No. _____

In The
Supreme Court of the United States

MAJOR GENERAL THOMAS P. HARWOOD, III,

Petitioner,

v.

AMERICAN AIRLINES, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does 38 U.S.C. § 4312, consistent with USERRA's literal language, entitle a disabled service member, who meets all the conditions specified in § 4312, to prompt reemployment in the escalator position he or she would have attained but for uniformed service and help to become qualified to perform the duties of his or her escalator position at no cost to the service member, OR can the employer determine, prior to reemployment, that the service member is not qualified and therefore not entitled to the escalator position he or she would have attained but for uniformed service, not entitled to any help to become qualified, and that the disabled service member must pay the expenses to become qualified?

II. Where an employer fails to place the returning service member into the escalator position, does 38 U.S.C. § 4313 require specificity in a job offer, as held by several circuits, or does an employer comply with USERRA where it provides a vague offer, as held by the Fourth Circuit?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Major General Thomas P. Harwood, III ("Harwood") who was plaintiff in the district court and plaintiff-appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Harwood is an individual.

STATEMENT OF RELATED CASES

The only pending case between the parties other than the case at bar is *Scanlon v. American Airlines*, Case No: 2:18-cv-04040, pending in Eastern District of Pennsylvania, of which Harwood is a class member and not a class representative.

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The August 9, 2017 unreported opinion of the United States District Court for the Eastern District of Virginia ("District Court") addressing American Airlines' Motion to Dismiss is reproduced at Pet. App. 98a (2017 WL 11318161). The May 23, 2018 opinion of the District Court addressing the parties' cross motions for summary judgment is reproduced at Pet. App. 86a (2018 WL 2375692). The August 20, 2018 opinion of the District Court addressing Harwood's Motion for Reconsideration is reproduced at Pet. App. 75a (2018 WL 8803959).

The July 6, 2020 reported opinion of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirming in part, vacating in part and remanding is reproduced at Pet. App. 37a (963 F.3d 408) ("*Harwood I*").[1] The October 6, 2020 remand opinion of the District Court is reproduced at Pet. App. 81a (2020 WL 6580394).

The June 17, 2022 final order of the Fourth Circuit is reproduced at Pet. App. 3a. (37 F.4th 954) ("*Harwood II*").[2] The July 18, 2022 denial of rehearing and rehearing *en banc* of the Fourth Circuit is reproduced at Pet. App. 124a.

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[1] Citations to the Joint Appendix of Harwood's first appeal to the Fourth Circuit appear throughout as J.A.1.

[2] Citations to the Joint Appendix of Harwood's second appeal to the Fourth Circuit appear throughout as J.A.2.

STATEMENT OF JURISDICTION

The Fourth Circuit entered its final judgment on June 17, 2022. On July 18, 2022, the Fourth Circuit denied the petition for rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Harwood refers the Court to the Appendix at Pet. App. 126a-143a.

STATEMENT OF THE CASE

A. Overview

In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Congress's intent in passing USERRA was explicitly 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." 38 U.S.C. § 4301(a)(1). Even before Congress made the purpose of USERRA clear, the Court recognized the crucial importance of protecting the reemployment rights of those who serve in holding that the law "is to be liberally construed for the benefit of those who left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

General Harwood, after returning from active military service, attempted to exercise his rights to be employed into the escalator position with American

Airlines as promised by USERRA. When American Airlines refused to honor the literal requirements of USERRA, Harwood was required to initiate this litigation. While Harwood was able to prevail on some of his claims, the decision by the Fourth Circuit rewrote the requirements of 38 U.S.C. § 4312 and § 4313, and what an employer's obligations are to those returning from service to this Country. It creates a dangerous and disturbing precedent that ignores Supreme Court precedent and conflicts with how other Circuits have interpreted USERRA. If not reversed, the decision will discourage civilians from serving in the uniformed service.[3]

The decision warrants this Court's review. It is of vital importance for the Court to address this disregard for USERRA and to protect the rights of uniformed service men and women.

B. Factual History

Petitioner Harwood is a decorated member of the Air Force Reserve (Ret.) and a pilot with American Airlines ("AA").[4] Pet. App. 5a-7a. Harwood was hired by AA as an airline pilot in 1992. J.A.2 at 137; Pet. App. 100a. From June 2013 through August 2015, Harwood took a qualifying period of military leave from AA for a tour of duty to serve as the Chief of the

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[3] Lolita C. Baldor, *National Guard Struggles as Troops Leave at Faster Pace*, AP NEWS (Oct. 8, 2022), https://apnews.com/article/health-middle-east-covid-government-and-politics-987f5dbc245858f372eaeeb3edc018bd.

[4] *Major General Thomas P. Harwood III,* AIR FORCE, https://www.af.mil/About-Us/Biographies/Display/Article/108437/major-general-thomas-p-harwood-iii/ (last visited Sept. 27, 2008).

U.S. Military Training Mission to Saudi Arabia, U.S. Central Command. Pet. App. 100a. During this military service he was diagnosed with atrial fibrillation.[5] J.A.2 at 243, 247; Pet. App. 39a. On June 3, 2015, roughly two months before the end of his tour, Harwood contacted AA stating his intent to return to work as a pilot. J.A.2 at 407; Pet. App. 40a. On August 3, 2015, AA initially confirmed to Harwood that he would be employed on September 1, 2015, as a Boeing 737 Captain based out of LaGuardia Airport.[6] J.A.2 at 314.

Around August 26, 2015, Jerry Shaw, AA New York Flight Administration, advised Harwood that AA would not reemploy Harwood until Harwood possessed a valid First-Class Medical Certificate from the FAA ("Medical Certificate"). J.A.2 at 101, 185-86, 327. Harwood still requested that AA reemploy him as a pilot and allow him to use his sick leave balance of 854 hours until he could obtain a Medical Certificate. J.A.2 at 185-86, 327-28, 458. AA informed Harwood that it could not return him to work as a pilot because he was not eligible to fly without a Medical Certificate. *Id.*

Harwood informed AA that AA's policy appeared to violate USERRA; specifically, 38 U.S.C. § 4312, by adding a requirement to possess a valid Medical Certificate prior to reemployment that is not found anywhere in USERRA. J.A.2 at 330-32.

