No._____

In the Supreme Court of the United States

MICHAEL G. FARIS,
Petitioner

v.

UNITED STATES AIR FORCE,
Respondent

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

PETITION FOR WRIT OF CERTORARI

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I. Questions Presented

1. Are federal employees considered a "person" for the purposes of USERRA and thereby entitled to the Rights and Benefits guaranteed to "any person" by Chapter 43 of Title 38 U.S. Code.
2. What are the characteristics of a leave of absence that may be considered in determining "comparability" between a leave of absence for service to the uniformed services and other leaves of absence, particularly for determination of benefits (and employee costs of benefits) that should be provided?
3. Did Congress mean what they said, through plain language, in 38 U.S.C. § 4318(a)(1), that a right provided under any Federal law governing pension benefits for governmental employees shall be determined by that section (unless precluded by 38 U.S.C. § 4302(a) because the other law provides greater rights or benefits)?
4. Are all periods of uniformed service while in a status included in the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) eligible for the pension rights and benefits under USERRA?
5. Should a Court of Appeals be authorized to reframe a contention in the public opinion in a manner that conceals the actual complaint and the law on which a contention is based?
6. Where does the burden of proof lie in a USERRA case brought forward against a federal government agency under 38 U.S.C. § 4312-4318?

II. Parties and Related Cases

All parties are listed in the caption of the case. There are no known proceedings in another state or federal court directly related to this case.

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V. Opinions Below

The decision by the Administrative Judge (AJ) from the Merit System Protection Board (MSPB) denying relief on February 1, 2022 is cited as "Faris v. Air Force (MSPB, 1 Feb 2022)". That decision is attached at Appendix ("App.") 1-20. The Court of Appeals for the Federal Circuit (CAFC) decision denying the appeal on the merits is cited as "Faris v. Air Force (CAFC, 22 Sep 2022)". The CAFC decision is attached at App. 21-29. The CAFC denial of a combined petition for rehearing and rehearing en banc is cited as "Faris CAFC Rehearing Denial (9 Nov 2022)". The denial of rehearing is attached at App. 30-31.

VI. Jurisdiction

The CAFC's decision for my appeal in Faris v. Air Force (CAFC, 22 Sep 2022) was entered on September 22, 2022 (App. 21). I timely requested a combined petition for rehearing and rehearing en banc, which was denied on both accounts on November 9, 2022 (App. 31). The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1254(1). In accordance with Rule 13.3 of the *Rules of the Supreme Court of the United States,* effective January 1, 2023 ("S. Ct. Rules") this petition for a writ of certiorari is timely filed, within 90 days, from the date of the denial of rehearing from CAFC.

VII. Statutory and Regulatory Provisions Involved

In accordance with S. Ct. Rule 14(f), only a list of references is provided in this certiorari due to the length of the citations. Full citations are attached at App. 32-40. All references are included in the table of authorities.

VIII. Statement of the Case

A. Issues of Concern

(1) The Air Force withholds pension credit (also referred to as "service credit") under the Federal Employee Retirement System (FERS) from civilian employees who were carried in a leave of absence without pay status for performance of uniformed service unless a "military service deposit" is paid, regardless of the duration of the period of uniformed service. (The leave of absence status may be referred to as "Absent-US" or "LWOP-US"). Meanwhile, employees carried in comparable leaves of absence without pay for reasons other than uniformed service receive service credit for up to 6 months aggregate in any calendar year and do not have to pay a service deposit for receipt of that pension credit[1]. Specifically, the Air Force required me to pay a "service deposit" in the amount of approximately $1,027 to receive pension credit for 14 distinct periods of uniformed service which ranged from 4 days to approximately 4 months in duration, intermittently during the timeframe of April 24, 2016 through March 12, 2020 (App. 94-97)[2].

(2) The Air Force disallows civilian pension credit for multiple types of uniformed service included in the definition of "service to the uniformed

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[1] The factuality of this statement was confirmed by the Air Force, the AJ from the MSPB, and by the CAFC (App. 6, n.3; 26)

[2] On the Defense Finance and Account Service (DFAS) Military Deposit Information sheets, interest accrual dates ("IAD") are 3 years from the date of return to civilian employment from the period of uniformed service; thus to determine the corresponding return date to civilian service, subtract 3 years from the IAD (App. 94-97).

services" at 38 U.S.C. § 4303(13), even for those periods of service that occur while employed with the Air Force. The Air Force does not even allow employees the opportunity to make a service deposit for these periods of service[3]. Specifically, the Air Force disallowed me from obtaining service credit for a period of "inactive duty training" that occurred during a period of leave of absence without pay for April 4-7, 2017 (and the Air Force does not have a process in place to allow me to apply for said service credit even with intentions of making a deposit).

