No. 15-13233-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RODNEY BODINE,
Plaintiff-Appellant

v.

COOK'S PEST CONTROL, INC., *et al.*
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (No. 2:15-cv-413-RDP)

BRIEF FOR PLAINTIFF-APPELLANT RODNEY BODINE

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No. 15-13233-FF

Bodine v. Cook's Pest Control, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Bodine, Rodney, Plaintiff-Appellant
2. Butler, David A., counsel for Defendants-Appellees
3. Cook's Pest Control, Inc., Defendant-Appellee
4. Fant, Max, Defendant-Appellee
5. Fisher, Samuel, counsel for Plaintiff-Appellant
6. Galese, John M., counsel for Defendants-Appellees
7. Galese & Ingram, P.C., counsel for Defendants-Appellees
8. Jackson, Sidney M., counsel for Plaintiff-Appellant
9. Kalupa, Cassandra Harris, counsel for Defendants-Appellees
10. Piscitelli, Kathryn S., counsel for Plaintiff-Appellant
11. Proctor, Honorable R. David, United States District Court Judge
12. Romer-Friedman, Peter, counsel for Plaintiff-Appellant
13. Washington Lawyers' Committee for Civil Rights and Urban Affairs, counsel for Plaintiff-Appellant
14. Wiggins, Childs, Pantazis, Fisher & Goldfarb, LLC, counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Rodney Bodine requests oral argument in order to fully present the legal bases for reversal of the lower court's order, as well as aid the decisional process. At issue in this appeal is a question of first impression in the Eleventh Circuit: whether Section 4302(b) of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") supersedes any agreement that limits or eliminates any right under USERRA, or instead authorizes severance of a specific provision of an agreement that limits or eliminates a USERRA right. This issue involves questions of statutory interpretation that are of significant consequence to members and veterans of the United States Armed Forces.

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STATEMENT OF JURISDICTION

In this action, Rodney Bodine brings claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), as amended, 38 U.S.C. § 4301 *et seq.*, and Alabama law. (Doc 1.) The district court had jurisdiction over Bodine's USERRA claims under 28 U.S.C. § 1331 and 38 U.S.C. § 4323(b)(3), and over his state law claims under 28 U.S.C. § 1367(a).

On June 18, 2015, the district court issued an order compelling arbitration and dismissing the case without prejudice. (Doc 18.) A district court order compelling arbitration and dismissing a case without prejudice is a final, appealable decision under 9 U.S.C. § 16(a)(3). *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005).

On July 17, 2015, Bodine filed a timely notice of appeal. (Doc 19.)

STATEMENT OF THE ISSUE

1. Does USERRA's non-waiver section, 38 U.S.C. § 4302(b), which "supersedes any . . . contract [or] agreement . . . that reduces, limits, or eliminates in any manner any right" under USERRA, preclude an employer from enforcing an employment agreement that limits or eliminates a service member's substantive rights under USERRA?

STATEMENT OF THE CASE

In 1994, Congress enacted USERRA, 38 U.S.C. § 4301 *et seq.*, to protect service members against discrimination and ensure that they can return to their civilian jobs after serving their country. *See* infra Argument, Part II.A. In enacting this federal civil rights law, Congress re-codified and strengthened federal reemployment rights that have existed since the 1940s and that have been interpreted liberally by the Supreme Court and this Court for the benefit of members of the Armed Forces. In addition to enacting strong affirmative protections for service members, Congress established one of the strongest anti-waiver provisions that voids all contracts or agreements that limit any right under USERRA. 38 U.S.C. 4302(b).

The facts of this case illustrate why USERRA is absolutely critical to sustaining the Guard and Reserve and protecting service members against invidious discrimination—and why Congress included an extremely protective anti-waiver

provision in USERRA. Immediately after he was hired, Plaintiff Bodine was repeatedly told by his supervisor at Cook's that employees who serve in the Armed Forces do not work out well at the company. Bodine's supervisor incessantly pressured Bodine to quit the Army Reserve, told Bodine not to renew his contract with the Army Reserve, shamed Bodine in front of other employees for serving in the military, and then terminated Bodine when Bodine renewed his contract with the Army Reserve.

When Bodine took action to enforce his rights under USERRA in federal court, Bodine's employer, Cook's, moved to compel arbitration and impose terms of arbitration that eliminated a number of Bodine's substantive rights under USERRA, including the right to not pay any fees or costs and the right to bring a claim regardless of the date that it accrued. When Bodine pointed out that USERRA's non-waiver section bars an employer from taking away substantive rights of a service member under USERRA, Cook's stipulated that it would modify its agreement to excise the provisions that limited substantive rights under USERRA. In light of this stipulation, the district court severed the illicit provisions of the agreement that limited substantive rights and compelled arbitration.

The district court erred in severing the provisions of the agreement that limited substantive rights under USERRA. The district court made this error because it disregarded USERRA's specific statutory command in 38 U.S.C. § 4302(b) that

agreements that limit rights under USERRA are superseded by USERRA and cannot be enforced by an employer in a USERRA action.

In this appeal, the only dispute between the parties concerns the appropriate remedy when an employment agreement limits substantive rights under USERRA. As described herein, 38 U.S.C. § 4302(b) governs this specific situation in which an employment agreement limits substantive rights under USERRA, and precludes an employer from enforcing an agreement that limits a service member's substantive USERRA rights in an action under USERRA.

I. STATEMENT OF THE FACTS

A. The Facts Underlying Cook's Discrimination Against Bodine for His Service in the Army Reserve in Violation of USERRA

For nearly a decade, Rodney Bodine has been a member of the United States Army Reserve. (Doc 1 – Pg 2.) Three years ago, Bodine applied for a sales position at Cook's Pest Control, Inc. ("Cook's"), in Alabama. (*Id.*) Cook's invited him in for an interview. At the interview, Bodine told Cook's hiring manager, Max Fant, about his Army Reserve membership. (*Id.*) Fant told Bodine that "military folks don't work very well here," but that he would give Bodine a chance anyway. (*Id.*) Cook's then hired Bodine. (*Id.* – Pg 3)

Fant became Bodine's direct supervisor and immediately began making negative comments about Bodine's military obligations, including that it would be best if Bodine would get out of the military. (*Id.* – Pg 3.) Throughout Bodine's

employment with Cook's, Fant engaged in a pattern of repeatedly pressuring Bodine to leave the military and threatening that Bodine's continued service in the military would cost Bodine his job. (*Id.* – Pgs 3, 7.)

