No. _____

In The

Supreme Court of the United States

LuzMaria Arroyo,

Petitioner,

v.

Volvo Group North America, LLC, doing business as Volvo Parts North America,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals for the Seventh Circuit erred in in applying 38 U.S.C. § 4311 of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the wrong provision, rather than 38 U.S.C. § 4313, the right provision, which applies to "a person who, 'like Arroyo,' has a disability incurred in, or aggravated during" her military service, and in so doing, endorsing the lower court's decisions preventing Arroyo from offering at trial evidence of her post-traumatic stress disorder and subsequent treatment that ought to have been admitted so that Arroyo could keep her pre-deployment job – an entirely different analysis than that of the Americans with Disabilities Act ("ADA"). Instead, the lower courts relied on the ADA to trump USERRA's reemployment rights protections to the substantial prejudice of Arroyo, and every other USERRA plaintiff seeking reemployment after having been disabled in military service.

II. Whether the Court of Appeals for the Seventh Circuit erred in affirming the district court's decision that Arroyo could not perform the essential functions of her position with or without reasonable accommodation and was thus not a qualified individual with a disability under the ADA, and thereby conflated the statutory frameworks for USERRA disability with ADA disability and working an injustice for large swaths of our American populace, both veterans and the disabled.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner is LuzMaria Arroyo ("Arroyo"), is an individual residing in the state of Illinois and is the Plaintiff-Appellant below. Respondent is Volvo Group North America, LLC, doing business as Volvo Parts North America ("Volvo"), and is the Defendant-Appellee below.

RELATED PROCEEDINGS

District Court Decisions

Arroyo v. Volvo Group North America, LLC, No. 12-cv-6859, 2014 U.S. Dist. Ct. Lexis 206312 (N.D. Ill., Nov. 5, 2014).

Arroyo v. Volvo Group North America, LLC, No. 12-cv-6859, 2019 U.S. Dist. Ct. Lexis 168213, 2019 WL 4749869 (N.D. Ill., Sep. 30, 2019).

Seventh Circuit Court of Appeals Decisions

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JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its decision on February 24, 2024. *LuzMaria Arroyo v. Volvo Groups North American LLC, doing business as Volvo Parts North America*, 93 F.4th 1066, (7th Cir. 2024). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §§ 2000e *et seq.*, Title VII of the Civil Rights Act of 1964 ("Title VII")

42 U.S.C. §§ 12101 *et seq.*, Americans with Disabilities Act ("ADA")

29 U.S.C. §§ 791 *et seq.*, Rehabilitation Act of 1973 ("Rehabilitation Act")

38 U.S.C. §§ 4301 *et seq.*, Uniformed Services Employment and Reemployment Rights Act ("USERRA")

38 U.S. Code §§ 4212 et seq., Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA")

INTRODUCTION

Arroyo is a veteran of the U.S. Army with three overseas tours in combat zones, the third of which caused her chronic PTSD, and a U.S. Army reservist who was hired by Volvo in 2005. While Arroyo worked for Volvo, she was summoned to active duty with the U.S. Army Reserve three times -- in 2006, 2008, and 2009. Under USERRA, and more specifically § 38 U.S.C. § 4313, her employer was required to re-employ her after the completion of each term of military service. Congress imposed this obligation, which exists for employers above and beyond the obligations that exist pursuant to the ADA, and more specifically 42 U.S.C. § 126. USERRA requires that employers reemploy disabled veterans regardless of whether the employee remains qualified or not in the prior position. Stated differently, USERRA imposes a higher standard upon employers, which the district court and the Seventh Circuit failed to apply which is likely explained given the limited guidance, as the trial judge noted, this Court has provided on the proper application of USERRA and the ADA.

Specifically here, USERRA requires that if the employee is qualified the employer must re-employ the veteran/servicemember "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform." 38 U.S.C. § 4313(a)(2)(A). But if the employee is not qualified due to "a disability incurred in, or aggravated during, such service" the employer must first make "reasonable efforts ... to accommodate the disability" and if the employee remains unqualified the employer is required to transfer the employee into "any other position which is 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 by the employer." 38 U.S.C. § 4313(a)(3)(A).