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[5] Atrial fibrillation is a common condition involving an irregular heartbeat. Pet. App. 39a.

[6] Harwood was based out of LaGuardia Airport as a pilot at the time of his deployment in June 2013. Pet. App. 40a-41a.

Despite AA having already acknowledged that Harwood had met the conditions for reemployment set out in USERRA § 4312, Pet. App. 6a, AA told Harwood that it would not reemploy him as a pilot without the Medical Certificate or a waiver. J.A.2 at 330; Pet. App. 41a-42a.

On September 1, 2015, Harwood emailed Scott Hansen, Director of Flight Operations at AA, to confirm his reemployment had begun on that date as initially agreed. J.A.2 at 202. During an exchange of multiple emails beginning that day, Hansen confirmed that Harwood had met USERRA § 4312's requirements for reemployment but that Harwood had not satisfied company policy regarding the Medical Certificate, so AA would not reemploy Harwood as a pilot.[7] J.A.1 at 275-78. Hansen stated that AA was willing to get Harwood back to work "in a reasonable time" and that the first step was to see if AA could provide reasonable accommodations for the pilot position. J.A.2 at 330. Barring that, Hansen stated, "we can explore other paths," referring to USERRA § 4313. *Id.* Hansen concluded by asking when Harwood was available for a meeting. J.A.1 at 276. Harwood retained counsel upon receiving this response.

Around this same time, Hansen affirmed that AA would extend Harwood's period of military leave

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[7] If Harwood had developed atrial fibrillation while he was an active pilot at AA and not while out on military leave, Harwood would have had full access to the 854 hours of sick leave he had accrued during his employment with AA -- this access would have extended to the time when Harwood was waiting to receive a Medical Certificate from the FAA. J.A.1 at 156-58; J.A.2 at 102-03.

until Harwood could obtain an FAA waiver, but AA declined to reemploy Harwood. J.A.2 at 330-32.

On October 1, 2015, Harwood, through counsel, advised AA in writing that he wished to be "'reemployed as quickly as possible so that he [could] gain access to his 854 hours of sick leave.'" J.A.2 at 365. He also requested that – *if he was unable to obtain* the Medical Certificate or waiver – he be reemployed in an equivalent position in Operations Safety and Compliance or Flight Operations, both of which are located in Dallas, Texas. *Id.*

On October 22, 2015 — more than six weeks after Harwood's active military service ended — AA offered to reemploy Harwood conditioned upon his return to a different ad hoc position in the Flight Technical Operations Group at the AA Flight Academy in Dallas, Texas.[8] J.A.2 at 367. The ad hoc position offer included no job description, no indication of what the work involved, nor any means of comparing it to the position of pilot other than AA's lawyer's vague statement that it would be "appropriate for his status" and pay the same as if actively flying. *Id.* AA maintained its refusal to reemploy Harwood as a pilot until he obtained the

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[8] AA's offer consisted of an email to Harwood's attorney and read as follows: "[I]f . . . Harwood does not wish to extend his military leave, [AA] will reemploy him in the Flight Technical Operations Group at the Flight Academy in [Dallas], in a position appropriate for his status. In that position, Harwood will be compensated at the same rate he would receive if actively flying. If . . . Harwood elects employment in the Flight Technical Operations Group, he can continue to seek a waiver from the FAA on his First Class Medical." J.A.2 at 367.

Medical Certificate. *Id.* AA did not offer to provide all lost wages and benefits. *Id.*

Harwood initially declined this offer, but effective January 25, 2016, Harwood accepted the ad hoc position. Pet. App. 7a. On that same day, the FAA issued Harwood an authorization for special issuance of a Medical Certificate under 14 C.F.R. § 67.401. J.A.1 at 292-94. AA advised Harwood upon learning this news that AA could return Harwood "immediately to the line." J.A.2 at 200.

C. Proceedings Below

Harwood sued AA in the District Court on April 24, 2017. The District Court granted AA's motion to dismiss as to the § 4311 discrimination claim on August 9, 2017. Pet. App. 98a, 111a, 122a-123a. After lengthy discovery, the parties filed cross motions for summary judgment in the District Court on March 9, 2018. *See* J.A.2 at 43, 213. The District Court granted summary judgment in favor of Harwood as to liability and issued a memorandum opinion on May 23, 2018. Pet. App. 86a, 96a, 97a.

After the District Court received submissions from the parties, the District Court, without holding an evidentiary hearing, awarded damages to Harwood for the period of September 1, 2015 to January 25, 2016. Pet. App. 81a, 85a.

The parties cross-appealed, and on July 6, 2020, the Fourth Circuit affirmed the District Court's holdings as to liability under §§ 4312 and 4313 of USERRA. Pet. App. 50a-54a. The Fourth Circuit remanded the case for a recalculation of damages

consistent with its opinion requesting that the District Court make factual findings as to whether the position offered to Harwood by AA's lawyer on October 22, 2015 was equivalent under USERRA. Pet. App. 50a-54a, 59a.

On September 8, 2020, the District Court ordered briefing on that issue, and the parties submitted their briefs on September 28, 2020. *See* J.A.2 at 842-43. On October 6, 2020, the District Court reduced Harwood's damages award to $28,771.41, which was the back pay from September 1, 2015 through October 22, 2015. *Id.* at 833. The District Court concluded, again without holding an evidentiary hearing, that the position offered on October 22, 2015 was equivalent in status, seniority, pay, and benefits. *Id.* Harwood appealed once more to the Fourth Circuit on the matter of whether the District Court erred in finding that the ad hoc position offered to Harwood on October 22, 2015 was equivalent in status, seniority, pay, and benefits as required under USERRA. J.A.2 at 836.