When Fant learned that Bodine's contract with the military was up for renewal, Fant pressured Bodine not to renew the contract, telling Bodine that he would be better off if Bodine left the military and that doing so would be good for his future at the company. (*Id.* – Pg 3.) Fant's relentless comments about Bodine's military service caused Bodine to feel discomfort and stress, and led Bodine to fear that he would be terminated if he renewed his military contract. (*Id.*)

Nonetheless, in early 2014 Bodine renewed his military contract. (*Id.* – Pg 4.) When Bodine told Fant that he had renewed his contract and had military orders to report to duty at Fort Knox, Fant angrily said he thought Bodine would have listened to him and left the military. (*Id.*)

When Bodine returned from his Fort Knox military commitment, Fant told Bodine it was time for Bodine to retire from the military. (*Id.*) Cook's then hired a new salesman, and Fant gave that salesman one of the most profitable sections of Bodine's sales territory. (*Id.*) Bodine's loss of the sales territory made it difficult for Bodine to meet his sales goals. (*Id.*)

While Bodine was participating in a weekend Army Reserve drill in April 2014, another employee sold a Cook's contract plan in Bodine's sales territory. (*Id.*)

When Bodine returned, Fant shamed and embarrassed Bodine in front of other employees, stating that if Bodine had not been in military drill, he may have received the sale. (*Id.*) In a mocking manner, Fant said it was Bodine's choice to be in the military. (*Id.* – Pgs 4-5.)

In July 2014, upon receiving Bodine's military orders to report for annual training, Fant said: "[T]his is bad, real bad." (*Id.* – Pg 5.)

In mid-August 2014, Fant told Bodine that Bodine had "far too many irons in the fire" and was "not meeting your full potential because you're in the military and something needs to change." (*Id.*) A week later, Fant repeated the "too many irons in the fire" comment, and when Bodine asked if Fant was talking about the military, Fant responded "yes and you have a choice to get out." (*Id.*)

On or about September 15, 2014, Fant told Bodine that Bodine's military membership would cost Bodine his job. (*Id.*) Two days later, Fant fired Bodine. (*Id.*)

B. Bodine's Employment Agreement

When Cook's hired Bodine, it required him to sign an "Employment Agreement" as a condition of employment. (Doc 2 – Pgs 8, 10-15.) The Agreement defined Bodine's status as "at will" and detailed Bodine's obligations concerning his job performance, noncompetition, and confidentiality. (*Id.* – Pgs 10-12.) It also prescribed alternative dispute resolution procedures. (*Id.* – Pgs 13-14.)

The Agreement required alternative dispute resolution as follows:

> THE PARTIES TO THIS AGREEMENT HEREBY EXPRESS THAT, EXCEPT AS SET FORTH BELOW, ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN THE PARTIES HERETO, ARISING OUT OF OR IN ANY WAY RELATED TO THE WITHIN AGREEMENT, ITS INTERPRETATION, PERFORMANCE OR BREACH, SHALL BE RESOLVED EXCLUSIVELY BY THE FOLLOWING ALTERNATIVE DISPUTE RESOLUTION ("ADR") MECHANISMS:
>
> A. Negotiation — The parties hereto shall first engage in a good faith effort to negotiate any such controversy or claim by communications between them. The negotiations may be oral or written. To the extent that they are oral, they should be confirmed in writing.
>
> B. Should the above-stated negotiations be unsuccessful, the parties shall engage in mediation pursuant to the American Arbitration Association Commercial Mediation Rules, or such other mediation rule as the parties may otherwise agree to choose.
>
> C. Should the above-stated mediation be unsuccessful, the parties agree to arbitrate any such controversy or claim with the express understanding that this Agreement is affected by interstate commerce in that the goods and services which are the subject matter of this Agreement, pass through interstate commerce. The arbitration shall be conducted pursuant to the Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") or such other arbitration rule as the parties may otherwise agree to choose.

(*Id.* – Pg 13.)

An "Equitable Litigation" exception authorized resort to courts for "interim relief," including motions to compel arbitration, before or during the ADR procedures. (*Id.* – Pg 13.)

The Agreement imposed a six-month statute of limitations for "any claim or lawsuit relating to this Agreement or the employment relationship or otherwise," with the six-month period starting on "the date of the employment action that is the subject of this lawsuit." (*Id.* – Pg 14.) The Agreement required the parties to mediate and arbitrate in Decatur, Alabama. (*Id.*)

With respect to liability for the costs and fees of arbitration, the Agreement stated that "[t]he Employee shall pay no more than $150 in arbitration costs," but that "the arbitrator may as part of his final decree reapportion the fees, including attorney's fees, as allowed by applicable law." (*Id.* – Pg 13.) The Agreement further provided that "in the event the Employee defaults in his performance of this Agreement, the Employee will pay all attorneys' fees incurred by the Employer in any action or proceeding instituted by the Employer to enforce this Agreement which involves Equitable Litigation." (*Id.* – Pg 15.)

The Agreement also had a severability clause that stated: "If any term or provision of this Agreement shall be invalid or unenforceable to any extent or application, then the remainder of this Agreement shall be valid and enforceable to the fullest extent and the broadest application permitted by law." (*Id.* – Pg 14.)

The Agreement did not mention USERRA or Bodine's rights under USERRA.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Bodine brought this lawsuit against Cook's and Fant, alleging that they violated USERRA by discharging, harassing, and constructively demoting him because of his membership in the Army Reserve. (Doc 1 – Pgs 1, 6-12.) He also alleged violations of Alabama law. (*Id.* – Pgs 12-15.) Bodine demanded a jury trial on his claims. (*Id.* – Pg 16.)

Cook's and Fant (hereinafter collectively "Cook's" or "Defendants") moved to compel Bodine "to submit all of his disputes with the Defendants to binding arbitration." (Doc 2 – Pg 1; Doc 6 – Pg 1.) They contended that "[t]he FAA applies in this case and preempts state law because employment in an industry affecting commerce, using supplies moving in interstate commerce, involves and/or affects interstate commerce." (Doc 6 – Pg 3.)

Bodine filed a memorandum opposing the motion in which he argued that Section 4302(b) of USERRA superseded the Agreement. (Doc 4.) He contended, *inter alia*, that the Agreement reduced, limited, or eliminated his substantive and procedural rights under USERRA: (1) by imposing a statute of limitations, whereas USERRA forbids applying any time limit to USERRA claims; (2) by requiring him to pay fees or costs, whereas USERRA prohibits charging him fees or costs; (3) by requiring arbitration in the absence of specific, clear, and unequivocal waiver of his

rights under USERRA; and (4) by requiring waiver of future statutory rights as a condition of employment. (*Id.* – Pgs 2-6.)

In a reply memorandum (Doc 7), Cook's did not dispute that the Agreement violated USERRA's prohibitions on applying time limits to USERRA claims and requiring plaintiffs to pay fees or costs. Instead, it agreed to waive any defenses based on those provisions and stipulated that it would "bear any and all costs associated with any arbitration, mediation, or negotiation of this matter." (*Id.* – Pgs 2-3.) And, based on its purported "waiver" and the Agreement's severability clause, Cook's argued that the Agreement would no longer limit Bodine's substantive rights under USERRA and could be enforced by the Court. (*Id.* – Pgs 2-4.)