B. Employment and Uniformed Service Background

I initially began federal civilian employment on November 19, 2012, as a Plumber (WG-9) with the U. S. Air Force, at Elmendorf Air Force Base (AFB), Alaska. This was after I was released from honorably serving four years of enlisted Active Duty with the Regular Air Force from September 16, 2008 through September 15, 2012, as a Water and Fuel System Maintainer. I also went directly into the Air Force Reserve upon my release from Active Duty and maintained the same specialty, serving in a Reserve unit at Elmendorf AFB. I had a break in federal civilian employment starting February 9, 2013, while I was working as a Police and Fire Officer at the Ted Stephens Airport in Anchorage, Alaska. I reapplied for my previous civilian position with the Air Force due to family

[3] The reason the federal government restricts certain uniformed service from eligibility for a service deposit is due interpretation of the differences in the definition of "military service" at 5 U.S.C. § 8401(31), which is used to determine FERS creditability under 5 U.S.C. § 8411, compared to the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13), which is used to determine eligibility for benefits under USERRA, including pension benefits at 38 U.S.C. § 4318.

hardships causing conflict with my police and fire job and was reappointed as a Plumber (WG-9) in the Air Force on May 5, 2014. I was subsequently promoted to Utility System Repairer (WG-10) on October 5, 2014.

On or about May 15, 2015, I transferred from the Air Force Reserve to the Alaska Air National Guard due to a Congressional decision to shut-down my Reserve unit. Shortly after joining the Air National Guard, I was selected to commission as an officer. From April 24, 2016 through June 18, 2016, I went into Absent-US from my civilian employment with the Air Force. The purpose of that period of service conducted from April 24, 2016 through June 19, 2016 was to complete initial training to become a Personnel Officer in the Alaska Air National Guard. As I quickly found, the demands for my services in a uniformed status grew much greater in my new role as a commissioned officer - I went into Absent-US 13 more times[4] to perform uniformed service while a civilian employee of the Regular Air Force (App. 94-97). Meanwhile, I was selected to become an Engineering Technician (GS-11) in my civilian capacity with the Air Force, on October 14, 2018, and continued in that position, while still intermittently performing service to the uniformed services, until I transferred employment to become a Human Resources Officer as a Dual-Status Technician with the Alaska Air National Guard (GS-12) on March 29, 2020[5].

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[4] The purpose of the uniformed service was a mix of training and operational requirements, ranging from Personnel Officer School and annual training, to supporting homeland defense planning, hurricane relief, and the State and federal response to COVID-19.

[5] The focus of this case is the 14 periods of Absent-US that occurred between April 24, 2016 and March 12, 2020, and ranged anywhere from 4 days to about 4 months in duration. I was also on

C. Military Service Deposits and Attempts at Redress

I completed my first military service deposit on December 5, 2017, to garner FERS credit for my four years of pre-civil-service uniformed service and for the periods of uniformed service I performed during my break-in-service from federal employment. While researching the service deposit "requirements" published by the Air Force and the Office of Personnel Management (OPM) to make application for that deposit, I recognized several inconsistencies with the program when compared to actual requirements within the law, particularly with regard to uniformed service performed while eligible for entitlements under USERRA. The Air Force (through OPM guidance) required me to pay a service deposit to receive FERS credit for the periods of time I was in Absent-US, regardless of length, but allows up to 6 months of service credit in any calendar year for employees who are placed in an unpaid leave of absence for various other reasons without any required payment (App.3). This is clearly inconsistent with 38 U.S.C. § 4316(b)(4) which requires that employee costs of benefits not exceed the costs paid by an employee in a comparable status while on leaves of absence for reasons other than performance of uniformed service. It is also inconsistent with 38 U.S.C. § 4311(a) which prohibits discrimination for receipt of any benefit of employment based on performance of uniformed service[6]. My total leaves of absence without pay (to include leaves of

multiple periods of paid leaves of absence for uniformed service during this timeframe too, but those periods of paid leave are not of relevance here.

[6] "Rights and benefits under a pension plan" is explicitly included in the USERRA-definition of "Rights and benefits" at 38 U.S.C. § 4303(2).

absence for uniformed service) never exceeded 6 months aggregate in any calendar year, therefore, it became apparent to me that my employee cost for receipt of the pension credit should be no more than $0 for all the periods of service since that is what employees in a comparable leave status for other reasons are required to pay (App. 94-97).

The Air Force (based on OPM guidance) also prevented me from receiving pension credit for a period of inactive duty service I performed on April 4-7, 2017 because they determined inactive duty does not qualify for making a military service deposit (and as I established above they believe the only way to receive credit for periods of Absent-US is to make a deposit). It was apparent to me that this is clearly inconsistent with 38 U.S.C. § 4312(a) which requires that:

> "[Subject to stipulations that are undisputed that I met...] any person[7] whose absence from a position of employment is necessitated by reason of service to the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter".

One of the reemployment rights and benefits included in Chapter 43 of Title 38 are pensions rights and benefits, which are explicitly included in the definition of

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[7] "Person" is not defined by USERRA, but it is defined in other portions of law. 18 U.S.C. § 2510(6) specifically includes employees and agents of the federal government in that definition of "person" while 1 U.S.C. § 8 simply requires a homo sapien to be born alive to be a "person". There is no reason to believe I, as a federal employee, am not to be considered a "person" for the purposes of USERRA, and therefore entitled to all rights and benefits under USERRA.