The district court below, and the Seventh Circuit, viewed Arroyo's claims under the rubrics of the ADA and pursuant to a different provision of USERRA, § 4311(a), which proscribes differential treatment of the servicemember/employee solely on the basis of her status as a reservist/servicemember. In so doing, the lower courts erred in rejecting and failing to analyze Arroyo's disabling conditions that she suffered due to her service. This is reversible error, and must be corrected to effect Congress's intent, and to protect Arroyo. This Court should reverse and remand, and instruct the lower court to address the application of 38 U.S.C. § 4313(a) to the facts Arroyo has presented.

SUMMARY OF THE ARGUMENT

The trial judge totally overlooked the plain language of USERRA, § 4302 which states, in relevant part, this chapter supersedes any … other matter that reduces, limits, or eliminates in any manner any right or benefit of the chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit. The trial judge erred in elevating the ADA over USERRA's protections.

More specifically, where two statutes appear to overlap, USERRA specifically states that USERRA remains prominent and, like here, the ADA remains subordinate. USERRA states that if another statute, like the ADA, grants less rights or benefits, then USERRA must be applied first and USERRA's terms cannot be diminished, by plain language and case law interpretation.

For service members who incur disabilities during their military service, USERRA requires employers to make reasonable efforts to accommodate those disabilities and to rehire the servicemembers in the position they would have held but for their military service or in a position of equivalent "seniority, status, and pay." 38 U.S.C. § 4313(a)(3); *see also* 20 C.F.R. § 1002.225. The Seventh Circuit erred by relying on the wrong statutory subpart to reach the incorrect and unjust result: 38 U.S.C. § 4311 is an employment anti-discrimination statute and has nothing to do with reemploying a former employee disabled by military service.

By contrast, 38 U.S.C. § 4313 applies to "a person who has a disability incurred in, or aggravated during" her military service, and in so doing. The statute requires an employer to do three things when an employee returning from service demonstrates a military-related disability: (1) return that employee to the position she occupied prior to deployment, a.k.a. the "escalator principle"; (2) provide an equivalent position for which the returning employee is qualified notwithstanding the service-connected injury; or (3) place her in the nearest approximation in terms of her original, pre-deployment position. § 4313(a)(3).

The district judge "read out" § 4313(a)(3) and instead, erroneously relied on § 4311, which prohibits workplace discrimination resulting in an adverse employment action based on anti-military animus to dismiss Arroyo's $7,800,000.00 jury verdict, finding that § 4311 did not provide protections for disabilities.

The Seventh Circuit compounded the trial judge's USERRA misplacement by agreeing with the district court that Arroyo was not a qualified individual with a disability under the ADA with or without accommodation.

Further, the trial judge refused to allow Arroyo to offer evidence of her service-connected PTSD and thereby gutted her USERRA § 4313(a)(3) claim, which, had the evidence been properly admitted, would have proven that Volvo took no steps under the escalator principle, the equivalent position principle, nor the nearest approximation principle to lawfully reemploy Arroyo.

Put differently, the ADA does not mandate training for disability accommodation while the USERRA specifically requires employers to reemploy and find a suitable position, take reasonable efforts to train to accommodate the wartime disability, or assign the nearest approximation to the returning veteran.

Stated yet another way, the ADA does not require the employer to prove in the affirmative that they made the returning employee qualified, or to place them in another position with like seniority or pay. Indeed, the ADA states that if the employee cannot be accommodated, the employer has the lawful right to terminate the employee. In contrast, USERRA imposes greater obligations on the employer, and confers upon the servicemember-employee more robust protections. The employer must find the returning veteran employee any other position for which they are qualified or can become qualified. When the ADA standard is used in place of USERRA, as was the case here, the servicemember-employee is denied protections Congress created.

Moreover, the Seventh Circuit's decision in this case conflicts with this Court's decision in *Torres v. Texas Dep't of Public Safety*, 597 U.S. 580 (2022). As it turns out, Arroyo, in consultation with counsel, remarked in person, "had I sued in Texas [5th Circuit], I would have been allowed to maintain my USERRA disability claim."

In *Arroyo*, the Seventh Circuit shuttered the Federal courthouse doors to Arroyo's § 4313(a)(3) claim for

reemployment and efforts to identify a suitable post-military service position. By contrast, in *Torres*, this Court reversed and remanded re-opening the Federal courthouse doors to Torres to bring his § 4313(a)(3) claim. Arroyo should be afforded the same protections. Herein lies another reason to grant: a split between the Fifth and the Seventh Circuits on the very same question of law.