On June 17, 2022, the Fourth Circuit affirmed the District Court's decision, finding that the position offered to Harwood on October 22, 2015 was equivalent as required under USERRA and that damages were properly calculated on remand. Pet. App. 10a–13a, 18a.

Harwood requested a panel rehearing and rehearing *en banc* of this decision rendered by the panel of the Fourth Circuit. The Fourth Circuit denied Harwood's petition on July 18, 2022. Pet. App. 124a–125a.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The Fourth Circuit's disregard for USERRA's purpose deeply impacts active-duty service members and reservists who desire to return to their civilian employment after risking their lives for the safety of our nation. Today, there are roughly 1.195 million active-duty service members and over 770,000 reservists across the six branches of the U.S. military.[9] As of June 30, 2022, there are 329,479 Americans actively serving in the U.S. Air Force and Space Force.[10] These statistics exhibit a sizable military population whose service members, from across the nation, pause their civilian lives to serve our country, trusting that USERRA will protect them when they return. When our service members fight for this country, they fight for the *entire* country. Their promised reemployment rights should not be defined by their zip codes or judicial circuits; they should be uniform across the country. This case presents a sound vehicle for this Court to ensure uniformity—and with it, peace of mind for those brave enough to serve.

Since its inception following the September 2001 terrorist attacks, the ongoing War on Terror has led many service members, like Harwood, to leave their family, friends, and civilian careers behind to

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[9] Zoe Manzanetti, *2021 Military Active-Duty Personnel, Civilians by State*, GOVERNING (Feb. 1, 2022), https://bit.ly/3TF6Qex.

[10] Air Force Demographics, AIR FORCE'S PERS. CTR. (June 30, 2022), https://bit.ly/3BgUGkG.

join the military. These periods of military leave put emotional and financial strains on military families, as those valiant enough to serve our country "see their incomes shrink and businesses dry up."[11] Military leave from civilian jobs has put a "relatively minor" burden on employers, while military families instead bear the brunt of the strain, "feel[ing] pushed to [their] economic breaking point[s], with reactions running from cutting back on cable television to selling one of the family cars." *See* source cited *supra* note 11. This was not Congress' intent when USERRA was signed into law on October 13, 1994.

USERRA serves as a solemn obligation to service members, who voluntarily or involuntarily take military leave, that their careers will be reinstated without loss of seniority, status, or pay upon return from service. USERRA's explicit purpose is to (1) "encourage [military service] by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;" (2) "minimize the disruption to the lives of persons performing [military] service;" and (3) "to prohibit discrimination against persons because of their [military] service." 38 U.S.C. §§ 4301(a)(1)-(3). USERRA functions to "ensure reemployment to our military men and women returning from military service," irrespective of their employer's wishes.

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[11] Steven Greenhouse, *After the War: The Reservists; Balancing Their Duty to Family and Nation*, N.Y. TIMES (June 22, 2003), https://www.nytimes.com/2003/06/22/us/after-the-war-the-reservists-balancing-their-duty-to-family-and-nation.html.

United States v. Nevada, 3:09-CV-00314-LRH, 2012 WL 1517296, at *4 (D. Nev. Sept. 26, 2011).

The purpose of USERRA is unequivocal — protect "those who left private life to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285. Service members should not be required to wait for a deep circuit split to ensure their financial security. These brave men and women deserve to take military leave—as USERRA intended—without fear that employers will exploit the Fourth Circuit's outlier decision to deny benefits promised them under the law.

II. THERE IS CONFLICT AMONG COURTS AS TO THE APPROPRIATE APPLICATION OF 38 U.S.C. §§ 4312 AND 4313.

Despite having a lengthy and complex procedural history, the issue for this Court to resolve is straightforward but critically important for those who serve our country or are considering military service. Justice Kavanaugh, in a recent oral argument, highlighted the importance of USERRA protections: "We don't know what's going to be happening over the next 50 days in terms of national security and personnel. And so I think it's important to recognize that a significant component of the power to wage war successfully is having personnel who are willing to sign up, and they're not going to be willing to sign up."[12] Justice Kavanaugh further noted, "And those people need protection . . . for their jobs." *See* source cited *supra* note 12 at 88.

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[12] Transcript of Oral Argument at 89, *Torres v. Texas Dept. of Pub. Safety*, 142 S. Ct. 2455 (2022) (No. 20-603).

The issue presented here goes to the heart of the concerns Justice Kavanaugh raised. Reduced to its essence, the issue presented is whether the literal language of § 4312, as applied by the Sixth Circuit, various district courts, and the U.S. government, requires the immediate reemployment of the service person, allowing the person to immediately access their accrued employment rights and benefits. The Fourth Circuit below complicated this issue when it ignored whether there was a violation of § 4312 and instead focused on whether AA violated § 4313 by failing to promptly reemploy Harwood in an "appropriate" position.

By framing the sole issue as "simply whether the airline acted sufficiently promptly to meet its burden under § 4313 to reemploy Harwood in an appropriate position as soon as was practical under the circumstances," the Fourth Circuit rewrote the employment protection Congress provided in § 4312. Pet. App. 52a. Lest there be any doubt, the Fourth Circuit reiterated the issue as whether AA "failed to discharge its statutory duty *promptly*[,]" using language only found in § 4313. Pet. App. 53a–54a (finding no error in District Court's conclusion that AA did not "reemploy Harwood promptly in an appropriate position.").

This improper analysis stripped Harwood of the employment rights promised to him by USERRA and will harm other service members if not corrected by this Court. Had §§ 4312 and 4313 been independently applied to Harwood's case, *he would have been immediately reemployed, enabling him to access his accrued sick leave and other employment benefits*. But by commingling the requirements of

§§ 4312 and 4313, rather than analyzing whether each subsection was violated individually—as the District Court did below—the Fourth Circuit diluted the congressional purpose of § 4312 and undermined this Court's holding in *Fishgold*. *Fishgold*'s mandate is clear: a court faced with applying multiple USERRA provisions must "give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285.