"rights and benefits" at 38 U.S.C. § 4303(2), and provisions of those rights under federal pension plans is expressly required by 38 U.S.C § 4318 (a)[8].

Part of my duties as a Personnel Officer is to counsel members of the Reserve Component on their rights under USERRA. Because of my familiarity with USERRA, the service deposit "requirements" stated in guidance from the Air Force and OPM did not make sense as I was reading through it, so I sought clarity through multiple inquiries to my local civilian personnel office, the Air Force Personnel Center, and to OPM's retirement services office. Ultimately, my inquiries with the Air Force and OPM did not lead to any clarification or reconciliation. The Air Force generally let on that they were simply adhering to OPM guidance, but were not doing anything to challenge or change it. OPM never responded directly to my multiple attempts to address the problems within the program. The most disappointment I experienced through this whole process is knowing that at any point the Air Force could have decided to do the right thing for uniformed service members and take an active role in fixing this injustice in partnership with me; but instead they decided to take the opposing stance and became the most significant obstacle I needed to work to overcome.

Under OPM guidance if a deposit is not paid within two years of initial employment or performance of the uniformed service then the deposit will incur

[8] AS CAFC also pointed out, 38 U.S.C. § 4316(b)(6) clarifies that pension benefits are provided for under 38 U.S.C. § 4318(App. 26).

penalties in the form of interest accumulation[9]. See also App. 94-97. I avoided making additional deposits while conducting my research and inquiries until, over time, I resentfully completed additional service deposit payments, each paid off just prior to the respective two year marks of the earliest period of service covered by the deposit, as a way to avoid the interest accumulation[10].

When I became a fulltime Human Resources Officer with Alaska Air National Guard in March 2020, shortly after COVID-19 response begun to really spin up, I was responsible for bringing members on orders for the state response and briefing them on their benefits and entitlements (including on USERRA). It was during this time that I thought to myself how messed it is that so many of our reserve component members are also federal employees and thus not receiving the entitlements and service credit that they should, while putting themselves at risk to answer their Nation's call. Worse was that no one in the government with influence over personnel policy was doing anything to fix it. I began losing sleep over my convictions and it didn't take me long to decide that I am now someone in the government with the obligation to influence personnel policy, so I decided I would take it on myself to do something to fix it. The laws have already been in place

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[9] Interest bearing works a bit odd in that the interest is technically chargeable at 2 years, but interest payments aren't required until the 3-year anniversary. See IADs at App. 94-97.

[10] The CAFC addressed their concern that I "changed tack" by bringing forward a formal complaint in 2020 (App. 23). That is a false assessment of the situation – I have continually challenged the legitimacy of the service deposit program starting at the lowest levels (my local civilian personnel office, Air Force Personnel Center, and OPM's retirement website) before working my way up; I logically made the payments because it was necessary to avoid causing myself further harm through interest accrual.

since at least 1994...I just needed to get the attention of decision makers so federal government policy could be adjusted to match the laws.

On or about May 11, 2020, I filed a claim with the Department of Labor Veterans' Employment and Training Service (VETS) against the Air Force for mismanagement of pension credit for periods of uniformed service protected under USERRA. From day one, without even conducting any level of investigation to that point, the VETS investigator (Brandon Webb) determined they could not submit a finding that there was a USERRA violation because OPM has authority to promulgate regulations under USERRA and so the investigator asked me to withdrawal my claim[11] (App. 86-87). I refused to withdrawal and was eventually able to convince the investigator to look into the matter. *Id.* Although the investigator let on several times over the phone that the Air Force's approach and application of USERRA was odd and not something he would consider to be consistent with USERRA, the Air Force cited OPM guidance to support their conduct and so the VETS office made a determination that there was no violation of USERRA (App. 88). One of the two particular guidances that was cited, OPM Benefits Administration letter 95-101, says itself on the cover page that it is incomplete[12]; the other cited guidance, 5 C.F.R 842, Subpart C is outdated in that it

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[11] See 38 U.S.C. § 4331(b). Note, that as a condition of OPM's authority to promulgate regulations, Congress requires OPM regulations to be consistent with Department of Labor (DoL) "except that employees of the Federal Government may be given greater or additional rights."

[12] OPM Benefits Administration Letter (BAL) 95-101 only evaluated changes to Title 5 U.S. Code made by Public Law 103-353 (USERRA), but did not evaluate any requirements under Chapter 43 of Title 38; this is in spite of OPM mentioning in BAL 95-101 that the requirements of Chapter 43 of Title 38 are "expressly applicable to Federal retirement systems" (App. 92).

doesn't address anything specific to USERRA[13]. I submitted a rebuttal to the VETS office explaining the flaws of the Air Force rationale, and that rebuttal received no response, other than to confirm receipt. I subsequently filed two complaints with the DoL office of the Inspector General for the VETS failure to maintain integrity to meet their investigatory obligations (I felt they were just trying to evade a political quibble with OPM over who has authority to make USERRA determinations for federal employees rather than having the backbone needed to supporting service members in a manner we desperately need them to). The IG complaints received no response whatsoever. To date, the VETS office has not responded to any request to provide written explanation of how they arrived at their finding of no USERRA violation. They also have not responded to requests for input during these legal proceedings, even from the opposing counsel while at CAFC.

