

No. 18-3609

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

DAVID MUELLER, Plaintiff-Appellant, v. CITY OF JOLIET; BRIAN BENTON, in his official and individual capacity as the CHIEF OF POLICE; and EDGAR GREGORY, in his individual capacity, Defendants-Appellees.))))))))))))	Appeal from the United States District Court for the Northern District of Illinois, Case No. 17 C 7938 The Honorable HARRY D. LEINENWEBER, Judge Presiding.
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**AMICUS BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ALASKA,
ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA,
IDAHO, INDIANA, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA,
MISSISSIPPI, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA,
SOUTH CAROLINA, VIRGINIA, WASHINGTON, AND WEST VIRGINIA
IN SUPPORT OF PLAINTIFF-APPELLANT DAVID MUELLER
SEEKING REVERSAL OF THE DISTRICT COURT’S JUDGMENT**

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ISSUE PRESENTED FOR REVIEW

Whether the Uniformed Service Members Employment and Reemployment Act, 38 U.S.C. §§ 4301 *et seq.* (“USERRA”), applies to full-time National Guard duty under Title 32 of the U.S. Code, 32 U.S.C. §§ 101 *et seq.* (“Title 32”), including counter-drug duty under 32 U.S.C. § 502(f).

IDENTITY AND INTEREST OF AMICI STATES

The amici States submit this brief pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. They do so because the issue presented in this appeal is one of first impression in the federal circuit courts, with potentially far-reaching significance regarding the scope of USERRA’s protection, and in particular whether it applies to full-time National Guard duty under Title 32. Thus, the Court’s decision will have a major impact on the men and women ordered to such duty, and on the States in whose National Guards they serve. The amici States have a direct interest in this case based on their need to attract people willing to serve in their National Guards, including in Title 32 operations, which have substantially expanded in recent decades. The district court’s opinion, if not reversed, will discourage individuals from serving in the States’ National Guards and fulfilling various Title 32 duties — including homeland security operations, responses to disasters and other emergencies, and counter-drug operations — by denying them USERRA protection for that service.

The amici States take no position on the merits of Plaintiff’s claim apart from the statutory interpretation question on which the district court based its judgment.

STATEMENT OF THE CASE

Plaintiff David Mueller was a police officer for the City of Joliet, Illinois (“Joliet”), and a member of the National Guard. (Dkt. 36, ¶¶ 9, 12–13, 18, 23.) For three months in 2016, he provided full-time National Guard duty as part of a “counter-drug” operation authorized under Section 502(f) of Title 32, 32 U.S.C. § 502(f). (Dkt. 32 at 1; Dkt. 36, ¶¶ 24–28, 42–44.) His duty orders expressly relied on the authority of Section 502(f) and stated that he was “ordered to Full Time National Guard Duty.” (Dkt. 41.) When that service ended, Joliet refused to give Mueller various benefits that he alleged USERRA required it to provide. (Dkt. 32 at 1–2; Dkt. 36, ¶¶ 40–42, 48–49.) He then brought this action against Joliet alleging a violation of USERRA. (Dkt. 1; Dkt. 36.)

The district court dismissed the action, holding that USERRA’s provisions apply only to service by National Guard members when their duties are controlled by the President of the United States, not National Guard service controlled by the Governor of their State. (Dkt. 32 at 5–8.) In reaching that conclusion, the district court relied on its interpretation of 20 C.F.R. § 1002.57(b), which describes the scope of service by National Guard members covered by USERRA. (*Id.* at 7–8.) The district court also relied on its view that reading USERRA to apply to counter-drug duty by a National Guard member under Section 502(f) of Title 32 would violate the Posse Comitatus Act, 18 U.S.C. § 1385. (*Id.* at 6–7.) Mueller filed a motion for reconsideration, which the district court denied. (Dkt. 33; Dkt. 55.) He then appealed. (Dkt. 57.)

SUMMARY OF ARGUMENT

USERRA's provisions defining the scope of its coverage, based on "service in the uniformed services," unambiguously state that it applies to both "active duty" in the armed forces, governed by Title 10 of the U.S. Code, 10 U.S.C. §§ 101 *et seq.* ("Title 10"), and "full-time National Guard duty," governed by Title 32. Those statutory provisions are dispositive of the issue in this appeal. Nothing in USERRA's regulations or in the Posse Comitatus Act warrants a contrary conclusion.