This mistaken interpretation of §§ 4312 and 4313's operation circumvents *Fishgold*'s holding and conflates the distinct purposes of these crucial provisions. While § 4312 "creates an entitlement to reemployment" if its four conditions are satisfied, *Hart v. Family Dental Grp., PC*, 645 F.3d 561, 563 (2d Cir. 2011), § 4313 "protects only the [returning] service person's 'seniority, status and pay.'" *Petty v. Metro. Gov't of Nashville-Davidson Cnty.*, 538 F.3d 431, 445 (6th Cir. 2008). Though § 4312 entitles service members to the reemployment rights and benefits granted under § 4313 and the other employment benefits found in §§ 4316-4319, § 4312 also acts as the gatekeeper to further analyses. If it and § 4313 are construed to be one and the same, there is cause for confusion among the courts and service members as to what rights they are entitled. The Fourth Circuit's opinion below serves as an example of this persistent confusion rearing its head.

A. SEVERAL CIRCUIT COURTS, DISTRICT COURTS, AND THE U.S. GOVERNMENT ADHERE TO THE LITERAL LANGUAGE OF USERRA BY APPLYING §§ 4312 AND 4313 AS TWO DISTINCT SUBSECTIONS.

The Fourth Circuit rightly held that AA violated § 4313, but it ran afoul of USERRA's clear mandate by conflating the analysis of §§ 4312 and 4313 and rewriting § 4312 to contain a requirement that Congress did not include.[13] The Fourth Circuit ignored the fact that the District Court found AA violated *both* §§ 4312 and 4313. The District Court's holding—which both appropriately outlined the distinct functions of these two provisions[14] and heeded *Fishgold*'s guidance—was explicit:

> Under a holistic reading that broadly construes USERRA's protections, Section 4313 does not add a complex

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[13] 38 U.S.C. § 4302(b), when referring to USERRA, says: "This chapter supersedes any State law (including any 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 this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." In this case, the Fourth Circuit also neglected to discuss or make a determination on whether AA had violated this provision by requiring that Harwood have a Medical Certificate before reemployment.

[14] While the District Court appropriately outlined the distinct functions of the two provisions, Harwood maintains that it failed to properly apply the § 4313 analysis which would have reinstated him into his correctly-identified-escalator position of 737 Captain based out of New York on September 1, 2015, with all the rights and benefits he had when he left on June 13, 2013 and those accrued by seniority while absent.

> fifth requirement to § 4312's list, and qualification issues addressed by § 4313 never appear in § 4312(d)(1)'s exclusions. There is no doubt that American is entitled to engage in a § 4313 analysis upon learning that that General Harwood cannot fly airplanes because he lacks a first class medical certificate from the FAA. But the plain language of the statutes required American to re-employ General Harwood on September 1, 2015, even if American had not yet identified an appropriate position for him under [] § 4313.

Pet. App. 93a–94a. This analysis tracks the literal language of the statute, honors USERRA's legislative purpose, and abides by *Fishgold*'s command that courts liberally construe USERRA. 328 U.S. at 285.

The District Court below is not alone in this proper interpretation of §§ 4312 and 4313. The Sixth Circuit reversed a district court decision, pointing to its erroneous application of these two provisions. *See Petty*, 538 F.3d at 434. The Sixth Circuit explained that when a returning service member has "satisfied the only prerequisites to § 4313—those specified in § 4312," *id.* at 443, an employer is "not permitted to delay or otherwise limit [the service member's] reemployment rights in any way." *Id.* at 441 (quoting § 4302(b) and finding that "[b]y applying its return-to-work process to Petty, Metro . . . limited and withheld benefits to which Petty was entitled under USERRA."). The Sixth Circuit emphasized that once § 4312 is satisfied, any "attempt to impose additional

prerequisites" is "wholly impermissible." *Id.* at 444 (citing 38 U.S.C. § 4302(b)). This analysis correctly construes §§ 4312 and 4313 as separate provisions ensuring distinct rights to returning service members and properly recognizes that § 4313's mention of "qualifications" has no place in § 4312's analysis.

Numerous district courts have reached the same conclusion. *See Nevada*, 2012 WL 1517296, at *8, 12 (holding that "qualifications are relevant only in determining the appropriate *position* of reemployment under § 4313, not the existence of the right to reemployment generally," and recognizing that any argument to contrary "fails to appreciate the distinct operations of §§ 4312 and 4313"); *Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637, 645 (M.D. Tenn. 2012) (holding that "qualifications . . . cannot be taken into account before reemployment," and are only considered after returning service member has been reemployed). Indeed, the U.S. government explicitly embraced this view in its *Nevada* brief: "The 'plain language' of [§ 4312] 'creates an unqualified right to reemployment to those who satisfy the service duration and notice requirements . . . subject only to the defenses enumerated in § 4312, i.e. reemployment is unreasonable, impossible or creates an undue hardship.'"[15]

Simply put, the Sixth Circuit, several district courts, and the U.S. government all recognize the discrete purposes of §§ 4312 and 4313—namely, that § 4312 operates independently from § 4313's

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[15] Mem. in Supp. of the United States' Mot. for Partial Summ. J. at 17, *Nevada*, 2012 WL 1517296 (No. 83-2) (quoting *Jordan v. Air Prods. & Chems., Inc.*, 225 F. Supp. 2d 1206, 1208 (C.D. Cal. 2022)).

"qualifications" analysis and provides a separate entitlement to reemployment. The Fourth Circuit, however, supersedes § 4312(d) by finding a strict qualification requirement in § 4313 despite the "reasonable efforts" language of § 4313 as defined in § 4303(10), which directly contradicts such a finding.[16] Such a finding also contradicts, or effectively erases subsection 4302(b) from USERRA.

B. THE FOURTH CIRCUIT'S IMPROPER APPLICATION OF USERRA §§ 4312 AND 4313 UNDERMINES USERRA'S CORE PURPOSE AND DIRECTLY CONTRADICTS THE COURT'S DECISION IN *FISHGOLD* WARRANTING THIS COURT'S REVIEW.