STATEMENT OF THE CASE

This Petition arises from a lawsuit filed by LuzMaria Arroyo, a U.S. Army Reservist and veteran of three overseas tours, who sued her employer, Volvo Group North America, LLC (Volvo), alleging discrimination based on her military status and her related PTSD pursuant to the Uniformed Services Employment and Re-employment Rights Act, 38 U.S.C. §§ 4301 *et seq.* ("USERRA") and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), among other statutes.

The district court initially granted Volvo summary judgment on all Ms. Arroyo's claims. In October 2015, the Seventh Circuit, however, reversed the district court's grant of summary judgment on all claims in *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278 (7th Cir. 2015). The case was remanded to the district court, and proceeded to trial on two remaining counts, USERRA and the ADA, where a jury ruled in Arroyo's favor and awarded her $7,800,000 in damages. *Id.*

After trial, however, Volvo moved for judgment as a matter of law, and the district court granted the

motion as to Arroyo's ADA claim, and ordered an entirely new trial on the remaining USERRA claim. The district court, however, had granted a motion *in limine* filed by Volvo preventing Arroyo from submitting evidence of her PTSD and treatment, concluding that such evidence was irrelevant to Arroyo's USERRA claim. A complete overlook of § 4313 which directs district judges to admit evidence of disability, something that would have happened in the Fifth Circuit, but not the Seventh Circuit.

In that second trial, which occurred in February 2022, the jury found in Volvo's favor. Arroyo appealed to the Seventh Circuit, which affirmed the verdict, finding that the district court did not abuse its discretion in concluding that Arroyo is not a qualified individual under the ADA, and in finding that the jury verdict of the first trial resulted from passion and prejudice.

The Seventh Circuit also adopted the district judge's determination not to apply § 4313(a)(3) and instead, affirmed the lower court endorsing favorably the ruling that evidence of Arroyo's PTSD diagnosis and treatment was irrelevant to the USERRA claim and likely to confuse the jury.

From the Seventh Circuit's February 2024 decision affirming the district court's decision rejecting both her ADA and USERRA claim, Arroyo respectfully submits this petition for a writ of certiorari.

ARGUMENTS

I. The Lower Courts should have Entertained Arroyo's § 4313(a)(3) Claim, Recognizing the Difference between USERRA's Predominant Requirement to Take Reasonable Efforts to Retrain a Disabled Veteran Returning to work, vis-a-vis the ADA's Relatively less robust Protections, and should have Held the Employer to the Standards Imposed by USERRA that require the Employer to Accommodate Veterans and Ensure Returning Veterans are placed in a Position in which they can Meet Duty Performance Expectations.

USERRA provides substantial protections to veterans who have sustained temporary or permanent disabilities (or aggravated existing disabilities) as a result of service-connected injuries or illnesses. USERRA's protections, in many ways, are similar to those protected under the ADA. Indeed, USERRA borrows phraseology from the ADA, and there is substantial overlap between the statutes. But USERRA goes beyond the ADA. For example, the reemployment rights USERRA provides to veterans are greater than those provided to other employees than under the ADA.

To establish a cognizable USERRA claim, Arroyo must have averred that she was subject to an adverse employment action and that her military service was a motivating factor in her termination. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011). Once established, the burden shifts to the employer to "prove that the [termination] would have been taken in the absence

of such membership." *Crews v. City of Mt. Vernon*, 567 F.3d 860, 864-65 (7th Cir. 2009). More specifically, where, like here, a returning veteran has a disability incurred during mobilization, the employer is precluded by law from terminating the disabled veteran and must follow those statutory requirements set forth in § 4313 (escalator position, retrained position, any position of equal status for which the returning veteran qualifies).

Arroyo is a U.S. Army veteran and reservist. She began working with defendant Volvo as a material handler in the Company's Chicago Parts Distribution Center (the "Distribution Center") in Joliet, Illinois, in June 2005, and remained employed there until she was fired in November 2011. There is no question that Volvo knew of Arroyo's status as a veteran and U.S. Army reservist when she was hired.

During Arroyo's tenure at Volvo, she served as an Army Reservist, and often had to take time off from Volvo to attend to her military duties, as authorized by USERRA. Also because of her military service, Arroyo suffered from PTSD, a condition she had communicated to her supervisors at Volvo, which manifested after Arroyo's third combat tour in Iraq.