The regulations implementing USERRA expressly affirm that the law protects full-time National Guard duty under Title 32. In reaching the contrary conclusion, the district court relied on its interpretation of an isolated phrase in one of these regulations: 20 C.F.R. § 1002.57. But Section 1002.57 must be read to conform to the plain meaning of USERRA and other USERRA regulations, all of which state that full-time National Guard duty under Title 32 is within the law's coverage. Overlooking these provisions, the district court mistook a reference in Section 1002.57(b) to the absence of coverage for *state active duty* — i.e., operations by National Guard members in their home States entirely under state law — for the absence of coverage for Title 32 duty, which operates under state command but is authorized by federal law.

The district court also erred by relying on the Posse Comitatus Act, which generally prohibits using the "armed forces," in Title 10 status, for domestic law enforcement. Full-time National Guard duty under Title 32, including counter-drug duty under Section 502(f), is not service in the armed forces. It also falls within the Posse Comitatus Act's exclusion for activities specifically authorized by Congress.

ARGUMENT

I. Standard of Review

The district court's interpretation of USERRA presents a question of law, subject to *de novo* review. See *United States v. Miller*, 883 F.3d 998, 1003 (7th Cir. 2018).

II. USERRA Applies to Full-Time National Guard Service under Title 32.

The district court's judgment should be reversed because it rests on an incorrect interpretation of USERRA that erroneously excludes coverage of full-time duty in the National Guard authorized under Title 32. USERRA expressly provides that its protection applies to "service in the uniformed services," 38 U.S.C. § 4312(a), which it defines to include "full-time National Guard duty," 38 U.S.C. § 4303(13). The plain meaning of this statutory text is controlling.

In reaching a contrary conclusion, the District Court effectively disregarded USERRA's language and relied on two mistaken assumptions: (1) the belief, based on its misinterpretation of a Department of Labor regulation, that USERRA does not apply to Title 32 duty because it is under state command; and (2) the belief that counter-drug duty under federal command pursuant to 32 U.S.C. § 502(f) would violate the Posse Comitatus Act. Both assumptions are wrong, and neither overcomes USERRA's plain language stating that it covers full-time National Guard duty under Title 32.

A. Structure of the National Guard

An understanding of the scope of USERRA's protection benefits from a short exposition of the National Guard's structure and the different capacities in which its members serve. Briefly, as described more fully below, members of a State's National

Guard may serve in three different non-civilian capacities, or “statuses”: (1) in “active duty” under Title 10, as part of the federal armed services under the President’s command (also referred to as “federal service”); (2) in the National Guard under Title 32, including full-time National Guard duty, authorized by federal law but under state command; and (3) in “state active duty,” exclusively under state-law authority.

1. Service of National Guard Members Under Federal Law

For historical reasons, and due to differences in Congress’s constitutional authority over the Army (consisting mostly of full-time soldiers) and over the Militia (comprised of civilians available for service), it has regulated the two entities under separate sets of laws. *Perpich v. Dep’t of Defense*, 496 U.S. 334, 340–46 & nn.13–15, 350 (1990); *Clark v. United States*, 322 F.3d 1358, 1361 (Fed. Cir. 2003); *United States ex rel. Gillett v. Dern*, 74 F.2d 485, 487 (D.C. Cir. 1934); see generally J. Kester, *State Governors and the Federal National Guard*, 11 Harv. J.L. & Pub. Pol’y 177, 190–99 (1988); F. Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 184–85 (1940). The result is that the National Guard has a “hybrid” role under federal law in which its members’ status depends on their prescribed duties in response to specific circumstances. See *Lipscomb v. Fed. Labor Relations Auth.*, 333 F.3d 611, 614 (5th Cir. 2003); *Clark*, 322 F.3d at 1361, 1365–67; *United States v. Hutchings*, 127 F.3d 1255, 1258 (3d Cir. 1997); *Charles v. Rice*, 28 F.3d 1312, 1315-16 (1st Cir. 1994); *Knutson v. Wisconsin Air Nat’l Guard*, 995 F.2d 765, 767 (7th Cir. 1993); *Illinois Nat’l Guard v. Federal Labor Relations Auth.*, 854 F.2d 1396, 1397–98 (D.C. Cir. 1988).