Bodine responded that, notwithstanding Cook's litigation-focused representations, the plain language of USERRA superseded the Agreement. And Bodine explained that Cook's could not unilaterally modify the Agreement by severing provisions that limited or eliminated his substantive rights under USERRA. (Doc 11 – Pgs 2-6.) In response, Cook's contended, *inter alia*, that even if Cook's stipulations were ineffective, the Agreement's severability clause permitted the district court to sever the provisions of the Agreement that limited substantive rights under USERRA and enforce the rest of the Agreement. (Doc 13 – 1-5.)

The district court chose to sever the provisions that unlawfully limited substantive rights. Although it acknowledged that the Agreement "contains

provisions which conflict with the substantive provisions of USERRA" (Doc 17 – Pg 4), the district court opted to blue-pencil "these impermissible portions of the Agreement," compel Bodine to arbitrate his claims, and dismiss the case without prejudice. (*Id.* – Pg 7.)

In a separate order, the district court directed that "[a]ll provisions in the agreement at issue in this case that purport to set a six month limitations period on Plaintiff's USERRA claims or require Plaintiff to bear unreasonable fees (or what amounts to a filing fee) related to the arbitration of this matter are **SEVERED** from the agreement at issue in this case"; directed that "Defendants **SHALL** bear any and all costs associated with any arbitration, mediation, or negotiation of this matter"; and dismissed the claims "without prejudice." (Doc 18.)

Bodine's timely appeal followed.

III. STANDARD OF REVIEW

This Court reviews de novo district court orders compelling arbitration. *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014) (collecting cases). Moreover, "[b]ecause this appeal raises purely legal questions," namely the interpretation of USERRA, this Court's "review is de novo." *In re Witcher*, 702 F.3d 619, 621 (11th Cir. 2012).

SUMMARY OF THE ARGUMENT

When Bodine was hired in 2012, his employer, Cook's, chose to insert a number of provisions into Bodine's employment agreement that limited or eliminated substantive rights that Congress had provided to Bodine due to his military service. In this case, there is no dispute that the employment agreement violated USERRA's non-waiver section, 38 U.S.C. § 4302(b), because the agreement limited or eliminated Bodine's substantive rights under USERRA. The only disputed issue in this appeal is over the appropriate remedy when an employment agreement limits or eliminates substantive rights under USERRA.

The answer to this disputed legal issue is clear, and was specifically addressed by Congress when it enacted USERRA in 1994. Because the employment agreement limited or eliminated Bodine's substantive rights under USERRA, the employment agreement cannot be enforced against Bodine in a proceeding under USERRA.

This result is mandated by the plain language of USERRA's non-waiver section, which states that USERRA "supersedes any . . . contract [or] agreement . . . that reduces, limits, or eliminates in any manner any right" under USERRA. 38 U.S.C. § 4302(b). This statutory language precludes the enforcement of a contract or *an agreement* against a service member, and not merely the non-enforcement of *provisions of an agreement* that limit rights under USERRA.

Congress enacted 38 U.S.C. § 4302(b) to ensure that service members could not surrender their rights under USERRA as a condition of employment and to re-codify and strengthen broad non-waiver protections that have defended the reemployment rights of service members since 1946. In reaffirming USERRA's non-waiver protections in 1994, Congress unmistakably intended that § 4302(b) would supply the rule of decision when an employment agreement limits substantive rights in a USERRA action, and that the remedy would be to preclude an employer from enforcing the contract or agreement against a service member.

The district court erred by disregarding USERRA's specific non-waiver protections and instead applying the Federal Arbitration Act's ("FAA") effective vindication exception—a more general, judge-made doctrine that was created to bar arbitration procedures that have the effect of limiting federal statutory rights. Because the district court ignored § 4302(b) and applied the FAA's effective vindication doctrine, the district court erroneously concluded that Alabama contract law on severability should be borrowed to sever the provisions of Bodine's employment contract that limited his statutory rights under USERRA.

Instead of applying the FAA's effective vindication doctrine, the district court should have followed § 4302(b)—the statutory provision that Congress intended to govern the waiver of rights under USERRA. Section 4302(b) speaks directly to the issue of invalidating agreements that limit USERRA rights, while the effective

vindication doctrine is a judge-made principle that courts apply to ensure the fairness of arbitration agreements under the FAA. Under well-established principles of statutory interpretation, USERRA, a specific statute enacted later in time must be applied over the FAA, a more general statute that Congress enacted decades earlier. Moreover, in enacting USERRA, Congress was aware of the FAA's effective vindication doctrine, but chose to adopt a strong non-waiver provision that applies exclusively to USERRA disputes.

Before Congress enacted USERRA, the Supreme Court had established that USERRA's non-waiver principles govern over other federal laws or agreements that otherwise apply to employment disputes. As Congress invoked the Supreme Court's non-waiver decisions in enacting § 4302(b), and stated that case law from USERRA's predecessor remains in full force and effect to the extent consistent with USERRA, Congress clearly intended for courts to apply § 4302(b)'s non-waiver principles before analyzing the waiver of rights under other federal laws like the FAA. And because § 4302(b) is more protective of rights under USERRA than the FAA's effective vindication doctrine, there would never be an occasion to apply the effective vindication doctrine in a USERRA dispute.

To apply FAA principles that borrow from state law to determine whether to sever provisions of an employment agreement that limits substantive USERRA

rights would be inconsistent with § 4302(b)'s purpose of protecting service members from state laws and private contracts that limit USERRA rights.

When USERRA is applied to Bodine's employment agreement—rather than the FAA—it is clear that Cook's cannot enforce the agreement against Bodine.

Section 4302(b)'s plain language mandates the conclusion that an agreement that limits or eliminates rights under USERRA cannot be enforced by an employer in a USERRA dispute, and consequently a severability provision cannot save the agreement from being superseded by § 4302(b). This plain language understanding is bolstered by the canons for interpreting USERRA liberally for the benefit of the service member, which the Supreme Court has repeatedly affirmed and directed all courts to apply when construing USERRA. Sound public policy reasons also support Bodine's plain language reading of § 4302(b), because the rule that Congress adopted creates a disincentive for employers to overreach or routinely pack form contracts with provisions that limit rights under USERRA.

For this Court to interpret § 4302(b)'s plain language to permit the severability of a provision of an agreement that limits rights under USERRA, it would need to rewrite the statute to say something Congress did not say and did not intend.

ARGUMENT

I. THIS APPEAL RAISES THE SINGLE ISSUE OF WHETHER USERRA'S NON-WAIVER SECTION VOIDS AGREEMENTS THAT LIMIT SUBSTANTIVE RIGHTS UNDER USERRA

In 1994, Congress enacted one of the strongest employment laws in the history of the United States to protect service members against discrimination and ensure that they can return to their civilian jobs after serving their country. *See infra* Part II.A. As part of this statute, Congress adopted one of the broadest anti-waiver provisions ever in order to protect service members from surrendering their USERRA rights to employers as a condition of employment. *See* 38 U.S.C. § 4302(b); *see infra* Part II.B. In § 4302(b), Congress codified non-waiver principles that the Supreme Court has endorsed since 1946, and provided that USERRA "supersedes any . . . contract [or] agreement . . . that reduces, limits, or eliminates in any manner any right" under USERRA. 38 U.S.C. § 4302(b); *see infra* Part II.B.