The Fourth Circuit's decision adds an additional requirement to § 4312, which Congress did not prescribe, for those service members returning from duty and seeking reemployment under USERRA. Where the District Court held that AA "failed to abide by § 4312's explicit requirement that an employee who meets § 4312's statutory requirements be reemployed[,]" Pet. App. 93a, the Fourth Circuit made no such finding. Instead, as discussed above in Section II(a), the Fourth Circuit viewed §§ 4312 and 4313 as "interconnected," which led to the impermissible addition of § 4313's "qualifications" calculus to § 4312's analysis. Pet. App. 51a; *see also* Pet. App. 52a ("[E]ligible returning servicemembers must be *promptly* reemployed an

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[16] 38 U.S.C. § 4303(10) states that efforts are bounded only by "undue hardship," not by mere inconvenience or undesirability.

[sic] in an appropriate position *for which they are qualified*.") (emphasis in original).

This interpretation may at first appear inconsequential, but it carries significant ramifications for those placing their civilian employment on hold to serve our country. The Fourth Circuit's analysis substantially weakens the protections § 4312 was intended to provide to those service members returning to their civilian employer. Instead of recognizing § 4312's "entitlement to reemployment" in its own right, *Hart*, 645 F.3d at 563, the Fourth Circuit added an additional hurdle to this entitlement: that the service member be "qualified," Pet. App. 52a–53a. This "attempt to impose additional prerequisites" to reemployment under § 4312, is, as the Sixth Circuit noted, "wholly impermissible," and cannot "serve as a basis for delaying or otherwise limiting" a returning service member's right to reemployment. *Petty*, 538 F.3d at 443-44. Moreover, the Fourth Circuit's holding runs contrary to the decisions outlined above and thereby perpetuates judicial confusion surrounding the proper application of §§ 4312 and 4313.

In Harwood's case, this flawed interpretation brought with it real-life consequences that, if left unaddressed, will directly impact other service members seeking to return to their civilian employment. Had AA followed the plain language of § 4312 as written by Congress—and, as previously noted, as applied by numerous courts—Harwood would have been reemployed on September 1, 2015, allowing him to access all his employment benefits, including his accumulated sick leave, his seniority and other benefits under his union's Collective

Bargaining Agreement, and his bumping rights arising from USERRA until he received his Medical Certificate.[17] In short, five years of litigation would have been avoided.

Far from alleviating the confusion surrounding the application of §§ 4312 and 4313, the Fourth Circuit's opinion below fails to recognize the distinct role § 4312 plays in granting—subject only to the four prerequisites found in that provision—an entitlement to reemployment for returning service members, with that entitlement "backstopped" by the § 4302(b) prohibition against "additional prerequisites" or being superseded by company policy. If USERRA's "liberal maxim" is to be "appl[ied] with full force and effect," Kathryn Piscitelli & Edward Still, *The USERRA Manual* § 1:4 (2022), to ensure returning service members "not be denied their old jobs as reprisal for their service," *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455, 2461 (2022), then the crucial role § 4312 plays in creating a strict liability entitlement to reemployment must be clearly understood and consistently applied across the country.

While Supreme Court Rule 10 notes that a circuit split may be a basis for granting certiorari, that Rule also recognizes that this is "neither controlling nor fully measuring th[is] Court's discretion." U.S. S. Ct. R. 10. Given USERRA's purpose and what we ask of those who put their lives

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[17] Harwood was owed health benefits under 38 U.S.C. § 4312(a) as soon as he met the requirements for reemployment under the statute. *See* 38 U.S.C. § 4317. Harwood remained unemployed with only part-time military reserve pay and benefits.

on the line to serve our country, we respectfully urge this Court to grant certiorari on this compelling issue and provide employers—but most importantly those who serve—much needed clarity on the purpose of § 4312. Indeed, the Fourth Circuit's application of §§ 4312 and 4313, in contrast to the proper reading of those provisions employed by numerous other courts, has "spawned the sort of confusion in the lower courts that calls for the exercise of this Court's certiorari jurisdiction." *Ford v. Kentucky*, 469 U.S. 984, 986 (1984) (Marshall, J., dissenting).

III. THE FOURTH CIRCUIT'S HOLDING THAT USERRA DOES NOT REQUIRE SPECIFICITY IN OFFERS OF REEMPLOYMENT IS INCONSISTENT WITH 38 U.S.C. § 4313 AND OTHER CIRCUIT COURTS, RESULTING IN DIMINISHED PROTECTIONS FOR SERVICE MEMBERS.

A. THE FIFTH, SIXTH, AND SEVENTH CIRCUITS REQUIRE SPECIFICITY PROTECTING SERVICE MEMBERS' RIGHTS TO REJECT REEMPLOYMENT OFFERS NOT EQUIVALENT TO THE ESCALATOR POSITION.

USERRA is a service members' rights statute, and it mandates that if a returning service member with a service-related disability cannot qualify for their escalator position after reasonable efforts by the employer, the employer must reemploy the service member in a position "equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with

reasonable efforts[18] by the employer." 38 U.S.C. § 4313(a)(3). Accordingly, USERRA's guarantee of equivalent reemployment must be construed in a manner that best protects the serviceperson's interests. "The principle of liberal construction . . . is designed to ensure that servicemembers may take full advantage of the substantive rights and protections provided by a statute." *Ziober v. BLB Res., Inc.*, 839 F.3d 814, 819–20 (9th Cir. 2016).