Consistent with the National Guard's status as a reserve force, its members keep their civilian status except when performing assigned duties. *Perpich*, 496 U.S. at 348. Such assigned duties include part-time training. See 32 U.S.C. §§ 501–507; *Charles*, 28 F.3d at 1316 (“[m]any Guard members, so-called ‘weekenders,’ serve only part-time, by participating in drills and maneuvers on weekends and in the summer”). In addition to performing their regular readiness training, members of the National Guard may be either called into “active duty” in the armed forces (often referred to as “federal service”), in which they temporarily relinquish their National Guard status and serve under the President’s command, or placed in “full-time National Guard duty” in response to natural disasters or to perform other operations. See *Perpich*, 496 U.S. at 343–51; *Clark*, 322 F.3d at 1366–67; *Hutchings*, 127 F.3d at 1258; *Gilliam v. Miller*, 973 F.2d 760, 763–64 (9th Cir. 1992); Nat’l Guard Regulation 500-5, § 4-1 (Aug. 18, 2010) (“NGR 500-5”), available at www.ngbpdc.ngb.army.mil/Portals/27/Publications/ngr/ngr%20500-5.pdf (last visited June 25, 2019).

Active duty status in the armed forces is governed by Title 10, which relieves a member of his National Guard status. 10 U.S.C. § 101(d)(1); 32 U.S.C. §§ 325(a), (c); see also *Perpich*, 496 U.S. at 345–47 (describing “dual enlistment” structure under which “a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service”). National Guard members may be called up for active duty “[i]n time of war or of national emergency declared by Congress,” 10 U.S.C. § 12301, and “[i]n time of national emergency declared by the President,” 10 U.S.C. § 12302.

By contrast, National Guard status is governed by Title 32, which controls both the periodic training required of all National Guard members, and full-time National Guard duty for specific operations. See *Clark*, 322 F.3d at 1366–68; *Charles*, 28 F.3d at 1316; *Gilbert v. United States*, 165 F.3d 470, 473 (6th Cir. 1999); *Hutchings*, 127 F.3d at 1258; 32 U.S.C. § 101(19) (defining “Full-time National Guard duty” to include service “in the member’s status as a member of the National Guard of a State . . . under section 316, 502, 503, 504, or 505 of this title for which the member is entitled to pay from the United States”); 32 U.S.C. §§ 502(f) (providing that “a member of the National Guard may . . . be ordered to perform training or *other duty*”) (emphasis added); see also 32 U.S.C. § 101(12) (defining “active duty” to exclude “full-time National Guard duty”).¹

National Guard duty under Title 32 is funded by the federal government but conducted under the command of the States’ governors. 32 U.S.C. §§ 106, 107, 314, 328; *Perpich*, 496 U.S. at 351 (“The Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units.”); *Lipscomb*, 333 F.3d at 614 (2003) (“The daily operations of the national guard units are thus recognized generally to be under the control of the states, but governed largely by substantive federal law.”); *Charles*, 28 F.3d at 1315–16; see also *Clark*, 322 F.3d at 1366; *Hutchings*, 127 F.3d at 1258–59; *Knutson*, 995 F.2d at 767–68; *Ill. Nat’l Guard*, 854 F.2d at 1397–98; NGR 500-5, § 4-1(c)(1) (“Although these duties [under § 502(f)] are wholly federally funded, for all such duty, the National Guard remains under the command and control of the

¹ Federal laws relating to the National Guard typically contain parallel provisions for the Army National Guard and the Air Force National Guard. See 10 U.S.C. §§ 101(c)(1)–(5); 32 U.S.C. §§ 101(3)–(6), (19); see also *Knutson*, 995 F.2d at 767. For simplicity, this brief generally refers only to the Army National Guard.

respective Governor”); Maj. R. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, Army Law., Dec. 2007 30, 32 (“*Military Justice*”). In recent decades, Title 32 duty has expanded to include not only responding to natural disasters, but also homeland security actions (authorized by 32 U.S.C. § 904, added in 2004) and counter-drug operations (authorized by 32 U.S.C. § 502(f)). See also 32 U.S.C. § 112 (authorizing funding for counter-drug operations); W. Parker, IV, *New National Guard Missions and the Federal Tort Claims Act*, Army Law., Jan. 2011 59, 59–60 (“*New National Guard Missions*”).

