring him to take military leave from his civilian employment until October 2020. ER-162. Had Lehman worked continuously for Nevada without this break for military service, he would have reached five years of employment with Nevada in August 2018. ER-162. And had he not been on leave in August 2018, he would have had the opportunity to purchase the five credits at the then-current actuarial rate of $101,184.40. ER-162.

Upon reemployment in October 2020, Lehman immediately sought credit for his military service under USERRA. ER-162. Nevada finally credited him for his military service in April 2021, at which point his employment records reflected that he reached the five-year mark in August 2018, and he became eligible to purchase the airtime credits. ER-163. Lehman promptly inquired about purchasing the credits. ER-164. Rather than charge Lehman $101,184.40—the rate at which he would have been permitted to purchase the credits but for his service—Nevada insisted, in violation of USERRA, that he pay the actuarial rate determined by his age and salary as of April 2021: $139,391. ER-163. The United States filed this action alleging that Nevada, Nevada's Office of the Attorney

General, and the Public Employees' Retirement System of Nevada (collectively Nevada) violated USERRA, 38 U.S.C. 4318. ER-159-160.

ARGUMENT

Section 4318 of USERRA entitles Lehman to purchase the airtime credits at the August 2018 price upon reemployment. The law does not authorize a setoff for any time value of money benefit that he may have incidentally received from having held the funds past August 2018.

1. USERRA's text requires this conclusion. Section 4318 of USERRA details servicemembers' employee pension plan rights upon reemployment. 38 U.S.C. 4318. Upon reemployment following qualified military leave, section 4318 entitles servicemembers, like Lehman, to accrued pension benefits, as if they never left, provided that the servicemember makes the contributions that such benefits are contingent upon. 38 U.S.C. 4318(b)(2). Section 4318 also (1) expressly caps servicemembers' payments for such benefits at "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," and (2) affords servicemembers an extended window to make such payments "beginning with the date of reemployment" that is "three times the

period of the person's service in the uniformed services, . . . not to exceed five years." *Ibid.*

This extended, but finite, window for repayment is important. Congress has established a compromise arrangement between employee-servicemembers, the employer, and the pension authorities regarding the cost of these contributions (for the benefit of the servicemember) and when they should be made (for the benefit of the employer and pension authorities). Congress chose to give servicemembers an opportunity that non-servicemembers do not have to make pension contributions for time spent on military leave. But it also temporally limited that opportunity, which provides certainty to employers and pension authorities, and caps their costs. USERRA's pension provisions do not include a setoff to account for funds servicemembers held while performing qualifying uniformed service. The finite repayment window is how Congress chose to limit any windfall a servicemember may receive from holding the funds until they actually pay the contribution. A setoff should not be read into the statute, as that would dissipate servicemembers' pension-related benefits, which decrease every day that servicemembers are prevented from participating in the program due to military service.

Again, in this case, Lehman applied for the pension credits immediately upon his return to service. Any delay in his payment was caused by Nevada's failure to immediately credit his service time so he could qualify for the benefit. ER-162-164.

2. In alignment with Section 4318's text, the Department of Labor's USERRA implementing regulations expressly reject such setoffs:

> Does the employee pay interest when he or she makes up missed contributions or elective deferrals?
>
> No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

20 C.F.R. 1002.263. Charging servicemembers for the time value of their money is effectively charging them interest for holding onto their money while they could not make contributions during their military service. *See, e.g.*, *SEC v. Barry*, 146 F.4th 1242, 1263 (9th Cir. 2025) (explaining that interest serves the purpose of recognizing the time value of money, which is "the concept that money is worth more today than the same nominal amount in the future because that money could be put to use by its owner in the meantime").

3. As stated at oral argument, there are several examples where USERRA's protections arguably place servicemembers in a slightly better position than non-servicemembers. *See, e.g.*, 38 U.S.C. 4314 (reemployment by the Federal Government), 4316(c) (protection from discharge except for cause), 4317 (health plan coverage while on leave); 5 C.F.R. 353.110 (OPM placement assistance for federal employees). But the Supreme Court has dismissed concerns that protections under USERRA's predecessor statute "amount[] to preferential treatment" for reemployed servicemembers. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 561 n.12 (1981). "[T]his sort of treatment, clearly intended by the statute and its legislative history," the Court has explained, "is better understood as protection against discrimination that would not have occurred were it not for reserve obligations, than as preferential treatment accorded solely because of reserve status." *Ibid.*; *see also United States v. Guam*, No. 1:21-cv-00022, 2023 WL 3727475, at *10 (D. Guam May 30, 2023) ("[T]hat the Guam leave sharing program may give military servicemember government employees greater or additional benefits does not foreclose a violation merely due to asymmetry, especially when § 4318(a)(2)(A) expressly requires that those reemployed not be

treated as having breaks in service due to their period of active duty."). Any time value of money "benefit" that servicemembers receive here is no different.

4. Because USERRA and its implementing regulations do not authorize a setoff, no "appropriate method of calculation of the setoff" exists. The regulations explicitly prohibit any action that would equate to an "employee [having to] pay interest when he or she makes up missed contributions or elective deferrals." 20 C.F.R. 1002.263.

CONCLUSION

USERRA affords servicemembers a time-limited opportunity to make up pension contributions upon reemployment. It does not permit employers to setoff the contribution amounts to account for any time value of money benefit that servicemembers may incidentally receive as a result, and the Court should not impose such a setoff.

Respectfully submitted,

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Date: March 23, 2026