No. 20-480

IN THE
Supreme Court of the United States

DAVID BABCOCK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Government agrees on the two things that matter. First, it agrees that the question presented—whether dual-status military technicians' Civil Service Retirement System (CSRS) payments qualify for the uniformed-services exception to the Windfall Elimination Provision (WEP)—has divided six circuit courts. Second, it agrees that the dual-status military technician role has a "necessary" military component and also has civilian features. Opp. 16. The upshot is that this petition presents a straightforward question of statutory interpretation that is ripe for resolution and is a matter of deep financial importance to those who have loyally served our Nation: Given the dual

military-civilian nature of dual-status technicians, is a pension payment based exclusively on that service "a payment based wholly on service as a member of a uniformed service"? 42 U.S.C. § 415(a)(7)(A)(III). Only this Court can answer that question and provide uniformity on how thousands of veterans receive Social Security benefits.

The Government tries to minimize the importance of this question. It notes that the question only applies to those who began their service before 1984. But this problem is not going away: Affected veterans will continue to retire for years, and they and their survivors will continue to collect benefits for decades. That the issue may resolve itself sometime many years from now is no justification for arbitrarily different treatment in the meantime.

Tellingly, the Government devotes much of its opposition to arguing the merits. Its presentation includes several new arguments not adopted below. That only reinforces that this is a weighty statutory-interpretation question that warrants this Court's resolution.

David Babcock served his country for over three decades as a pilot and pilot instructor supporting the National Guard, and in that role he was decorated for his active-duty service in Iraq. Pet. 6, 8. He served in uniform every day in a manner indistinguishable from active-duty personnel on post. *Id.* at 6-7, 16-17. Tens of thousands of dual-status technicians have served in a similar capacity.[1] They deserve to know whether their service counts as "uniformed service," and not to

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[1] In fact, another petition raising the same question is pending before the Court in *Larson* v. *Saul*, No. 20-854.

have the answer depend on which side of a state line they live on.

The Court should grant certiorari and reverse.

ARGUMENT

I. THIS PETITION IS AN EXCELLENT VEHICLE TO RESOLVE A DEEP SPLIT ON AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION.

1. The Government acknowledges (at 19) that the question presented has divided six circuits.[2] Because of that, veterans like Babcock who served as dual-status military technicians receive different Social Security benefits based on the arbitrary happenstance of where they retire. Had Babcock retired to Minnesota rather than in Michigan, he would be eligible for the uniformed-services exception and would not have his benefits reduced by the WEP. *See* Pet. 10, 14-16. The decision below thus merits this Court's review because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

2. The Government's response—tucked away in the last two pages of its opposition—is that the

[2] The Third Circuit has recently joined the courts that hold that dual-status technicians do not qualify for the uniformed-services exception. *Newton* v. *Commissioner Soc. Sec.*, 983 F.3d 643, 650 (3d Cir. 2020). It continues the trend of disagreeing with its sister circuits on its reasoning for that conclusion. Whereas the Sixth Circuit here largely relied on the statute's use of the word "wholly," Pet. App. 10a-12a, the Third Circuit thought the word "provides little assistance in discerning the plain meaning of the uniformed services exception," 983 F.3d at 649.

acknowledged and growing circuit split is not worth the Court's time. Its arguments are as weak as their back-of-the-brief placement suggests.

a. First, the Government contends that the question presented is not important because it affects a "discrete segment" of claimants. Opp. 19-20. But virtually all cases this Court reviews affect only a discrete group of people potentially affected by the question at issue. The Social Security cases that this Court has taken up in recent years show exactly this. *E.g.*, *Astrue* v. *Capato ex rel. B.N.C.*, 566 U.S. 541, 544 (2012) (affecting children conceived posthumously through in vitro fertilization seeking Social Security survivor benefits); *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1771-72 (2019) (affecting Social Security disability claimants whose administrative appeals were dismissed as untimely).

The "discrete segment" the Government refers to is not small. As it points out (at 19-20), the question presented affects any dual-status technician hired over a 16-year period from 1968 to 1984 who also performed covered work during their lifetime to qualify for Social Security. Congress has consistently mandated that more than 60,000 dual-status technicians be employed. Pet. 16. The Government presumably has the data necessary to show this Court that the problem is not that large, yet its opposition provides nothing to undermine the petition's inference from the raw figures that "tens of thousands of veterans" are likely affected. *Id.*

b. The Government also suggests (at 19) that the importance of the question presented will "diminish over time." This verges on morbid. It effectively asks the Court to ignore the question because dual-status

technicians hired in the '60s, '70s, and '80s (and their survivors) will eventually pass away, and then there will be no one left to seek or receive Social Security benefits. The Court should not play that macabre waiting game. These dual-status technicians, like Babcock, spent decades supporting the National Guard while also standing ready to be called up for active duty. *See* Pet. 6, 8. They deserve not to be treated differently based on where they live when retiring. If anything, their mortality should motivate the Court to grant the petition now, because every month matters as some of these dual-status technicians pass away. *See, e.g.*, *Larson* v. *Saul*, 967 F.3d 914, 919 n.2 (9th Cir. 2020) (dual-status technician passed away while challenging the SSA's application of the uniformed-services exception). In any event, it is hardly unusual for the Court to consider how to interpret laws with limited prospective effect. *E.g.*, *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 199 (2011) (resolving circuit split on meaning of since-replaced regulation).

And the wait the Government endorses is not a short one. There is a reason that this circuit split has only recently matured: Claimants like Babcock who began their careers as dual-status technicians only recently begun retiring. Nearly four decades elapsed between when Babcock became a dual-status technician and when he applied for Social Security benefits. Pet. App. 2a, 4a. Those following in his footsteps who began their career in the early '80s will still be applying for benefits for years to come, and retired dual-status technicians (and their survivors) will be collecting retirement benefits for decades more.