2. State Active Duty

A key aspect of non-civilian service by National Guard members that the district court overlooked or misapprehended is that such service is not limited to duty under federal law pursuant to Title 10 or Title 32. Instead, the National Guard of each State also constitutes its own militia and may be tasked with implementing operations exclusively under state law — commonly referred to as “state active duty” (or “SAD”) — under the command of its Governor, using state funds. See *Smith v. Sikorsky Aircraft Corp.*, 623 F. App’x 156, 159 (5th Cir. 2015) (explaining that service “pursuant to § 505 of Title 32 of the United States Code . . . and state active duty (SAD) status are mutually exclusive”); *Jorden v. Nat’l Guard Bureau*, 799 F.2d 99, 101 (3d Cir. 1986); see also 32 U.S.C. § 109(b) (“Nothing in this title limits the right of a State . . . to use its National Guard . . . within its borders in time of peace”); *Perpich*, 496 U.S. at 351 (referring to State’s “ability to rely on its own Guard in state emergency situations”); NGR 500-5

§§ 3-2, 4-1, 10-2.² Such duties, which do not depend on federal law and are not funded by the federal government, include, for example, fighting forest fires and in-state relief efforts following natural disasters like floods or hurricanes. *Jorden*, 799 F.2d at 101; *New National Guard Missions*, Army Law., Jan. 2011 at 59–60; *Military Justice*, Army Law., Dec. 2007 at 34. In Illinois, for example, state-law authority for such operations is found in its state constitution and corresponding laws. Ill. Const. Art. XII, § 4; 20 Ill. Comp. Stat. 1805/5 *et seq.* (2016).

B. USERRA’ Plain Language Establishes that It Applies to Full-Time National Guard Duty under Title 32.

The plain meaning of USERRA’s governing text establishes that USERRA applies not only to “active duty” under Title 10, but also to “full-time National Guard duty” under Title 32. USERRA’s declared purposes are:

- (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 See also S. Kealy, *Reexamining the Posse Comitatus Act: Toward A Right to Civil Law Enforcement*, 21 Yale L. & Pol’y Rev. 383, 416 n.224 (2003); R. Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists’ Reemployment Rights*, 30 Wm. Mitchell L. Rev. 797, 831 (2004); W. Parker, IV, *New National Guard Missions and the Federal Tort Claims Act*, Army Law., Jan. 2011, 59, 59–60 (describing Title 32 operations that previously would have been performed as “state active duty”); Lt. Col. H. Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 Air Force Law. Rev. 55, 85–86 (1999); Capt. R. Gleason, *The Use of National Guard Personnel for Counter-Drug Operations: Implications Under the Federal Tort Claims Act*, Army Law., June 1991 47, 47–49; K. Reynolds, *et al.*, *Uniformed Services Employment and Reemployment Rights Act*, American Bar Ass’n, GPSolo March/April 2019, 42, 44–45 (explaining differences among “three types of military orders a servicemember can serve under”: “Title 10 Active Duty (serving in the military pursuant to Title 10 U.S. Code), Title 32 (serving in the military pursuant to Title 32 U.S. Code), and State Active Duty (SAD, serving pursuant to state statute).”).

(2) to minimize the disruption to the lives of persons performing service in the uniformed services . . . 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. USERRA achieves these purposes by granting anti-discrimination and reemployment protections — detailed in Sections 4311 to 4319 (38 U.S.C. §§ 4311 to 4319) — to “any person whose absence from a position of employment is necessitated by reason of *service in the uniformed services*.” 38 U.S.C. § 4312(a) (emphasis added).

The controlling issue in this appeal is whether full-time National Guard duty under Title 32 generally, and such duty in a counter-drug operation under 32 U.S.C. § 502(f) specifically, qualifies as “service in the uniformed services” within the meaning of USERRA Section 4312(a). Section 4303(13) explicitly answers that question in the affirmative, stating:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, [and] *full-time National Guard duty*[.]

38 U.S.C. § 4303(13) (emphasis added). Section 4303(16) similarly provides: “The term ‘uniformed services’ means the Armed Forces [and] the Army National Guard . . . when engaged in active duty for training, inactive duty training, or *full-time National Guard duty*” 38 U.S.C. § 4303(16) (emphasis added).

These provisions unambiguously establish that USERRA applies not only to “active duty” under Title 10, but also to “full-time National Guard duty” under Title 32, which was Mueller’s status that formed the basis for his USERRA claim in this case. Surprisingly, the district court did not mention these statutory provisions. (Dkt. 32; Dkt. 55.) Instead, citing a Department of Labor regulation implementing USERRA, Section 20 C.F.R. § 1002.57, the district court stated that the term “uniformed service” is “defined in federal law as *excluding a tour of duty while under state control* and not under federal control.” (Dkt. 32 at 7, emphasis added.) As discussed directly below, that is not even an accurate reading of this regulation. But because USERRA itself is clear, there was no reason for the district court to refer to its regulations. See *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355, 358 (7th Cir. 2006); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). Rather, the district court should have held that USERRA, by its plain terms, covers full-time National Guard duty under Title 32.