Like other veteran and service member statutes, § 4313(a)(3) protects service members "against receiving a job inferior to that which [they] had before entering the armed services." *Fishgold*, 328 U.S. at 284. Consistent with the language of § 4313(a)(3) and the Court's reasoning in *Fishgold*, several circuits have held that a "veteran need not accept an offer of reemployment which extends anything short of the statutory guarantees" to preserve his or her right to reemployment or his or her right to a claim under USERRA. *Stevens v. Tenn.*

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[18] The Fourth Circuit's decision below allowed AA to skip its burden of proving that it engaged in "reasonable efforts" to qualify Harwood for his escalator position. "Reasonable efforts" in USERRA means "actions, including training provided by an employer that do not place an undue hardship on the employer." 38 U.S.C. § 4303(10). As such, employers must exercise reasonable efforts up to the point of "undue hardship" to qualify returning service members for their escalator positions. "Undue hardship" is defined in 38 U.S.C. § 4303(16), explaining what lengths employers must go to in making reasonable efforts to qualify returning service members. This Court's *dicta* make it clear that USERRA "obliges an employer to restore a returning United States service member to his prior role unless doing so would cause an 'undue hardship.'" *Small v. Memphis Light, Gas & Water*, 141 S. Ct. 1227, 1228 (2021) (quoting 38 U.S.C. §§ 4303(10), 4313(a)(1)(B), (a)(2)(B)). The Fourth Circuit directly contradicts the statute in not requiring such a finding.

Valley Auth., 699 F.2d 314, 315 (6th Cir. 1983); *see also Hembree v. Georgia Power Co.*, 637 F.2d 423, 428 (5th Cir. 1981); *Ryan v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 15 F.3d 697, 699 (7th Cir. 1994).

In *Hembree*, the returning service member's escalator position was any apprentice position within the General Repair Shop. 637 F.2d at 425. Because Hembree sustained an eye injury during military service, the company reemployed him as a clerk instead. *Id.* The service member sued, arguing that the company failed to reemploy him under USERRA's precursor statute. *Id.* In response, the company argued that there were no equivalent positions in the General Repair Shop and that he should have bid for a position in the Central Meter Shop. *Id.* at 427. The Fifth Circuit rejected the company's arguments, holding that "[w]hile plaintiff could have taken this course, plaintiff was not required to accept a position that did not approximate the apprentice electrician in pay, status, and seniority. It follows that plaintiff's refusal to accept a position that did not fully comply with the statutory requirements should not be held against him." *Id.* at 427–28.

Similarly, in *Stevens*, the Sixth Circuit held that a veteran need not accept an unconditional offer of employment before challenging its equivalency to avoid loss of backpay. *Stevens*, 699 F.2d at 316. To decide otherwise, "thwarts the literal terms of the statute and demeans the value of the veteran's service to his country." *Id.* at 316; *see also Ryan,* 15 F.3d at 699 (holding that veteran did not waive her reemployment rights by refusing to accept inferior and ill-defined position created by her employer).

These circuit court holdings are in harmony with the Court's instruction in *Fishgold* that a statute that protects service members' rights must be interpreted broadly in favor of the service member. *Fishgold*, 328 U.S. at 285. Because the disability provisions of USERRA mandate that after reasonable efforts, the service member be reemployed in a position of equivalent seniority, status, and pay, the employer must assess the service member's career trajectory to offer an appropriate position. If the employer presents an inferior offer, the service member may reject it. *See Hembree*, 637 F.2d at 428; *see also* 38 U.S.C. § 4313(a)(3).

B. By Not Requiring Specificity in Offers of Reemployment, the Fourth Circuit's Decision in *Harwood II* is in Direct Conflict with the Fifth, Sixth, and Seventh Circuits.

The Fourth Circuit below deviated from the holdings of the Fifth, Sixth, and Seventh Circuits,[19] weakening protections for returning service members within its jurisdiction.

In the Seventh Circuit's *Hanna* cases, the court decided that the plaintiff should have been reinstated "with all attendant rights under the collective bargaining agreement," and refused to penalize a returning service member for leaving an inferior

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[19] The Fifth, Sixth, and Seventh Circuits require specificity in offers of reemployment. *See Hanna v. Am. Motors Corp.*, 557 F.2d 118, 122 (7th Cir. 1977); *Hanna v. Am. Motors Corp.*, 724 F.2d 1300, 1312–13 (7th Cir. 1984); *Hembree*, 637 F.2d at 427–28; *Stevens,* 699 F.2d at 316.

position. *Hanna*, 557 F.2d at 122. The Seventh Circuit followed *Fishgold* in its later *Hanna* decision, stating that a returning service member "steps back [into employment] at the precise point he would have occupied had he kept his position continuously during the war." *Hanna*, 724 F.2d at 1312–13 (quoting *Fishgold*, 328 U.S. at 284-85).

In *Hembree*, the Fifth Circuit stated that a returning disabled veteran is not obligated to accept a position that does not approximate the position which he would have had if he had not left employment in pay, status, and seniority. *Hembree*, 637 F.2d at 427–28. "It follows that plaintiff's refusal to accept a position that did not fully comply with the statutory requirements should not be held against him." *Id.*

In *Stevens*, the Sixth Circuit held that a returning service member does not need to accept an offer which includes anything less than what he is owed statutorily to retain his full right to reemployment and claims for damages. *Stevens*, 699 F.2d at 316.

All the above decisions point to the idea that there is in fact a specificity requirement in USERRA. An offer of reemployment must include all statutory rights and requirements and must be equal to the position that the service member would have held had he not left employment to serve. Moreover, a service member should not be penalized in the form of losing his right to damages if he rejects a position which does not meet the statutory requirements.

In affirming the District Court's findings as to whether the October 22 offer was an "appropriate

position" under § 4313, the Fourth Circuit penalized Harwood for refusing an inferior offer of reemployment. Pet. App. 13a. The panel reasoned that the District Court did not abuse its discretion in finding that the offer was "appropriate," despite Harwood's argument:

> that [AA]'s offer of reemployment was vague, in that it only stated that the position was appropriate for his status and would be compensated at the same rate as he would be as a pilot but failed to outline specific benefits such as those that were negotiated under the collective bargaining agreement.

Pet. App. 12a.