Around September of 2020, I filed a request for assistance with this matter to Senator Dan Sullivan's office. Senator Sullivan's office was finally able to get a response from OPM, which essentially said the service deposit program is in accordance with the applicable laws under Title 5, U.S. Code (confirming my consternation that OPM does not recognize the requirements of Chapter 43 of Title 38, U.S. Code, particularly requirements of 38 U.S.C. § 4316(b) and 38 U.S.C. § 4318) (App. 90-91). I requested further input, specifically an explanation to why OPM seems to believe federal government agencies do not have to meet employer

[13] The relevant portions of CFR § 842 Subpart C have not been updated since 1987, whereas USERRA was implemented in 1994.

obligations under Chapter 43 of Title 38 U.S. Code, but OPM said they considered the matter closed and Senator Sullivan's Office did not push for more information.

Around January 2021, I filed a request for assistance to Senator Lisa Murkowski's office to ask for clarification on the service credit issues. OPM responded with a link that shows methods of determining leave accrual rates for new employees and they told Senator Murkowski's office that they did all they were going to do and considered the matter closed. Senator Murkowski's office advised that I probably would not get any further without taking legal actions.

Subsequently, I requested legal representation from the Office of Special Counsel for representation before MSPB and I was denied with no explanation; I believe the denial was based solely on the VETS office finding of no USERRA violation. On May 27, 2021, I filed a pro se appeal with the Merit Systems Protection Board. At the AJ's behest I filed a supplemental claim on August 8, 2021, for a total of seven areas where the federal service deposit program is out of compliance with USERRA requirements. The AJ found 5 of those issues to have caused me no direct harm (thus he found there was no jurisdiction or no legal path for reconciliation) (App. 1-3, App. 9-12).

I filed an appeal with CAFC, authorized by 38 U.S.C. § 4324(d)(1), on two of the issues heard. For the requirement to pay a service deposit for qualifying military service, the Air Force referred to an unlawfully decided MSPB precedent[14] to

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[14] In phone discussions I revealed to the Air Force Counsel present at MSPB that this same issue was previously unlawfully decided in *Whittacre v. Office of Personnel Management*, 120 M.S.P.R. 114 (2013). It was an unlawful decision because OPM brought a USERRA claim against Whittacre

support their stance, and the AJ determined he was bound by that precedent (App. 6-7). For the issue of being disallowed service credit for inactive duty, the AJ irrationally reasoned on his own that because Public Law 103-353 (USERRA) also amended portions of Title 5 U.S. Code, specifically the definition of "military service" at 5 U.S.C. § 8401(31) and did not include inactive duty in that definition then it evinced Congress' intent to disallow pension credit for inactive duty service (App. 7-9). This determination is in spite of the explicit requirements of USERRA showing that all "service to the uniformed service" is required to be allowed for credit when conditions of USERRA apply, and OPM's own guidance at OPM BAL 95-101 showing that provisions of Chapter 43 of Title 38, U.S. Code are explicitly applicable to federal retirement systems (App. 92). Additionally, congress explicitly excepted the Thrift Savings Plan (TSP) from USERRA pension provisions (see 38 U.S.C 4318(a)(1)(B), so using the AJ's own logic, it is clear that if Congress intended to except all of FERS from 38 U.S.C. 4318 then they would have said so.

On appeal to CAFC the merits panel determined that 38 U.S.C. § 4316(b) is applicable to pensions (consistent with MSPB findings and core to the MSPB

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without standing to do so and convinced the board to use minimum provisions of USERRA to overturn a previous board decision, in Whittacre v. OPM, 118 M.S.P.R. 33 (2012), which originally granted pension benefits based on entitlements under Title 5 U.S.C. § 8411. The overturn was in opposition of the plain language of 38 U.S.C. § 4302(a) that nothing in USERRA would diminish greater rights and benefits allowed under another federal law. Particularly, the MSPB decision applied only *half* of 38 U.S.C. 4316(b)(4), as proof that employee shares of contributions could be required, but disregarded the part that limits payment to the extent required for other comparable leaves of absence to receive the same benefit.

precedent upon which the AJ made his determination)[15] (App. 26-27). CAFC determined, however, the pertintent question at hand in my first issue (having to pay a service deposit to receive any pension credit for a leave of absence without pay for uniformed service) is whether my leaves of absence without pay for uniformed service are "comparable" to the leaves of absence that receive pension credit without a deposit (App. 27). In contradiction to the plain language of the statutes, regulations, and other court decisions (including one of their own precedents) CAFC ultimately determined that leaves of absence without pay for uniformed service are not comparable to other leaves of absence without pay because uniformed service is authorized service credit in excess of 6 months in any calendar year by paying the deposit, "a distinction favoring members of the military". *Id.* See also Infra. 23.