In recent years, a significant debate has arisen over whether § 4302(b) prohibits the waiver of only substantive rights, or whether it prohibits waiver of both substantive *and* procedural rights. Since 2008, there has been a circuit split over this legal question about whether § 4302(b) protects procedural rights. *Compare Russell v. Merit Sys. Prot. Bd.*, 324 F. App'x 872, 874-75 (Fed. Cir. 2008) (per curiam) (holding that § 4302(b) protects procedural rights, as well as substantive rights, and

voiding an agreement that required a veteran to resolve his USERRA claims through a grievance procedure that included binding arbitration), *with Garrett v. Circuit City Stores, Inc*., 449 F.3d 672, 674-75 (5th Cir. 2006) (holding that § 4302(b) does not protect any procedural rights, and that § 4302(b) does not invalidate all arbitration agreements), and *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 561-63 (6th Cir. 2008) (same).

In this case, all of the parties agree that it is not necessary for this Court to decide whether USERRA prohibits the waiver of procedural rights. Instead, in this appeal, the only dispute between the parties concerns the appropriate remedy when an employment agreement limits the *substantive rights of a service member* under USERRA in violation of 38 U.S.C. § 4302(b). In other words, when an employment agreement limits a service member's substantive USERRA rights, must the court refuse to enforce that agreement or may the court sever the provisions that limit substantive rights under USERRA?

In the proceedings below, Bodine asked the district court to invalidate Cook's arbitration agreement on the ground that § 4302(b) protects substantive rights against waiver and that any agreement that contains a waiver of substantive rights is invalid and cannot be enforced by an employer. Indeed, as the district court recognized in its order, Bodine did not assert any "'argument to the contrary'" that USERRA

claims "'generally, are subject to arbitration,'" (Doc 17 – Pg 4 (quoting Bodine's Sur-Reply (Doc 11 at 6)), and emphasized that the dispute between the parties was whether the arbitration agreement's limitations on substantive rights invalidates the agreement. *Id.*

On appeal, Bodine is advancing the same argument he made in the district court—that an agreement that limits a substantive right under USERRA is unenforceable as a whole under § 4302(b), and that the specific provisions that limit substantive rights may not be severed from the rest of the agreement. Accordingly, in this appeal Plaintiff does not assert—and the Court need not consider—whether § 4302(b) prohibits the waiver of procedural rights.

II. BACKGROUND ON USERRA, ITS NON-WAIVER PROVISION, 38 U.S.C. § 4302(B), AND CANONS FOR INTERPRETING USERRA LIBERALLY FOR THE BENEFIT OF SERVICE MEMBERS

A. Congress Enacted USERRA to Protect Those Who Serve in the Armed Forces and Reaffirm and Strengthen Service Members' Employment and Reemployment Rights

Since the 1940s, an unbroken line of federal statutes has protected service members and veterans so that they can serve their country, return to their civilian jobs after serving, and remain free of discrimination based on their military status and service. *Lapine v. Town of Wellesley*, 304 F.3d 90, 97-98 (1st Cir. 2002)

(describing the history of USERRA and its predecessor statutes); H.R. Rep. No. 103-65 at 18 (1993) ("House Report"), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2451.

"Veteran reemployment statutes 'date from the nation's first peacetime draft law, enacted in 1940," and in enacting these statutes "Congress intended for 'the statutory right to reinstatement . . . to bolster the morale of those serving their country and to facilitate their reentry into the highly competitive world of job finding without the handicap of a long absence from work.'" *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1235 (11th Cir. 2005) (quoting *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240, 242 (8th Cir. 1991)). The Supreme Court has recognized that granting service members reemployment rights "provides the mechanism for manning the Armed Forces of the United States." *Alabama Power Co. v. Davis*, 431 U.S. 581, 583 (1977); *accord Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) ("The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job.").

In 1994, "Congress enacted USERRA in order to 'clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions.'" *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (quoting *Gummo v. Village of Depew*, 75 F.3d 98, 105 (2d Cir. 1996) (quoting House

Report at 18)); *accord* Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149, 3150 (1994) (stating that USERRA's purpose is "to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services"). Just like USERRA's predecessor statute, *see Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1082 (5th Cir. 1979), USERRA was enacted pursuant to the war powers of Congress. *Bedrossian v. Northwestern Mem. Hosp.*, 409 F.3d 840, 843 (7th Cir. 2005) (noting that "USERRA was enacted in 1994 pursuant to the War Powers Clause").[1]

As this Court has explained, USERRA "represents long-standing national policy intended to encourage service in the armed forces," and does so by "requir[ing] an employer to promptly reemploy" employees who have served in the military. *United States v. Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d 1320, 1324 (11th Cir. 2012); *accord Coffman*, 411 F.3d at 1235.

[1] Congress's war powers include the power to "provide for the common Defence," U.S. Const. art. I, § 8, cl. 1; "declare War, *id.*, cl. 11; "raise and support Armies," *id.*, cl. 12; "provide and maintain a Navy," *id.*, cl. 13; and "make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14.

When Congress reaffirmed and strengthened the prior law's employment and reemployment protections in 1994, it identified three specific purposes of USERRA:

> (1) 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;
>
> (2) 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; and
>
> (3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301(a).

Consistent with these objectives, USERRA constitutes one of the strongest and most comprehensive employment laws in the history of the United States. Unlike nearly all other federal employment statutes, USERRA applies to private and public sector employers of *all sizes*, including federal, state and local governments—and regardless of whether the employer engages in activity affecting interstate commerce. *Compare* 38 U.S.C. § 4303(4), *with* 29 U.S.C. § 2611(4)(A)(i) (limiting "employer" under the Family and Medical Leave Act to entities "engaged in commerce or in any industry or activity affecting commerce" that employ 50 or more employees), *and* 42 U.S.C. § 2000e(b) (limiting "employer" under Title VII of the

Civil Rights Act to entities "engaged in an industry affecting commerce" that employ 15 or more employees).

USERRA bars employers from discriminating at all stages of employment based on a person's past, present, or future membership or service in the Armed Forces, 38 U.S.C. § 4311(a); bars employers from retaliating against individuals who take action to enforce their rights under USERRA, 38 U.S.C. § 4311(b); requires employers to reemploy employees returning from military service in the positions they would have obtained, and with the rights and benefits they would have attained, but for their military service, 38 U.S.C. §§ 4312(a), 4313(a), 4316(a); requires employers to continue providing health benefits to employees during their military service, 38 U.S.C. § 4317; and requires employers and pension plans to provide pension credits and contributions for employees' periods of military service, 38 U.S.C. § 4318.