Employees at Volvo are subject to an attendance policy under which the employee receives a whole or fractional "occurrence" every time he or she arrives late to work without providing required documentation. The policy outlines the disciplinary steps to be taken as an employee accrues more occurrences, with the last step resulting in

termination. After returning from a tour of duty in 2010, Arroyo accumulated several occurrences, most of which involved her arriving to work a few minutes late.

Ultimately, Volvo fired Arroyo. While Volvo claimed Arroyo's termination stemmed from her violations of the attendance policy, Arroyo believed her termination was the result of discrimination based on her disability, and her status as a U.S. Army reservist, and were therefore, pretextual. In August 2012, she filed the lawsuit that is the subject of this petition for certiorari.

Initially, in September 2014, the district court granted summary judgment to Volvo on all claims, and Arroyo appealed. The Seventh Circuit reversed the district court on both Arroyo's ADA and USERRA claims. *See Arroyo v. Volvo Grp. N.A., LLC*, 805 F.3d 278, 286-87 (7th Cir. 2015) ("Arroyo I"). On remand, the parties proceeded to trial on those two claims. A jury returned a verdict in Arroyo's favor, awarding her $2,600,000 in compensatory damages, $5,200,000 in punitive damages for her ADA claim, and finding that Volvo willfully violated USERRA. After Arroyo requested equitable relief following trial, the district court awarded her back pay, front pay, and other employment-related compensation. However, pursuant to the statutory limitation on damages imposed by 42 U.S.C. § 1981a(b)(3)(D), the district court reduced Arroyo's compensatory and punitive damages award to $300,000.

Volvo then moved for judgment as a matter of law or, alternatively, a new trial. The district court granted Volvo's motion for judgment as a matter of law on the ADA claim because Arroyo failed to show at trial that she was a qualified individual under the ADA. The court next addressed Volvo's motion for a new trial. In doing so, the court first found the jury's damages award on the ADA claim to be "monstrously excessive" and the result of passion and prejudice. But because the court had already resolved the ADA claim in Volvo's favor, it only needed to determine whether that passion and prejudice likewise infected the jury's liability determination on the USERRA claim. The court concluded that it did, thereby warranting a new trial on the USERRA claim alone.

In February 2022, the district court held a second jury trial on the USERRA claim. Prior to trial, the district court excluded evidence of Arroyo's PTSD diagnosis and treatment, finding the evidence irrelevant to the USERRA claim and likely to confuse the jury, a turn of events that would not have happened in the district courts sitting in the Fifth Circuit. Ultimately, the jury found in favor of Volvo.

Arroyo filed a motion to reconsider pursuant to Federal Rule of Civil Procedure 59(e). The court denied the motion, and Arroyo timely appealed. Arroyo challenged the district court's orders granting judgment as a matter of law to Volvo on the ADA claim and ordering a new trial on the USERRA claim.

The Seventh Circuit affirmed the district court's decision granting Volvo judgment as a matter of law

on the ADA claim, concluding that Arroyo could not prove that she was a qualified individual with a disability under the ADA. And more specifically, the Seventh Circuit noted that Volvo had maintained a policy that outlined its attendance requirement, and that regular and timely attendance was an essential job function – and that Arroyo had not met the "essential job function" of regular attendance at her place of work, and therefore was not a qualified individual with a disability under the ADA.

Also, and notably, with respect to Arroyo's motion for new trial based on both her ADA and USERRA claims, she contested the district court's refusal to allow her to offer evidence of her PTSD diagnosis and treatment. The Seventh Circuit in its February 2024 decision stood firm, holding that the USERRA claim prohibits discrimination based on military status alone, rather than on conditions stemming therefrom. In doing so, the Seventh Circuit cited 38 U.S.C. § 4311(a) (providing that a "person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied ... any benefit of employment by an employer on the basis of that membership ... .") In its February 2024 decision, the Seventh Circuit (perhaps unwittingly) endorsed the district court's failure to analyze Arroyo's claim under the proper rubric.

Specifically, the district court did not evaluate Arroyo's argument through the prism of 38 U.S.C. § 4313(a)(3), which expressly addresses "a person who has a disability incurred in, or aggravated during"

military service, and imposes various obligations upon the employer to accommodate the servicemember/employee.