In regard to the second issue (being denied the opportunity to receive service credit for the period of inactive duty performed between April 4-7 2017), CAFC denied my appeal because 5 U.S.C. § 8411 does not specifically authorize pension credit for inactive duty (based on definitions from 5 U.S.C. § 8401(31) and 10 U.S.C. § 101(d) which are used to determine creditable "military service" under Title 5, U.S. Code) (App. 28-29). In the written opinion CAFC reframed the issue in way that makes me question their integrity: specifically, CAFC made it seem as though I was looking to supplant the term "military service" from 5 U.S.C. § 8401(31) by using the term "service to the uniformed service" from 38 U.S.C. § 4303(13) to apply

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[15] 38 U.S.C. 4316(b) applies to "benefits not determined by seniority". 5 C.F.R. 353.107 lists benefits determined by seniority and pension is not included. It has not been disputed that 38 U.S.C. 4316(b) applies; the contention rests on the proper application of 38 U.S.C. 4316(b)(4) specifically.

to provisions of 5 U.S.C. § 8411 (App. 28). CAFC completely disregarded the fact that I was claiming that an additional set of pension rights and benefits are guaranteed by USERRA through 38 U.S.C. § 4312(a), § 4316(b) and § 4318(a), and those rights and benefits are based on the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) (App. 65-68). It was clearly stated in my arguments that I held that 38 U.S.C. § 4318 is meant to be the primary approach for determining pension benefits following uniformed service covered by USERRA, while the changes to Title 5 U.S. Code show additional constraints on federal government agencies that are meant to be more beneficial to government employees, not more restrictive than USERRA (App.67-69).

IX. Reasons for Granting Certorari

A. CAFC Was Misleading In Their Public Opinion

I actually agree with the conclusion of CAFC based purely on the logic presented in their opinion of my second claim (my right to pension benefits for a period of inactive duty training) where they said:

> "*This set of statutory provisions* did not entitle Mr. Faris to be offered the opportunity to pay a deposit and receive service credit for his inactive-duty service" [emphasis added] (App. 29).

What I do disagree with is that, in their opinion, CAFC did not actually assess the set of statutory provisions on which my claim was based (App 28-29). I made a claim that 38 U.S.C. § 4312(a), § 4316(b)(6) & § 4318 explicitly requires pension benefit coverage (whether by a deposit or no deposit) for periods of inactive

duty training based on the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) (App. 65-68). I actually argued that there should be no deposit for the same reasons listed in my first issue (for being comparable to leaves that receive service credit without a deposit) and because I would have received the credit by being in a regular leave of absence status if I didn't demand protection of my seniority rights for that period of time. *Id.* However, I also argued that 38 U.S.C. 4318(b)(2) does in fact create a path to allow me to make a deposit even if the pension benefit actually was dependent upon the making of contributions. *Id.*

CAFC intentionally concealed the basis of my claim from the public to write their opinion in a way that still sounded rational for them to rule against me by making it sound like my claim was that the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) should be used in place of the term "military service" at 5 U.S.C. 8401(31) throughout 5 U.S.C. § 8411 (App 28-29). I see this as a serious integrity issue and it draws the legitimacy of the whole judicial system into question. I believe this is the most significant reason this court should step in to right this injustice and make it known that intentional lapses of integrity will not be taken lightly, regardless of how insignificant the amount of damages in the original claim may seem. I don't believe it was a simple mistake or misunderstanding either: I addressed the concern in my combined request for rehearing and CAFC passed up their opportunity to provide clarity to the record.

B. The Federal Government is the Single Largest Employer of Veterans

Many reports available from government sources show that the federal government is the single largest employer of military veterans. Estimates show that while veterans account for about 5 percent of the total U.S. work force[16], veterans account for about 31 percent of the civilian work force of the federal government[17], with some federal agencies (particularly the U.S. Air Force[18]) employing a significantly larger percentage. Data is less readily available on federal employees that are currently eligible for USERRA, but input provided by the Department of Defense to the Federal Register in 2020, addressing the need to more effectively screen principal civilian employment of military reservists, suggests a similar trend[19]. The Department of Defense estimated the federal government is "principal employer" to as many as 36 percent of the total Ready Reserve. *Id.* The same Federal Reserve entry shows there were 1,020,156 members of the Ready Reserve in 2020. *Id.* With an estimated 2.1 Million federal civilian employees[20], then these numbers show that approximately 17% of the federal civilian workforce is

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[16] https://blog.dol.gov/2021/11/9/veterans-in-the-labor-force-6-stats shows veterans represented 5.6% percent of the total U.S. workforce in 2020.

[17] Interagency Veterans Advisory Council, *State of Veterans in the Federal Workforce, 2021 Annual Report* (November 11, 2021).

[18] The Office of Personnel Management, *Employment of Veterans in the Federal Executive Branch Fiscal Year 2018* (November 2020) (p. 3) shows that in 2018, 56 percent of all Air Force civilian employees were military veterans.