Because of the vagueness of AA's offer, including its lack of inclusion of a clear definition of his seniority, and definition of only one element of his status (geographic location), Harwood should not be penalized for refusing the offer.[20] J.A.2 at 367. However, the Fourth Circuit reasoned that "USERRA does not have a *specificity requirement and, more notably, neither Harwood nor his counsel sought*

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[20] Congress made its intent clear that "a veteran or reservist does not waive his or her rights under [USERRA] by refusing an offer of reemployment which extends anything less than full statutory guarantees, including proper seniority, position, pay, and lost wages and benefits." H.R. Rep. No. 103-65, pt. 1, at *39 (1993) (citing *Hanna*, 724 F.2d at 1312–13 and *Stevens*, 699 F.2d at 316). Additionally, the employer has "the duty to disclose all positions that the veteran may be qualified to perform," USERRA, 70 FR 75246-01, whereas an employee has no obligation to accept an offer that is not comparable to the escalator position. *See Ryan*, 15 F.3d at 698–99.

further specifics about the position prior to rejecting it. We will not now hold American Airlines accountable for their silence." Pet. App. 12a. (emphasis supplied).

The Fourth Circuit's holding requires this Court's review because it strips a service member desiring to return to the workforce – specifically one who sustains an injury or whose medical condition is aggravated during military service – of the rights Congress promised in USERRA. The consequence of the Fourth Circuit's holding is contrary to the solemn promise our government made to service members through USERRA. Under the Fourth Circuit's analysis, an injured service member, who is not concurrently able to qualify for his escalator position, must accept *any* offer of *any* position despite the vagueness of the offer and without any evidence of any attempt by the employer to protect his seniority and status.

The Fourth Circuit encourages employers to issue vague offers, as it granted AA a presumption of equivalence though AA only asserted two out of three statutory criteria (equal status and pay), without providing any support for those claims. The Court has already recognized that when interpreting statutes dealing with service members' reemployment rights, employers must be specific, and employers do not comply by using misleading labels and definitions. *See Accardi v. Pennsylvania R. Co.*, 383 U.S. 225, 229 (1966). Employers in the Fourth Circuit should not be empowered to violate USERRA and then toll their liability with an offer of work, halfway across the country, consisting of little more than an office location and newly contrived title.

The Fifth, Sixth, and Seventh Circuits emphasize the importance of specificity in the reemployment offer by protecting service members' statutory right to reject inferior positions.[21] As discussed above, not only did the Fourth Circuit affirm the District Court's meager analysis as to the appropriateness of the offer,[22] but it also held that § 4313 contains no specificity requirement, directly conflicting with the purpose of USERRA and the holdings of other circuit courts.

This is a split from the broad protections other circuits and the Court have supported in their decisions protecting service members' reemployment rights.

The employer is the party who defines the job. *See* USERRA, 70 Fed. Reg. 75246-01 ("[B]ecause the employer has greater knowledge of the various positions and their requirements in the organization, the burden is appropriately placed on the employer" to disclose reemployment positions to which the employee is entitled). The burden should not be on the service member to ask for more information when the employer, who creates the position, is the master of the offer. In fact, it "demeans the veteran's service" to make them negotiate for statutory rights, particularly

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[21] *See supra* n.19.

[22] The District Court, without explaining, held that AA offered an appropriate position, equivalent to the "pay and benefits that [Harwood] received as a pilot, plus equal status within the organization." Pet. App. 32a-34a. The District Court relied heavily on the fact that, before remanding the issue, the Fourth Circuit referred to the offered position as "appropriate." Pet. App. 33a.

in this case, while the service member is still unlawfully unemployed. *Stevens*, 699 F.2d at 316.

Where an employer is required to "assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed" it does not follow that an undefined offer of reemployment could be sufficient. 20 C.F.R. § 1002.194. If the employer cannot describe the position because it lacks information at the time of the offer, the offered position is not equivalent. The details of the offer must be disclosed to facilitate its acceptance. Otherwise, the position is a label without meaning.

Moreover, where "no firm and definite offer was ever made either in writing or orally, there is nothing for the petitioner to accept or refuse." *See Travis v. Schwartz Mfg. Co.*, 216 F.2d 448, 455 (7th Cir. 1954). An offer that leaves out multiple necessary details can hardly be considered "firm" or "definite."

Because of the Fourth Circuit's deviation from the precedents established in the Fifth, Sixth, and Seventh Circuits and the Supreme Court, returning service members, who were injured while they served, seeking to return to their civilian jobs, lack an important right within the Fourth Circuit that they enjoy outside of its jurisdiction. This Court should grant certiorari to resolve this conflict in the circuits, and to ensure that service members' reemployment rights, as promised in USERRA, are always protected.

C. THE FOURTH CIRCUIT'S DECISION IN *HARWOOD II ALSO* CONFLICTS WITH SECOND, EIGHTH, AND FEDERAL CIRCUIT PRECEDENT CONCERNING WHAT POSITION IS APPROPRIATE UNDER THE ESCALATOR PRINCIPLE'S "LIKE SENIORITY, STATUS, AND PAY" REQUIREMENT WITH REGARD TO STATUS AND SENIORITY

Upon reemployment of a disabled returning service member, the employer must determine the service member's escalator position. When analyzing the status of the correct escalator position, the Second, Eighth, and Federal Circuits held that in accordance with 20 C.F.R. § 1002.194, an assessment of an employee's career trajectory including "what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he . . . had remained continuously employed" is required. *See Serricchio v. Wachovia Securities LLC*, 658 F.3d 169, 182 (2d Cir. 2011); *Milhauser v. Minco Prod. Inc.*, 701 F.3d 268, 272 (8th Cir. 2012); *see also Nichols v. Dep't of Veterans Affs.*, 11 F.3d 160, 163 (Fed. Cir. 1993). The Fourth Circuit deviated from those holdings by refusing to analyze what Harwood's career trajectory would have been in enforcing the vague October 22 job offer from AA as an appropriate equivalent position. Pet. App. 10a-13a.