In addition to establishing these far-reaching substantive reemployment and employment rights, USERRA provides service members with unusually strong enforcement rights and substantive remedies. For example, USERRA allows service members to file a claim against a private employer in the United States district court in any district where the employer "maintains a place of business," 38 U.S.C. § 4323(c)(2), which gives service members access to a much broader range of federal

courts than 28 U.S.C. § 1391 ordinarily provides. And unlike other employment statutes, USERRA has no statute of limitations and prohibits applying any time limit on the filing of USERRA claims. 38 U.S.C. § 4327(b) (stating that "there shall be no limit on the period for filing [a] complaint or claim"). Also, unlike other employment statutes, USERRA does not require the filing of an administrative charge as a prerequisite to filing suit. Instead, USERRA grants service members who have chosen not to file a complaint against a private employer with the Department of Labor an unqualified right to proceed directly to federal court. 38 U.S.C. § 4323(a)(3)(A), (b)(3), (c)(2). *Accord* S. Rep. No. 103-158 at 68 (1993) ("Senate Report").

Service members who prevail in a USERRA action may obtain full injunctive relief, including reinstatement, the wages and benefits they were denied, liquidated damages equal to their actual losses (in the case of willful violations), prejudgment interest, and attorneys' fees and costs. 38 U.S.C. § 4323(d), (e), (h)(2). And USERRA expressly prohibits charging service members who enforce their rights court costs or employers' fees or costs. 38 U.S.C. § 4323(h)(1) ("No fees or court costs may be charged or taxed against any person claiming rights under [USERRA]."). In contrast, other civil rights statutes do not exempt employees from paying court costs and, in some cases, may require an employee to pay a defendant's

fees or costs. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (allowing court to award fees and costs to "the prevailing party" under Title VII).

B. Section 4302(b) Codifies a Long History of Vigorously Protecting the Rights of Veterans and Service Members Against Waiver

Nearly 50 years before Congress enacted USERRA, the Supreme Court held that service members who bring claims under USERRA's predecessor statute could not waive their rights under that statute by virtue of agreements with their employers. *See Fishgold*, 328 U.S. at 285. In the Supreme Court's 1946 decision in *Fishgold*, the Court held that "[n]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Id.* Twelve years later, the Supreme Court announced that this non-waiver rule applied not only to substantive rights but also to procedural rights. *See McKinney v. Missouri-Kan.-Tex. R.R. Co.*, 357 U.S. 265, 268-70 (1958) (holding that an employer could not enforce an employment agreement with a service member to compel the service member to grieve or arbitrate his federal reemployment rights claim).

From 1946 until Congress enacted USERRA in 1994, it remained the law of the land that employers could not enforce private employment agreements that limited or eliminated service members' federal reemployment rights. *See, e.g.*, *Alabama Power Co.*, 431 U.S. at 584-85 (quoting *Fishgold*, 328 U.S. at 285);

Accardi v. Pennsylvania R.R. Co., 383 U.S. 225, 229 (1966) (stating an employer may not "deprive a veteran of substantial rights guaranteed by the Act," and citing *Fishgold*); *Hembree v. Georgia Power Co*., 637 F.2d 423, 429 (5th Cir. Feb. 20, 1981) (stating that "courts have rejected similar attempts to give private agreements precedence over the Act," and citing *Coffy v. Republic Steel Corp*., 447 U.S. 191 (1980) (collective bargaining agreement cannot authorize denial of perquisites of seniority, namely, supplemental unemployment benefits, due reemployed veteran), *Alabama Power Co.*, 431 U.S. at 584-85, and *Accardi*, 383 U.S. at 229); *accord* House Report at 20.

When Congress amended the federal reemployment rights law in 1994 by enacting USERRA, Congress took action to ensure that the non-waiver rule of *Fishgold* and its progeny would apply in the future. Notably, USERRA's predecessor statutes had not contained a provision that expressly addressed the non-waiver of rights. But to remove any uncertainty that this longstanding principle would apply to USERRA, Congress expressly stated in the statute that any agreement that limits or eliminates any right or benefit under USERRA is void and superseded by the statute. 38 U.S.C. § 4302(b).

In this statutory provision, Congress provided that:

> 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.

Id. Furthermore, when Congress enacted USERRA, both the House and Senate made statements in their respective reports about the vitality of the non-waiver rule from *Fishgold* and its progeny.

First, the House and Senate stated that prior case law interpreting USERRA's predecessor statutes "to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions." House Report at 19; *accord* Senate Report at 40. Of course, that prior case law includes *Fishgold* and its progeny.

Second, Congress described that the specific purpose of § 4302(b) was to void all agreements that limit the USERRA rights of service members. For example, the House Report stated that:

> Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. ***See Peel v. Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Dept. of City of New York*, 675 F. Supp. 847 (S.D. N.Y. 1987) and *Fishgold, supra*, 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43**. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals

> is not required. *See McKinney v. Missouri-K-T R.Co.*, 357 U.S. 265, 270 (1958); *Beckley v. Lipe-Rollway Corp.*, 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See Kidder v. Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

House Report at 20 (emphasis added).[2]

C. Courts Must Liberally Construe USERRA for the Benefit of Service Members and Apply Case Law from USERRA's Predecessor Statutes

Legislative history, judicial precedent, and administrative interpretation all support a longstanding commitment to the liberal construction of USERRA's statutory language. Accordingly, a liberal construction must be applied with full force to the language of § 4302(b) for the benefit of service members.

In 1946, the Supreme Court held in *Fishgold* that the federal reemployment rights law "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." 328 U.S. at 285. *Fishgold* further instructed that federal courts must "construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of

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[2] Similarly, the Senate Report stated that "section 4302(b) would clarify that chapter 43 preempts any State law or any plan, contract, policy or practice that would limit chapter 43 rights or benefits or that impose any additional prerequisites on the exercise of those rights or the receipt of those benefits." Senate Report at 41.

the veteran as a harmonious interplay of the separate provisions permits." *Id.* The Supreme Court thereafter reaffirmed that this "guiding principle" of liberal construction "govern[s] all subsequent interpretations of the re-employment rights of veterans." *Alabama Power Co.*, 431 U.S. at 584; *see also, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *Coffy*, 447 U.S. at 196.

This Court has reaffirmed and applied the "admonition to liberally construe reemployment rights statutes in favor of those who serve their country." *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1468 (11th Cir. 1987) (collecting Supreme Court cases affirming the same principle).

House and Senate Committee Reports affirm Congress's explicit intent to retain the same approach when construing the language of USERRA:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. **This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed."**

House Report at 19 (emphasis added) (citing *Fishgold*, 328 U.S. at 285; *Alabama Power Co.*, 431 U.S. at 584). *Accord* Senate Report at 40 (the rule of liberal construction to "remain in full force and effect" for cases under USERRA).