[19] https://www.federalregister.gov/documents/2020/12/28/2020-28646/screening-the-ready-reserve

[20] Interagency Veterans Advisory Council, *State of Veterans in the Federal Workforce, 2021 Annual Report* (November 11, 2021) (p. 27) shows total federal employees between FY 2014 to FY2018 ranged from 1.99 Million to 2.04 million; while my estimate allows for growth it may actually be high and under represent those federal civilian employees truly eligible for USERRA.

potentially USERRA-eligible service members (which far exceeds the rate of all categories of veterans in other forms of employment). As the largest employer of veterans and USERRA-eligible employees, Congress made their intent very clear when they enacted USERRA that the federal government "should be a model employer in carrying out the provisions of [USERRA]" (38 U.S.C. § 4301(b)). Congress also specified that regulations providing federal employees benefits under USERRA should be consistent or greater than regulations for state and private sector employees (38 U.S.C. § 4331(b)). Yet, federal government agencies are simply choosing to disregard provisions of USERRA related to pensions, even though OPM admitted that pension provisions of USERRA are "expressly applicable to federal retirement systems" (App. 92).

C. Improper Application of Other Laws in Relation to USERRA

MSPB and CAFC are allowing federal agencies to disregard the requirements of USERRA, and they even say it is justified, based on a flawed understanding of the preexisting retirement laws and the relationship of USERRA to other laws, regulations, and policies (App. 4-9, 23-29). In the decisions from MSPB and CAFC they point to 5 U.S.C. § 8411(c)(1)(B) as proof of a requirement for a deposit for an employee to receive pension credit for periods of "military service" (App. 4-6, 26). They point to the same provisions as proof of a lack of eligibility to receive pension credit for other statuses included in the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) that are excluded from the definition of "military service" at 5 U.S.C. § 8401(31). (App. 7-9, 28-29).

The plain text contained in subparagraphs (c) and (d) of 5 U.S.C. § 8411 shows these provisions place *constraints on the federal government* and *direct the government agencies* to allow service credit at specific times. In relevant context, the plain language of 5 U.S.C. § 8411 (c)(1)(B) is showing that an employee "shall be allowed credit for [...(2)] each period of military service [...] if a deposit is made[...]". MSPB and CAFC have taken the stance that the only way to get service credit for uniformed service is for the service to be included in the definition of "Military Service" at 5 U.S.C. § 8401(31) and for a deposit to be paid (App. 7-9, 28-29). However, the plain language of the various statutes shows that nothing about that constraint, requiring the federal government to allow credit for any period of military service if a deposit is made, conveys that it is the only method to acquire service credit (App 83-85). See 38 U.S.C. § 4318. In fact, the plain language of 5 U.S.C. § 8411(c)(1)(B) simply conveys that the government *cannot deny credit* if the member performed any period of military service and pays a deposit. Likewise, USERRA places additional constraints *on the federal government* (as an employer) through 38 U.S.C. § 4316(b), by requiring provision of the same benefits that are allowed while continuously employed and provided to others in a comparable leave of absence, with the employee cost of the benefit limited to what other employees in leave of absence are required to pay (App. 82). USERRA also places additional constraints on the federal government by requiring them to allow pension benefits for any periods of "service to the uniformed services" through 38 U.S.C. § 4312(a),

4316(b)(6) and 4318(a), based on the definition provided 38 U.S.C. § 4303(13) (App 65-69).

MSPB and CAFC pointed to the fact that Congress changed definitions through USERRA in 1994 as proof of intent to allow discriminatory practices against some periods of "service to the uniformed services" (App. 9, 28-29). Specifically, MSPB asserts that the intent of Congress is shown because they changed the definition of "military service" at 5 U.S.C. § 8401(31) so it does now include "full-time National Guard duty" when it interrupts civilian employment, but the definition of "full-time National Guard duty" at 10 U.S.C. § 101(d)(5) that Congress referred in the definition of "military service", explicitly states that inactive duty is not included in the definition of "full-time National Guard duty" (App. 9). That is poor logic as the definition Congress chose to point to simply clarifies that inactive duty is not full-time National Guard duty... it does not say that inactive duty is not eligible for the very pension credit mandated by 38 U.S.C. § 4318(a). I do not disagree with CAFC that inactive duty is not full-time National Guard duty, and as such is not creditable under the terms of 5 U.S.C. § 8411(c)(1)(B) (App. 28-29). However, nothing about 5 U.S.C. § 8411(c)(1)(B) requiring the government to allow pension credit for "any period of military service" neutralizes the additional requirements Congress levied against all employers (explicitly including the government) in 38 U.S.C. § 4318 to also provide service credit for periods of "service to the uniformed services" that occurred while covered by USERRA (App.92).

On a similar note, as CAFC noted, 38 U.S.C. § 4318(b)(2) does place a constraint on the employee that is seemingly disruptive to my claims: authorizing receipt of pension credit "contingent on or derived from employee contributions only to the extent the person makes payment to the plan" (App.26). The connotation of the statute has been distorted by federal agencies to evade their express obligations under 38 U.S.C. 4316(b) and the meaning misunderstood by MPSB and CAFC. *Id.* The fact that employees on leave without pay for reasons other than uniformed service can receive pension credit without payment of a deposit shows that the plan is not truly "contingent on or derived from" the making of contributions for at least the first 6 months while in leave of absence without pay in any calendar year (App. 23-24, 63-64). To claim that a deposit is required specifically for receipt of credit because of constraints Congress placed on the government in 5 U.S.C. § 8411(c) (to allow credit for any period of service if a deposit is made) is contradictory to the non-discrimination provisions of 38 U.S.C. § 4301(a)(3) and § 4311(a). As the largest employer of veterans and the expected model employer under USERRA, CAFC is essentially saying that it is okay for employers (in this case the government) to contradict USERRA and hold benefits guaranteed by USERRA for ransom as long as the ransom is consistent with their other non-USERRA provisions for military service, even when employees on a comparable leave for other reasons do not have to pay ransom for the same benefit (App. 27-28).