Both the trial judge and the Seventh Circuit missed the critical and dispositive analysis: The statute requires an employer to do three things when an employee returning from service demonstrates a military-related disability: (1) return that employee to the position she occupied prior to deployment, a.k.a. the "escalator principle;" (2) provide an equivalent position for which the returning employee is qualified notwithstanding the service-connected injury; or (3) place her in the nearest approximation in terms of her original, pre-deployment position. § 4313(a)(3).

Under section 4313(a)(3), USERRA imposed upon Volvo the duty to make accommodations for Arroyo's disability PTSD that she incurred during the period when she was away from her Volvo job for service in the uniformed services. If the disability could not be reasonably accommodated in the position that Arroyo left to report to active duty, and the position that she would have continued to hold if her Volvo employment had not been interrupted by uniformed service, Volvo was required to reemploy Arroyo in another position for which she was qualified or could become qualified with reasonable employer efforts.

Both the district court and the Seventh Circuit decided this case based upon the ADA, not USERRA, which must be reversable error. As it stands now, district courts throughout the Seventh Circuit will

apply § 4313 to deny admission of disability evidence, while district courts throughout the Fifth Circuit will allow evidence of disability pursuant to section 4313. It is this February 2024 Seventh Circuit decision that Arroyo asks this Court to review, and reverse.[1]

II. The Trial and Appellate Judges Decided the Case on the Wrong Law, Applying the ADA, and Ignoring USERRA.

The ADA prohibits employers from taking adverse employment actions against their employees because of a disability. To establish a violation of the ADA, an employee must show: (1) that she is disabled; (2) that she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer took an adverse action against her because of her disability or failed to make a reasonable accommodation. *Stevens*

[1] Petitioner also believes the trial judge and the Seventh erred in footnote two in Docket No. 351, when the trial judge took all Petitioner's damages away. Here is why: "The jury was asked to assess damages only with respect to Plaintiff's ADA claim. After the jury returned a verdict in favor of Plaintiff on her USERRA claim, the Court award awarded equitable relief in the amount of $550,830.32. Pursuant to the statutory cap on damages imposed by 42 U.S.C. § 1981a(b)(3), however, the Court reduced Plaintiff's $2.6 million compensatory damages award on her ADA claim to $300,000 and vacated the jury's $5.2 million in punitive damages award. The material and substantial legal and prejudicial error demonstrates that neither the Northern District of Illinois nor the Seventh Circuit understands the law. We therefore respectfully request that this Court instruct all lower courts on this relatively new statute (USERRA) and how to apply the statute to carry out the Congress's intent.

v. Illinois Dep't of Transportation, 210 F.3d 732, 736 (7th Cir. 2000).

In addition to impermissibly "reading out" USERRA § 4313, which specifically directs employers to re-employ veterans with service-connected disabilities, the lower courts missed the more than semantical difference between the ADA's definition of "disability," or more specifically, "a qualified individual," and misread the interaction between the two statutory frameworks.

USERRA provides reemployment and accommodation rights to reemployment-eligible employees who are not qualified for the escalator position due to a disability incurred in or aggravated during their most recent period of military service. *McConnell v. Anixter, Inc.*, 2017 WL 11478712, *3 (D. Neb. 2017). Thus, district courts in the Eighth Circuit appear to apply § 4313 consistently with district courts in the Fifth Circuit (*Torres*), but inconsistently with district courts in the Seventh Circuit (*Arroyo*).

Such an employee must be promptly reemployed in the following order of priority:

- *Escalator position*. The employee must first be placed in the escalator position. 20 C.F.R. § 1002.225. The employer must make reasonable efforts to accommodate the employee's disability and help the employee become qualified for the duties of the position. § 4313(a)(3); The escalator position is the position that the employee would have attained

with reasonable certainty if not for the employee's absence due to military service. 20 C.F.R. § 1002.191. The escalator position is the position that the employee would have attained with reasonable certainty if not for the employee's absence due to military service. This position reflects the escalator principle, a fundamental concept of federal veterans' reemployment law that dates back to the Supreme Court's post-World War II decision in *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, (1946). In *Fishgold*, the Supreme Court said that a reemployed veteran "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold*, 328 U.S. at 284–85.