C. The Regulations Implementing USERRA Confirm that It Applies to Full-Time National Guard Duty under Title 32.

Even if it were appropriate for the district court to consider USERRA’s regulations, they confirm that USERRA applies to full-time National Guard duty under Title 32, and thus to Mueller’s service on which he based his USERRA claim in this case. The district court erred, therefore, in concluding that these regulations, and 20 C.F.R. § 1002.57 in particular, warranted a contrary conclusion.

The regulations implementing USERRA are located at Title 20, Part 1002, of the Code of Federal Regulations. 20 C.F.R. §§ 1002.1 *et seq.* Especially relevant here, Sections 1002.5(l) and 1002.5(o), relating to USERRA’s definitions, state, respectively,

that “[s]ervice in the uniformed services includes active duty, active and inactive duty for training, [and] National Guard duty under Federal statute,” and that “[u]niformed services means the Armed Forces [and] the Army National Guard . . . when engaged in active duty for training, inactive duty training, or *full-time National Guard duty*.” 20 C.F.R. § 1002.5(l), (o) (emphasis added). Thus, these regulations both conform to the text of USERRA itself and affirm that full-time National Guard duty under Title 32 is covered service.

Section 1002.57, on which the district court heavily relied, does not warrant a different conclusion. That Section, which specifically addresses whether “all service as a member of the National Guard [is] considered ‘service in the uniformed services,’” states: “National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.” 20 C.F.R. § 1002.57. Elaborating, Section 1002.57 provides:

(a) *National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.*

(b) *National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. . . .*

Id. (emphasis added). Thus, Section 1002.57(a), like Section 1002.5(o), expressly includes full-time National Guard duty under Title 32 in USERRA’s coverage.

Again, however, the district court did not mention Section 1002.5(o) or Section 1002.57(a). Instead, it relied exclusively on the language in Section 1002.57(b) stating that “National Guard service *under authority of State law* is not protected by USERRA.” (Dkt. 32 at 8, emphasis added.) In doing so, the district court erred in two ways. First, it read this sentence without considering the text of USERRA and other regulations, including the rest of Section 1002.57 — all of which make clear that USERRA applies to full-time National Guard duty. Second, it misread the phrase “under authority of State law” to encompass Title 32 duty, when the proper interpretation of this language is that it was intended to exclude only *state active duty*, not full-time National Guard duty under Title 32, which is National Guard duty *under federal authority*.

As explained above, USERRA’s text expressly provides that the law applies to full-time National Guard duty, and the implementing regulations must be read to conform, not conflict, with the statute itself. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013); *Ortiz-Santiago v. Barr*, 924 F.3d 956, 961 (7th Cir. 2019). Sections 1002.5(l), 1002.5(o), and 1002.57(a), quoted above, clearly conform to USERRA’s text. And any ambiguity in the language of Section 1002.57(b), on which the district court relied, should be resolved in favor of the same meaning, under which USERRA’s protection includes full-time National Guard duty under Title 32. Thus, Section 1002.57(b)’s reference to “National Guard service under authority of State law” must be read to refer to *state active duty*, conducted entirely under state authority, not Title 32 duty conducted under state *and federal* authority (albeit under state command).

When it adopted the opposite view of this language, the district court seemingly assumed that National Guard members have only *two* non-civilian statuses, i.e., under Title 10 or Title 32, so that the distinction in Section 1002.57(b) must operate to exclude Title 32 duty. (Dkt. 32 at 7–8.) But that reading of Section 1002.57 fails to account for the *third* duty status of National Guard members: state active duty, for operations entirely pursuant to state law. By contrast, reading Section 1002.57(b)’s reference to “National Guard service under authority of State law” as applying only to state active duty gives it meaning, as the district court sought to do, while also avoiding a direct conflict with the text of USERRA itself, as well as the other regulations implementing it. That is, moreover, how it is widely interpreted. See *Military Justice*, Army Law., Dec. 2007 at 33; see also authorities cited above at 9, n.2.

D. The Posse Comitatus Act Does Not Support Interpreting USERRA to Exclude Full-Time National Guard Duty under Title 32, Including as Part of a Counter-Drug Operation.