The federal agencies and lower tribunals' understanding of the relationship of USERRA to other federal laws and policies is completely backward and often

inconsistent (App. 74). CAFC notes that the rules of statutory construction require all relevant laws to be construed together and to give meaning to all words of Congress (App. 28). See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). However 38 U.S.C. § 4302(b) requires that nothing in Chapter 43 of Title 38 U.S. Code will supersede any matter that is more beneficial to the employee and 38 U.S.C. § 4331(b) makes clear that Congress's intent is for federal employees to receive consistent or greater rights and benefits than state government and private sector employees. While 38 U.S.C. § 4318(b)(2) does not supersede or diminish the federal government's obligation to provide the benefit at a cost no greater than it is provided to employees on comparable leaves of absence for reasons other than to perform "service to the uniformed services", changes to Title 5 U.S. Code were meant to provide additional or greater rights to government employees (App. 68-69). Specifically, 38 U.S.C. § 4318(b)(2) put a time limit for any required employee-contributions to be complete and limits payments to the amount that would have been paid from civilian pay if the deposit is not made; through the requirement of 38 U.S.C. § 4302(a), that nothing in Chapter 43 of Title 38 U.S. Code will nullify or diminish greater benefits allowed by other laws, 5 U.S.C. § 8411 (c) & (d) simply requires the government to still allow credit for any periods of "military service" if a deposit is paid, even after expiration of the time limits prescribed in 38 U.S.C. § 4318(b)(2) and allows the contributions to be calculated based on military pay rates earned during the period of service (see 5 U.S.C. § 8422(e)). *Id.* I do agree that, under the requirements of Chapter 43 of Title 38 U.S. Code only, however, the

government may be within their rights to withhold credit until a deposit is paid for periods of service that exceed 6 months in a calendar year, since at that point the period of service likely becomes incomparable to the leaves of absence that do receive 6 months aggregate service credit without payment of a deposit (see 20 C.F.R. 1002.149-151)[21].

D. Inconsistent Application of Precedent, Rules, and Laws

For the issue of whether service credit should be provided without the need of a deposit for periods of leave without pay for uniformed service, the Air Force and CAFC admitted that the determination depends on whether my leave of absence for uniformed service is "comparable" to leaves of absence that do receive the service credit without a deposit (App. 27). Rules for determining benefit entitlements and "comparability" are listed in Department of Labor regulations at 20 C.F.R. 1002.149-151 and the issue has been decided by various Courts of Appeals[22]. *Id.* The "comparability" factors listed by the Department of Labor are: duration of the

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[21] In my claims to MSPB and CAFC I presented consternation that the wording of 5 U.S.C. § 8411(d) allows service credit without a deposit and without time limits – specifically leaves of absence for military service are not just *any* period of military service that are covered by §8411(c), but rather set aside as "special" ("generalia specialibus non derogant") as the government shows their gratitude to military service members as their civilian employer. I am not outright abandoning this argument, and this Court is welcome to act on it, but my concern and focus at this level is on the fact that CAFC has shown great inconsistency and an illogical approach in their application of USERRA-specific requirements and misapplication of their own (and other) precedent(s) in injustly deciding my case.

[22] Among the cases *are: Tully v. Department of Justice*, 481 F.3d 1367, 1368 (Fed. Cir. 2007); *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir.1986); *Travers v. FedEx* Corp., 567 F. Supp. 3d 542 (E.D. Pa. 2021). White v. United Airlines, Inc., 416 F. Supp. 3d 736 (N.D. Ill. 2019) in which the courts determined that specific attributes of the leave determine comparability; not one precedent allows consideration of benefits provided during the leaves to determine comparability.

leave[23], purpose of the leave, and ability to choose when to take the leave (see 20 C.F.R. 1002.150(b)). After the Air Force introduced the new "comparability" argument at CAFC, I provided 3 examples of leaves of absence without pay that are comparable to my leaves of absence for uniformed service, all of which receive service credit toward pensions without the need for a deposit(App. 70, 78, 81-82). Those leaves of absences listed are: (1) leave of absence for some periods of "uniformed service" that are not "military service" while carried in regular leave without pay rather than Absent-US, or when the discharge from uniformed service is not honorable so it no longer meets the definition of "military service" to be eligible for a deposit; (2) leave of absence for civil service connected illness or injury; (3) one-year mandatorily-approved leave of absence to Air Force employees who are also spouses of military members when the Air Force employee must move with the military member to a new duty station, along with the option to extend the leave of absence for a second year. *Id.* The Air Force, MSPB, and CAFC even referenced, and CAFC claimed to base their decision on, a precedent CAFC established addressing "comparability of leave" (App. 6-7, n. 3; App. 27). The case referenced by the tribunals is *Tully v. Dep't of Justice.*, 481 F.3d 1367, 1369 (Fed. Cir. 2007). However, CAFC did not appropriately apply their own precedent from *Tully* (App. 27). In my case, CAFC focused only on the fact that as a military member, I can receive *more* than 6-months service credit in a calendar year, while other leaves of