The Department of Labor's regulations interpreting USERRA contain similar language. *See* 70 Fed. Reg. 75,246 (Dec. 19, 2005) (recognizing that the liberal maxim for the benefit of service members "appl[ies] with full force and effect in construing USERRA and these regulations").

Another important canon governs the interpretation of USERRA. As noted above, "[i]n passing USERRA, Congress made it clear that the extensive body of case law under the predecessor statutes would remain in full force and effect to the extent it is consistent with USERRA." *Alabama Dep't of Mental Health & Mental Retardation*, 673 F.3d at 1329 n.6 (citation and internal quotation marks omitted); *accord Rivera-Meléndez v. Pfizer Pharm., LLC*, 730 F.3d 49, 54 (1st Cir. 2013) (stating same and following 20 C.F.R. § 1002.2).[3]

III. BACKGROUND ON THE FEDERAL ARBITRATION ACT'S EFFECTIVE VINDICATION DOCTRINE

"To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA)," which was intended to "place[] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*,

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[3] *Accord* 20 C.F.R. § 1002.2 ("Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA.").

546 U.S. 440, 443 (2006). Section 2 of the FAA provides that any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Supreme Court recognized an "effective vindication" exception to the FAA that "invalidate[s], on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies." *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citing *Mitsubishi Motors*, 473 U.S. at 637 n.19). The "effective vindication" doctrine is a "judge-made exception" that was adopted by the Supreme Court for public policy reasons, and not by Congress when it enacted the statute. *Id.*

Unlike USERRA's non-waiver provision, 38 U.S.C. § 4302(b), which applies to *all* contracts or agreements that limit rights under USERRA, *see id.*, the FAA and its effective vindication doctrine apply only to a single type of contract—an arbitration agreement. *See American Express*, 133 S. Ct. at 2310.

IV. USERRA'S NON-WAIVER SECTION REQUIRES COURTS TO VOID AGREEMENTS THAT LIMIT STATUTORY RIGHTS, AND NOT SEVER THE ILLICIT PROVISIONS THAT ELIMINATE RIGHTS

A. The District Court Erred by Applying the FAA's Effective Vindication Doctrine to Invalidate the Provisions of the Agreement

The district court made a legal error by applying the FAA and its effective vindication doctrine to invalidate the provisions of the agreement that limited Bodine's substantive rights under USERRA and, in turn, to sever those illicit provisions by applying Alabama state contract law on severability. Instead of applying the FAA, the district court should have followed the specific statutory provision that Congress enacted in 1994 to address the particular situation of a contract or an employment agreement that limits substantive rights under USERRA. *See* 38 U.S.C. § 4302(b).

In its order, the district court correctly observed that there was no dispute among the parties that Cook's arbitration agreement impermissibly limited Bodine's substantive rights under USERRA by imposing a six-month statute of limitations period (USERRA has none and forbids application of any time limit), and by allowing fees and costs to be charged to a plaintiff (which USERRA expressly precludes). (*See* Doc 17 – Pg 3 ("The parties do not dispute that, under USERRA, the arbitration clause contains provisions purporting to unlawfully limit the applicable statute of limitations and unlawfully apportion certain fees and costs to

Plaintiff.")); (*id.* – Pg 3 n.2) ("Defendants do not defend the legality of either provision [under USERRA]").

The order did not expressly state what federal law the district court applied to hold that the employment agreement's limits on substantive USERRA rights were invalid and could not be enforced. It did not cite or discuss USERRA's non-waiver provision, 38 U.S.C. § 4302(b). Instead, it quoted language from *Mitsubishi Motors* where the Supreme Court had established the effective vindication exception to the FAA that bars arbitration if a party would have to "'forgo the substantive rights afforded by the statute.'" (Doc 17 – Pg 4) (quoting *Mitsubishi Motors*, 473 U.S. at 628).

Although the district court did not expressly state what federal law it applied to hold that the agreement's limitations on substantive USERRA rights were invalid, it appears that the district court applied the FAA's effective vindication doctrine and disregarded § 4302(b) of USERRA when it invalidated the illicit provisions of the agreement and determined that the proper remedy for an agreement that limits substantive USERRA rights is to sever the illicit provisions.

Instead of considering what remedy USERRA's non-waiver provision requires the court to apply—*i.e.*, refusing to enforce the whole agreement or only the provisions that limit substantive rights—the district court simply assumed that the

FAA and this Court's cases applying the FAA's effective vindication doctrine supply the remedy for an agreement that limits substantive rights under USERRA. (*See* Doc 17 – Pg 6.) Accordingly, the district court followed this Court's opinions in *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005), and *Anders v. Hometown Mortgage Services*, 346 F.3d 1024 (11th Cir. 2003), which held that under the FAA when a contractual provision would prevent a plaintiff from vindicating his statutory rights in arbitration, the court should look to state law to decide whether to sever the offending provision or to decline to enforce the entire agreement. (*See* Doc 17 – Pg 6 (citing *Anders*, 346 F.3d at 1032 (applying Alabama law to sever unlawful provisions of arbitration clause), and *Jackson*, 425 F.3d at 1317 (reaching the same conclusion under Georgia law)).)

The district court's failure to apply § 4302(b) was a legal error, because § 4302(b) specifically governs (1) what types of agreements that limit substantive rights under USERRA are invalid, and (2) the appropriate remedy when such agreements limit substantive USERRA rights.

There are a number of reasons why the district court should have applied § 4302(b)—and not the FAA and its effective vindication doctrine—to invalidate an agreement that limits USERRA rights, and to determine the appropriate remedy when such an agreement illicitly limits USERRA rights.

First, § 4302(b) is a specific statutory provision that speaks directly to the issue of invalidating agreements that limit rights under USERRA, while the FAA's effective vindication doctrine is a more general, judicially-created principle that courts apply to ensure the fairness of agreements to arbitrate under the FAA. It is well established that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Rodgers v. United States*, 185 U.S. 83, 87-89 (1902)). Moreover, "[a]n ambiguous or general statutory provision enacted at an earlier time must yield to a specific and clear provision enacted at a later time." *Gilbert v. United States*, 640 F.3d 1293, 1308-09 (11th Cir. 2011) (citing *Morton*, 417 U.S. at 550-51); *Nguyen v. United States*, 556 F.3d 1244, 1253 (11th Cir. 2009) ("The canon is that a specific statutory provision trumps a general one."); *ConArt, Inc. v. Hellmuth, Obata & Kassabaum, Inc.*, 504 F.3d 1208, 1210 (11th Cir. 2007) ("We don't have the authority to excise specific statutory provisions in favor of more general ones."); *id.* ("[W]here two statutory provisions would otherwise conflict, the earlier enacted one yields to the later one to the extent necessary to prevent the conflict."); *Interstate Commerce Comm'n v. Southern Ry. Co.*, 543 F.2d 534, 539 (5th Cir. 1976) ("Under the usual rules of statutory construction, where

there is a conflict between an earlier statute and a subsequent enactment, the subsequent enactment governs.").