The district court also erred by ruling that the Posse Comitatus Act supports its interpretation of USERRA to exclude full-time National Guard duty under Title 32 generally, and Plaintiff’s counter-drug duty in particular. By its terms, the Posse Comitatus Act’s general prohibition against assisting domestic law enforcement operations applies only to the “Army or Air Force,” 18 U.S.C. § 1385, which does not include the National Guard in a Title 32 status. *Gilbert*, 165 F.3d at 472; *Hutchings*, 127 F.3d at 1258; see also *Clark*, 322 F.3d at 1367. The Posse Comitatus Act also contains a specific exception for activities “expressly authorized by the Constitution or an Act of Congress,” 18 U.S.C. § 1385, and that exception applies to all National Guard duty

authorized by Title 32, including, as in this case, counter-drug duty under 32 U.S.C. § 502(f), see *Gilbert*, 165 F.3d at 473–74; *United States v. Garcia*, 909 F. Supp. 334, 339 (D. Md. 1995), *aff'd*, 103 F.3d 121 (4th Cir. 1996) (unpublished).

In support of its contrary view, the district court emphasized that Section 112 of Title 32 authorizes federal funding for counter-drug operations by the National Guard “while not in federal service.” (Dkt. 32 at 6, quoting 32 U.S.C. § 112(a)(1).) But that limitation can be read in a manner that is consistent both with USERRA’s plain terms and with the general principle that, for domestic law-enforcement operations, National Guard members serve in their Title 32 status, not in active duty under Title 10, in order to comply with the Posse Comitatus Act. See *Clark*, 322 F.3d at 1367; *Hutchings*, 127 F.3d at 1258; *Tirado-Acosta v. Puerto Rico Nat’l Guard*, 118 F.3d 852, 853 (1st Cir. 1997). Thus, the “federal service” proviso in Section 112 is properly read to refer to Title 10 active duty, not service under Title 32, including full-time National Guard duty. *Gilbert*, 165 F.3d at 473; see also Lieut. Col. S. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities and Posse Comitatus: The Meaning and Implications of “In Federal Service”*, Army Law., June 1994 35, 42 (“both state active duty and Title 32 full-time National Guard duty are not in federal service and, therefore, are consistent with [Section 112’s] statutory language regarding the restriction against federal service”). That is the sense in which the term “federal service” is commonly used. *Perpich*, 496 U.S. at 343–51; *Clark*, 322 F.3d at 1366–68; *Hutchings*, 127 F.3d at 1258; 10 U.S.C. §§ 331, 332. Even the cases interpreting the Posse Comitatus Act on which the district court relied (Dkt. 32 at 6) held that it applies to Title 10 active duty, not full-

time National Guard duty under Title 32. See *Hutchings*, 127 F.3d at 1257–58; *United States v. Benish*, 5 F.3d 20, 25–26 (3d Cir. 1993). Indeed, both cases specifically held that a National Guard member’s participation in counter-drug operations under Title 32 — precisely the situation here — did not violate the Posse Comitatus Act. *Hutchings*, 127 F.3d at 1257–59; *Benish*, 5 F.3d at 25–26. The same conclusion applies in this case.

**E. The District Court’s Interpretation of USERRA
Conflicts with Congress’s Purpose.**

Finally, even if there were room to find that the text of USERRA or the corresponding regulations are ambiguous, the district court’s interpretation must be rejected because it is inconsistent with Congress’s purposes in passing the law. Those purposes include, in particular, “to encourage noncareer service in the uniformed services.” 38 U.S.C. § 4301; see also 20 C.F.R. § 1002.6 (noting that USERRA is “most often understood as applying to National Guard and reserve military personnel”). Although the district court’s rationale for limiting the scope of USERRA’s protection was applied in the specific context of counter-drug duty, it applies to *all* full-time National Guard duty under Title 32. The loss of USERRA’s protection for such duty would largely nullify its intended purpose. For this reason as well, the district court’s interpretation of USERRA should be rejected.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment and hold that USERRA applies to full-time National Guard duty under Title 32, including such duty as part of a counter-drug operation under Section 502(f).

Respectfully submitted,

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Certificate of Compliance With Circuit Rule 29

I certify that this brief complies with the type volume limitations set forth in Circuit Rule 29, in that the text of the brief, including headings, footnotes, and quotations, but excluding the cover page, the table of contents, the table of authorities, the appendix, this certificate and the certificate of service, contains 4,585 words.

In preparing this certificate, I relied on the word count of the WordPerfect X4 word processing system used to prepare this brief.

/s/ Richard S. Huszagh

Certificate of Filing and Service

I hereby certify that on June 27, 2019, I electronically filed the foregoing Amicus Brief of the States of Illinois, et al. with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will effect service on the other participants in the case, all of whom are registered CM/ECF users.

/s/ Richard S. Huszagh