[23] 20 C.F.R. 1002.150(b) says the duration of the leave may "be the most significant factor to compare".

absence cannot; "a distinction favoring members of the military". *Id.* This is an error on two fronts. First, CAFC was comparing benefits that are available to leaves of absence for uniformed service that are of *longer duration* than any of the leaves of absence in my claim, thus basing their decision on facts that are not pertinent to my claim and could make the leaves incomparable if my leaves were actually of longer duration (App. 94-97). Since I did not exceed 6 months total leave without pay (to include for military/uniformed service) in any calendar year or 6 months for any single period of service for the periods in question it is irrelevant that I could have received benefits unavailable to other leaves of absence if I did exceed 6 months. *Id.* Second, *Tully* specifically rebukes consideration of the benefits provided during a leave of absence in determining the "comparability" of leaves:

> "To allow differences in the available benefits to negate relief under section 4316(b)(1)(B) would undermine the effect of the statute, which is designed to remedy differences in the benefits provided for military leave and leave for other purposes" (*Tully* at 1371).

Throughout the MSPB and CAFC decisions they point to requirements on how to construe together the words of Congress (App. 9, 28). However, in their statutory construction, MSPB and CAFC did not actually consider the *explicit* words of Congress that contradict the very rationale they relied on... specifically, CAFC focused on what is not said in 5 U.S.C. § 8411 and § 8401(31), while they *blatantly ignored* explicit provisions of 38 U.S.C. § 4318(a). *Id.* 38 U.S.C. 4318(a)(1)

makes clear that all portions of 38 U.S.C. § 4318 apply to FERS because § 4318(a)(1) says that it applies to any federal employee retirement systems with the exception of the Thrift Savings Plan (TSP)...if Congress intended for FERS to be excepted from USERRA as well (specifically to adhere only to 5 U.S.C. § 8411), they would have said so (App. 27-28).

CAFC even relied on a portion of 38 U.S.C. § 4316(b)(4) as support that employees "*may be required to pay the employee cost, if any, of any funded benefits continued...*" [emphasis in original], but ignored the portion that says "to the extent other employees on furlough or leave of absence are so required" (App. 26). CAFC then says 38 U.S.C. § 4316(b)(4) is not applicable, (but only when in consideration of the portion that could benefit me) because the leaves are not comparable (App. 27). CAFC cannot have it both ways...either 38 U.S.C. 4316(b)(4) is applicable in whole, or it is not applicable at all. CAFC's determination of "non-comparability" is also in spite of the fact that I have shown that the leaves are comparable enough to get other continued benefits (specifically health benefits) at the same costs as other employees and then when the leaves become incomparable the costs of maintaining the benefits shift as well (App. 64).

The tribunals also ignored burden of proof requirements explicitly stated in MSPB Burden of Proof Rules (requiring the burden of proof to be placed on government agencies to prove they actually met their USERRA requirements). CAFC instead claims I didn't meet a burden they made up in their opinion of showing "disfavor" compared to employees in leaves of absence without pay for

other reasons (App. 27). First off, I did clearly show disfavor: I had to pay over $1,000 to receive a benefit other comparable leaves receive at no cost (App. 94-97). Second, I prepared my arguments to support exactly the elements that the rules of the tribunals show as important to the type of claim made under 38 U.S.C. § 4312-4318: MSPB rules on burden of proof specifically show that the presumption is to be in my favor while the agency is required to prove they met their USERRA obligations; as such the rules and burden of proof specifically do not require me to show disfavor (App. 101). Additionally, the only reason I had to pay a deposit is because the purpose for the leave was for performance of service to the uniformed services, which is a clear show of discrimination: that is another reason the burden of proof is on the employer, according to 38 U.S.C. § 4311(c)(1) and MSPB rules (App. 99).

X. Conclusion

This Court's intervention is crucial because my rights as a citizen and as a government employee under USERRA are being trod down by the government. The executive branch and lower levels of the judicial branch are banding together to support the government's stance and keep this major error swept under the rug. Rather than the judicial branch separating itself and taking an impartial and fair consideration of these issues, they are helping to keep the issue concealed and even reframing the issue to hide what I actually put forward as a claim (App. 28-29, Supra. 14-15). I ask that this Court restore the balance and order that comes with separation of powers; ensure the realization of the sense of Congress that the

Federal government should be a model employer under USERRA; and this Court's intent that the various laws should be construed as liberally to the benefit of the member the veteran as the various provisions allow (*Fishgold vs Sullivan Drydock and Repair Corp*, 328 US 275, 285 (1946)).

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 21, 2023.

//Signed//
MICHAEL G. FARIS
Petitioner (Pro Se)