In this case, the earlier and more general FAA, which Congress enacted in 1925[4] and its judge-made effective vindication doctrine that the Supreme Court created in 1985, *American Express*, 133 S. Ct. at 2310, must yield to the later, clearer and more specific statutory provision that Congress enacted in 1994 to invalidate agreements that limit rights under USERRA.

Second, when Congress enacted USERRA in 1994, it was fully aware of the existence of the FAA and its effective vindication doctrine. But Congress made a calculated decision to adopt a strong non-waiver provision that would apply exclusively to USERRA disputes. *See Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1332 (11th Cir. 2013) (applying "rule of statutory construction that Congress is presumed to know the law, including judicial interpretations of that law, when it legislates," and citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979)). If Congress had wanted the effective vindication doctrine to apply to USERRA claims as the doctrine applies to other federal statutes, Congress could have said so or could have remained silent. Yet Congress consciously chose to insert into

[4] Federal Arbitration Act of 1925, Act Feb. 12, 1925, ch. 213, 43 Stat. 883.

USERRA a specific prohibition on employment agreements that limit rights under USERRA, with the explicit goal of carrying forward a decades-old tradition of protecting federal reemployment rights against waiver under USERRA and its predecessor statutes. 38 U.S.C. § 4302(b); House Report at 20. The only way to understand the specific action that Congress took "against this background understanding" is that Congress wanted § 4302(b)'s non-waiver provision to apply and did not authorize courts to apply the more general effective vindication doctrine. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc*., 135 S. Ct. 2507, 2519-20 (2015) (holding Congress's 1988 amendment to the Fair Housing Act had to be construed "[a]gainst this background understanding in the legal and regulatory system").

Third, prior to the enactment of USERRA, the Supreme Court had held in *McKinney* and *Fishgold* that USERRA's non-waiver principles should be given priority over other federal laws or agreements that otherwise govern employment disputes, such as the Railway Labor Act ("RLA"), a federal law that mandates arbitration of labor disputes in the railroad and aviation industries. *See McKinney*, 357 U.S. at 268-70; *Fishgold*, 328 U.S. at 285. Given that Congress expressly invoked *McKinney* and *Fishgold* when it enacted § 4302(b), House Report at 20, and given that Congress "made clear that" prior case law from USERRA's predecessor

"would remain in full force and effect to the extent it is consistent with USERRA," *Alabama Dep't of Mental Health*, 673 F.3d at 1329 n.6, there can be no doubt that Congress intended for courts to apply § 4302(b)'s non-waiver principles before analyzing the waiver of rights under other federal laws like the FAA or the RLA.

Fourth, Congress could not have intended for courts to apply the FAA's effective vindication doctrine instead of the more specific § 4302(b) of USERRA, because § 4302(b) is far more protective than the FAA's effective vindication doctrine. Because § 4302(b) is far more protective of statutory rights under USERRA than the FAA's effective vindication doctrine, there would never be an occasion for a court to apply the effective vindication doctrine in a USERRA dispute. Indeed, there are many instances in which *only* § 4302(b) protects a service member but not the FAA's effective vindication doctrine. For example:

- Section 4302(b) invalidates "any" "agreement" that in "any manner" "limits" or "eliminates" "any right or benefit" under USERRA, whether or not it is part of an arbitration agreement, 38 U.SC. § 4302(b), while the effective vindication doctrine only supersedes arbitration agreements that would prevent a plaintiff from effectively vindicating his statutory rights in an arbitration proceeding. *See American Express*, 133 S. Ct. at 2310.

- The FAA and its effective vindication doctrine may not apply to small employers whose businesses do not affect interstate commerce, *see* 9 U.S.C. § 2; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 274-75 (1995) (concluding that "involving commerce" as used in 9 U.S.C. § 2 is the functional equivalent of "affecting commerce"), while USERRA applies to employers of all sizes and has no affecting-commerce requirement. *See* 38 U.S.C. § 4303(4) (defining the term "employer" under USERRA); 20 C.F.R. § 1002.34(a) ("USERRA applies to all public and private employers in the United States, regardless of size."). Accordingly, there are many instances in which employees have *no rights* under the FAA or its effective vindication doctrine, but they *do* have rights under USERRA and its non-waiver provision, 38 U.S.C. § 4302(b).

- While an agreement that allows fees or costs to be imposed on a plaintiff in a USERRA case would always violate § 4302(b), because it limits or eliminates the statutory right to never have costs imposed on a veteran, *see* 38 U.S.C. §§ 4302(b), 4323(h)(1), the same is not true under the effective vindication doctrine. Under the effective vindication doctrine, the costs imposed on a plaintiff in arbitration must rise to a significant level before a court would invalidate the costs' provision of the arbitration agreement. *See*

Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1215 (11th Cir. 2011) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (recognizing that "large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum")).

It simply makes no sense that Congress would enact § 4302(b) to protect the statutory rights of veterans under USERRA and to reaffirm a decades-old principle against the waiver of those statutory rights, but simultaneously would intend for courts to apply the less protective effective vindication doctrine in a proceeding under USERRA.

Fifth, the explicit purpose of § 4302(b) is to protect veterans from having their rights undermined by state laws and private agreements that limit rights under USERRA. 38 U.S.C. § 4302(b); House Report at 20; Senate Report at 41. And it does so by broadly preempting or superseding "*any*" state law or private agreement that "*limits, or eliminates in any manner any right or benefit [under USERRA]*." 38 U.S.C. § 4302(b) (emphasis added). Thus, § 4302(b) evidences significant Congressional hostility to all state laws and private contracts – not just arbitration agreements – that limit USERRA rights. It would be completely inconsistent with this specific purpose and Congress's hostility to state laws that interfere with USERRA rights for this Court to apply FAA principles that borrow from state law

to determine whether to sever provisions of an employment agreement that limit substantive rights. *See Nguyen*, 556 F.3d at 1252-53 (stating that in addition to giving priority to a more specific statutory provision over a general provision, the court must construe the law to be consistent with the purpose of the more specific law).

Finally, prior Eleventh Circuit cases that applied the FAA's effective vindication doctrine did not involve USERRA or the non-waiver provision of USERRA, 38 U.S.C. § 4302(b). *See, e.g.*, *Jackson*, 425 F.3d at 1317; *Anders*, 346 F.3d at 1027. And while *Jackson* and *Anders* observed that the FAA borrows from state contract law principles to ensure that arbitration agreements and contracts are put on equal footing, there is nothing in § 4302(b) that treats arbitration agreements any differently than any other type of contract or employment agreement. As described in the next section, the federal rule that § 4302(b) imposes is simple and shows no indication of an intent to borrow from state law—instead it invalidates the entire agreement.