- *Equivalent position.* If the employee is not qualified for the escalator position, despite reasonable accommodation and qualification efforts by the employer, the employee must be placed in a position equivalent in seniority, status, and pay to the escalator position. *Ryan v. City of Philadelphia*, 559 F. Supp. 783, 786, (E.D. Pa. 1983). Thus, the Third Circuit joins the Fifth and the Eighth to interpret and apply § 4313 one way, the correct way, which is in conflict with the Seventh Circuit's view. Beyond the statute, the relevant implementing regulations makes clear the Seventh Circuit's analysis is legally incorrect and against sister Circuits – the employer must make reasonable

efforts to accommodate the employee's disability and help the employee become qualified for the duties of the position. 20 C.F.R. § 1002.225.

- *Nearest-approximation position*. If the employee cannot become qualified for the equivalent position with reasonable accommodation and qualification efforts by the employer, the employee must be placed in a position that, consistent with the circumstances of his or her case, is the nearest approximation to the equivalent position in terms of seniority, status, and pay. 20 C.F.R. § 1002.225(b). The nearest-approximation position may be higher or lower than the equivalent position. *Id*. The employer must make reasonable efforts to accommodate the employee's disability and help the employee become qualified for the nearest-approximation position. *Id*.

A disability for purposes of USERRA's accommodation and reemployment requirements is *any* disabling condition incurred in or aggravated during an employee's period of military service preceding reemployment. 38 U.S.C. § 4313(a)(3). Surely the ravages of PTSD qualify as *any* disabling condition.

USERRA does not import the definition of "disability" of the Americans with Disabilities Act. 42 U.S.C. § 12102(1).

Thus, under USERRA, unlike the ADA, no analysis is necessary to determine whether a disabling condition substantially limits a major life activity. Nor does USERRA require that a disability be permanent or of any particular duration in order to be covered.

It is not necessary that a disability result from an employee's actual performance of combat or other military duty to qualify as a service-related disability under USERRA. 70 Fed. Reg. 75,246, 75,277.

So long as the disability is acquired or worsened during the employee's period of military service, the disability would be service related for USERRA purposes. If the disability were incurred or aggravated outside of the employee's period of military service, such as during the interval between the completion of military service and returning to employment, it would not be a USERRA-covered disability. *Id.*

If an employee's service-related disability does not impede the employee's ability to perform the essential tasks of the escalator position, reemployment of the employee would be governed by the applicable length-of-service reemployment priority scheme. *Id.*

What happens if a returning employee has a disability incurred in or aggravated during a period of military service that has not been detected when he or she applies for reemployment? The Department of Labor instructs that if such a disability is discovered after the employee resumes work and the disability interferes with the employee's ability to perform his

or her job, the reinstatement process should be restarted under USERRA's reemployment scheme for employees with service-related disabilities. *Id.*

A reemployment-eligible veteran's application for or receipt of Social Security disability benefits generally would not trump the veteran's right to seek and obtain reemployment under USERRA, even if the veteran represented inability to work in applying for such benefits. Courts have declined to invoke the doctrine of judicial estoppel to bar USERRA reemployment claims in such circumstances, given that determination of a disability for purposes of Social Security benefits does not include whether a claimant could work with reasonable accommodation. *Scudder v. Dolgencorp*, LLC, 900 F.3d 1000, 1006–07 (8th Cir. 2018).

As the Court of Appeals for the Eighth Circuit noted, in light of USERRA's requirement that employers make reasonable efforts to accommodate service-related disabilities of returning servicemembers, "a servicemember who is considered 'disabled' under the Social Security Act could still be qualified for work and therefore entitled to reemployment under USERRA." *Scudder*, 900 F.3d at 1007. The district court side-stepped this analysis, and the Seventh Circuit endorsed the error. The Court should therefore reverse the Seventh Circuit's February 2024 decision, and remand with instruction to apply the correct USERRA provision.

Section 4301 articulates the statutory intent USERRA seeks to achieve: "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," and " to minimize the disruption to the lives of persons performing *service in the uniformed services* as well as to their employers, their fellow *employees,* and their communities, by providing for the prompt reemployment of such persons upon their completion of such service." The trial court and the Seventh Circuit disserved the Congress's clear purposes, Arroyo, and unless this Court provides much needed guidance, disabled veterans in the Seventh Circuit will have to travel to Texas or Nebraska or Pennsylvania to have their disability evidence introduced as part of their USERRA claims.

CONCLUSION

For these reasons, the Court should grant Arroyo's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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