Further, an analysis of the offered responsibilities and duties is also essential. *Nichols*, 11 F.3d at 163 (holding that where returning service member was previously employed in position that

"had clear responsibilities, management duties, and the necessary authority to carry out those duties; a subsequent position must carry with it like responsibility, duties and authority if it is to be of like status and thus meet the requirements of the statute."). A position with "nebulously defined" duties is simply insufficient. *Id.*

The returning service member's employment trajectory must be analyzed with respect to what job they would have held and "the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he . . . had remained continuously employed." *See* 20 C.F.R. § 1002.194; *Serricchio*, 658 F.3d at 182; *Milhauser*, 701 F.3d at 272. After that analysis has been performed and a job has been provided, offered to, or accepted by the returning service member, that job must still have properly defined duties. *Nichols*, 11 F.3d at 163. Furthermore, the returning service member must have the same "clearly understood responsibility and objectives" and an understanding of "the criteria by which his success [is] to be judged." *Id.* If a returning service member's new position does not give him the information that he needs to be able to perceive what success is in that position, that position is not of like status under the statute. *Id.*

The Fourth Circuit, in finding that the "nebulously defined" position offered by AA on October 22 to be of like status, created new conflict with the law of the Second, Eighth, and Federal Circuits and failed to perform the required and proper analysis under 20 C.F.R. § 1002.194.

While the Fourth Circuit's conflict with the Second, Eighth, and Federal Circuits on the "status" analysis weighs heavy, so too does it conflict with the Eighth Circuit's "seniority" analysis. Part and parcel with seniority comes such benefits that are perquisites of seniority. The Eighth Circuit utilizes this Court's "two-pronged" reasonable certainty test to determine whether a benefit of employment is a "perquisite of seniority." *Goggin*, 702 F.2d at 701 (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980) and *Ala. Power Co. v. Davis*, 431 U.S. 581 (1977)).

The Eighth Circuit's two-pronged test includes (i) a finding of "reasonable certainty that the benefit would have accrued if the employee had not gone into military service;" and (ii) "the nature of the benefit must be a reward for length of service rather than a form of short-term compensation for services rendered." *Id.* (citing *Coffy*, 447 U.S. at 197-98 and *Alber v. Norfolk & W. Ry. Co.*, 654 F.2d 1271, 1276 (8th Cir. 1981)).

Seniority is defined under 38 U.S.C. § 4303(12) as "longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment." By that definition, it becomes necessary to use the Eighth Circuit's two-pronged test to decide whether specific benefits provided by an employer in a job offer to a returning service member are perquisites of seniority.

Without such an analysis, the Fourth Circuit determined below that, solely because Harwood might receive the "same pay and benefits that [he] received as a pilot" in a position which AA alleged held "equal status" within the organization, such

position was the correct equivalent position. Pet. App. 12a-13a. The statute established that a position offered to a returning service member must be equal in seniority, pay, and status, but the Fourth Circuit found that specific benefits were not necessary to make a decision on the position's equivalence. *Id.*

Without specific benefits being included in the job offer, including those which Harwood was owed under his union's Collective Bargaining Agreement made prior to his military leave, it was impossible for Harwood to know with reasonable certainty whether this October 22 offer was the correct escalator position with the correct level of seniority. Since seniority at AA includes benefits which are perquisites of seniority, Harwood required specifics to accept such a position. In the same vein, the Fourth Circuit has weakened returning service members' rights and protections by not requiring that the nebulous benefits offered were those to which Harwood would have been entitled with "reasonable certainty."

The Fourth and Eighth Circuits have previously held that "a transfer from one position to another was a denial of a 'benefit of employment' under USERRA." *See Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005) (citing *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 312 (4th Cir. 2001)). Under this precedent, an employer may be liable for a USERRA violation if a returning service member is transferred from a position with certain benefits to a position with uncertain and potentially lesser benefits. The Fourth Circuit not only fails to apply its own precedent, it creates new conflict with that of the Eighth Circuit in finding that a position with uncertain benefits is equal in seniority, status,

and pay, to the proper escalator position of 737 Captain based out of New York.

This Court should grant certiorari to resolve this conflict and ensure that service members' rights to reemployment and their benefits of employment, as promised in USERRA, are protected regardless of where they reside in the Country.

D. THE FOURTH CIRCUIT'S PRESUMPTION OF EQUIVALENCE BETWEEN JOBS RUNS COUNTER TO THE FIFTH CIRCUIT'S REJECTION OF SUCH A PRESUMPTION.

The Fifth Circuit rejects the existence of a presumption of equivalence between positions which the Fourth Circuit has read into the statute and created with its ruling. In *Hembree*, the Fifth Circuit required proof from the employer that a position was approximately accurate to that which he would have had if he never left to serve. 637 F.2d at 427, n.3:

> If a company has two positions that approximate the position to which a disabled veteran would be entitled but for his disability, the differences in the positions might be so de minimis as to allow the company to place the returning veteran in either position. But such is not the case here, for the . . . position offered plaintiff upon his return did not approximate the . . . position to which plaintiff would have been entitled but for his disability.

Id. A liberal construction of USERRA requires proof that a position offered to a returning serviceman approximates to that which the returning serviceman

"would have been entitled but for his disability." *See id.*; *see also Fishgold*, 328 U.S. at 282.

Under the Fourth Circuit's ruling, an employer may comply with USERRA by offering a position which only identifies the department and office location and by asserting equivalent status and pay, without evidence. The Fourth Circuit weakens returning service members' rights by not requiring employers to approximate accurately, with evidence, the appropriate escalator position. This Court should grant certiorari on this issue to provide clarity and guidance on whether a presumption of equivalence based on an employer's representations creates an equivalence with the position to which the returning service member would have been entitled but for his disability.

When a statute is largely construed in favor of the service member across the board, the Fourth Circuit's holding is an outlier and is a dangerous omission of the relevant legal considerations.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit, provide clarity as to the proper application of USERRA §§ 4312 and 4313, and remand. Additionally, because this case presents an extremely important issue of interpretation of USERRA guaranteeing our service members re-employment, this Court should invite the Solicitor General to file a brief in this matter expressing the position of the United States.

Respectfully submitted,

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