B. Section 4302(b) of USERRA Voids an Agreement That Limits Substantive Rights Under USERRA Rather Than Permitting the Severance of Illicit Provisions

Because the district court applied FAA's effective vindication doctrine to invalidate and sever the provisions of the employment agreement that limited

Bodine's rights under USERRA, it did not consider what remedy § 4302(b) provides for an agreement that limits substantive rights under USERRA.

If it had had considered this question, it would have—and should have—concluded that § 4302(b) does not permit severance of the illicit provisions when a veteran brings an action under USERRA. Instead, under the plain language of § 4302(b), an agreement that limits a substantive right under USERRA is void and, in its entirety, cannot be enforced by an employer in an action under USERRA. This plain language understanding is bolstered by the canon of interpreting USERRA liberally for the benefit of the service member and by sound public policy reasons.

1. The Plain Language of § 4302(b) Says and Means That a Contract or Agreement Cannot Be Enforced If It Limits USERRA Rights

The plain language of USERRA's non-waiver provision mandates the conclusion that an agreement that limits or eliminates rights under USERRA cannot be enforced by an employer in a USERRA dispute, and consequently a severability provision cannot save an agreement from being invalidated under § 4302(b).

As noted above, § 4302(b) states that USERRA "supersedes any . . . contract [or] agreement . . . that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA], including the establishment of additional

prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. § 4302(b).

This plain language clearly supersedes an agreement that limits a right under USERRA, and not merely a *provision of an agreement* that limits a right under USERRA. If Congress had merely wanted to invalidate a particular contractual provision that limits or eliminates any right under USERRA, it could have stated that USERRA supersedes "any provision of a contract" or "any provision of an agreement" "that limits any right or benefit." But unlike other federal statutes where Congress employed the term "provision of a contract," or "provision of an agreement,"[5] *here* Congress chose not to do so. Indeed, Congress clearly and

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[5] *See, e.g.*, 42 U.S.C. § 5421 ("The rights afforded manufactured home purchasers under this chapter may not be waived, and any provision of a contract or agreement entered into after August 22, 1974, to the contrary shall be void."); 43 U.S.C. § 390xx (authorizing "[t]he provisions of any contract entered into . . . by the Secretary with a district, which define project or non-project water"); 15 U.S.C. § 2802(b)(2) (stating that a "franchise" or "franchise relationship" is terminated by "[a] failure by the franchisee to comply with any provision of the franchise."); Amtrak Reform and Accountability Act of 1997, P.L. 105-134, 111 Stat. 2570, § 142(b) (Dec. 2, 1997) ("Any provision of a contract entered into before the date of the enactment of this Act between Amtrak and a labor organization representing Amtrak employees relating to employee protective arrangements and severance benefits applicable to employees of Amtrak is extinguished[.]"); 26 U.S.C. § 7701 (stating that the "the term 'terminal rental adjustment clause' means a provision of an agreement which permits or requires the rental price to be adjusted upward or downward by reference to the amount realized by the lessor under the agreement upon sale or other disposition of such property.").

specifically stated that a "contract" or an "agreement" itself is superseded by § 4302(b), *i.e.*, that the contract or agreement cannot be enforced by an employer in a USERRA proceeding if that contract or agreement limits a right under USERRA.

For this Court to interpret the plain language of § 4302(b) to permit the severability of a *provision* of a contract or agreement that limits rights under USERRA, it would need to rewrite the statute to say something Congress did not say *but could have easily said*. As this Court recently observed, courts "are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it, especially when doing so would defeat the clear purpose behind the [statutory] provision." *Nguyen*, 556 F.3d at 1256 (collecting Supreme Court and Eleventh Circuit cases).

2. Canon of Liberally Interpreting USERRA Bolsters the Plain Language Understanding That There Is No Severability Under § 4302(b)

Section 4302(b)'s plain language meaning becomes even clearer when one applies the canon for interpreting USERRA liberally that is well established in this Court and the Supreme Court. As this Court noted, any interpretation of USERRA must "begin with the admonition to liberally construe reemployment rights statutes in favor of those who serve their country." *Ingram*, 811 F.2d at 1468 (citations omitted). And as the Supreme Court has shown over many decades, this canon of

liberal construction is a "guiding principle" for interpreting the federal reemployment rights law. *Alabama Power Co.*, 431 U.S. at 584; *see also King*, 502 U.S. at 220 n.9; *Coffy*, 447 U.S. at 196.

In this case, there is only one possible interpretation of § 4302(b) that faithfully follows the canon to interpret USERRA liberally for the benefit of the service member—that is, in a USERRA proceeding an employer cannot enforce a contract or an agreement that limits a service member's rights under USERRA, and the specific provision that limits rights under USERRA cannot be severed to save the broader contract or agreement. In fact, the only other interpretation of § 4302(b) – that provisions that limit USERRA rights can be severed by the employer or the Court – would benefit the employer and put that employer in the driver's seat. Such an interpretation cannot be reconciled with the canon of liberal interpretation that must be followed here.

3. Public Policy Supports This Plain Language Interpretation That There Is No Severability Under § 4302(b)

There are important public policy reasons why Congress designed § 4302(b) to supersede a contract or an agreement that limits rights under USERRA, and to not merely invalidate specific provisions that limit rights under USERRA.

For example, giving employers the option to sever specific provisions that limit rights under USERRA would *encourage* employers to pack their form contracts with multiple provisions that limit the rights of service members under USERRA. There would be no downside for an employer in doing so. If the service member is unaware of his rights or has no lawyer, he would not challenge the contractual provisions that unlawfully limit rights under USERRA. And even if the service member filed a lawsuit to challenge the specific contractual provisions that unlawfully limit rights under USERRA, the employer would suffer no loss or detriment other than the ability to enforce the unlawful provisions.

As one court explained, "[a]n employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter." *Armendariz v. Foundation Health Psychcare Servs., Inc*., 6 P.3d 669, 697 n.13 (Cal. 2000).

On the other hand, the rule that Congress adopted in § 4302(b) creates a sufficiently strong disincentive for employers to overreach when they draft employment agreements that will impact a service member's rights under USERRA. If an employer believes that it will lose its ability to enforce a broader agreement against a service member because the agreement includes provisions that limit rights

under USERRA, the employer will be far less likely to draft an agreement that attempts to waive an employee's rights under USERRA.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's order compelling arbitration and dismissing Bodine's action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 10,058 words.

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CERTIFICATE OF SERVICE

I certify that on October 29, 2015, I electronically filed the foregoing Brief with the Clerk of the Court by using the appellate CM/ECF system; and I sent a signed original of the Brief plus six paper copies of the Brief to the Clerk of the Court via Express Mail. I also certify that counsel of record who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that counsel of record listed below, who is not CM/ECF registered, has agreed in writing to email service of the brief and will be served a copy of the Brief via email on October 29, 2015:

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