The Government points out (at 20) that in the Eighth Circuit, the Social Security Administration (SSA) has only applied the *Petersen* ruling prospectively. This is apparently a suggestion that dual-status technicians who have already retired and did not seek to have the uniformed-services exception applied to them are out of luck. But if this Court determines that *Petersen* is correct and that dual-status technicians are eligible for the uniformed-services exception, the SSA will be hard-pressed not to apply that rule nationwide to all retirees in Babcock's position.

c. Finally, the Government suggests (at 20-21) that the Eighth Circuit *may* reconsider its position. This is always a possibility, but there is no indication that the Eighth Circuit will do so here. It may not even have the opportunity, as the Government acknowledges that it is no longer litigating this issue there, even as it hedges that it "retains the authority" to do so at some point in the future. Opp. 21; *see* SSAR 12-X(8), 77 Fed. Reg. 51,842, 51,843 (Aug. 27, 2012) (SSA ruling acquiescing in the Eighth Circuit's *Petersen* decision).[3]

II. THE GOVERNMENT'S MERITS ARGUMENTS ARE IRRELEVANT AT THIS STAGE AND WRONG.

It is telling that, rather than focusing on the question of whether this case meets this Court's criteria for

[3] The Government also notes in passing that the split is "lopsided." Opp. 12, 19. That is no reason to deny certiorari. This Court often adopts the minority position in a circuit split, especially when that minority position is more faithful to the statutory text. *E.g.*, *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 24, 25 (2018) (unanimously adopting minority view in a 4-1 split).

taking up a case, the Government spends the bulk of its opposition previewing its merits arguments. *See* Opp. 11-19. They are not relevant to whether this Court's review is appropriate. And these arguments merely reinforce that intervention is needed to resolve a weighty question of statutory interpretation. In any event, these arguments are wrong.

1. The Government's leading argument (at 12-13) is that CSRS pensions, like the one at issue here, are reserved for civilian employees of the federal government. The Government also notes other features of the dual-status technician role—such as being permitted to join a union or to access certain civilian benefits—that are civilian in nature. Opp. 6-7, 12-13.

These observations only beg the question presented; they do not answer it. Nobody disputes that one part of the "dual" in "dual-status technician" is the civilian component of the job. *See* Pet. 7. But the *other* part—as the Sixth Circuit acknowledged below—is "irreducibly military." Pet. App. 15a. Dual-status military technicians must be in the National Guard, they wear a uniform and comply with military protocol while on the job, and they are outside the standard competitive service for civil servants. Pet. 6-7; *see* Opp. 16 (conceding that "National Guard membership is a necessary * * * condition of the receipt of CSRS payments in this context"). To the extent the specifics of Babcock's service are relevant, he served in a quintessentially military role as a test pilot and trainer on Black Hawk helicopters. *See* Pet. 16-17.

It is that dual nature that gives rise to the question presented: when dual-status technicians are serving in a role that requires them to be *both* civilian civil servants *and* members of a uniformed service, is any

resulting pension payment a "payment based wholly on service as a member of a uniformed service"? 42 U.S.C. § 415(a)(7)(A)(III). Babcock's argument is that his dual-status technician service was "service as a member of a uniformed service," even as it was also service as a member of the civil service. And because the CSRS pension payments are "based wholly" on that service, he qualifies for the exception. *See* Pet. 17-18.[4] The decision below and the Government's contrary view reads a requirement into the statute—absent from its text—that the service must be *exclusively* in a military capacity. *See* Pet. 19-20. The question presented thus boils down to whether there is such an exclusivity requirement; detailing why dual-status technicians are partially civilian in nature does nothing to answer it.

The Government appears to believe it has come up with a new argument when it notes that 5 U.S.C. § 2101(1) draws a distinction between "civil service" and "positions in the uniformed services." Opp. 13. But the fact that "uniformed service" is not "civil service" does not mean that the same person cannot perform both types of service at the same time—which is exactly what dual-status technicians do. Indeed, a neighboring statutory provision seems to recognize that the dual-status nature may cause confusion when it expressly provides that dual-status technician service "shall be credited" towards a CSRS pension. 5

[4] Notably, the Government is willing to concede—at least for the sake of argument—that "the term 'wholly' * * * modifies the term 'payment' rather than 'service.' " Opp. 16. If that is right, it is sufficient to qualify for the uniformed-services exception that dual-status technicians are serving in a uniformed service, irrespective of whether they are *also* serving in the civil service.

U.S.C. § 8332(b)(6). It thus resolves that the role's simultaneously military nature does not preclude civilian benefits—all Babcock is asking for is for the same logic to apply the other way 'round.

2. The Government reprises the SSA's view, supposedly derived from legislative history, that the uniformed-services exception was meant to apply only to pension payments for inactive-duty training between 1956 and 1988. Opp. 4-5, 18-19; 77 Fed. Reg. at 51,843 ("[T]he effect of the uniformed services exception * * * is to exempt from the WEP only military retirement pay based on reserve inactive duty training."); *but see* Pet. 21-22. If that is all Congress wished to cover, it would have written a statute that applies only to "payments based on inactive-duty training." It did not. Instead, the exception it wrote is unequivocally broader and applies to payments based on *all* "service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). The Government cannot rewrite the statute to fit its view of what Congress intended. *See Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014).

And even if the Government is right that the uniformed-services exception "was adopted to address inequitable treatment *of different types of military duty*," Opp. 19, it is not clear why that cuts against it covering dual-status technicians. The Government agrees that the exception was meant to restore the "windfall" mitigated by the WEP for inactive-duty "training or drills" that were not subject to Social Security taxes. *See id.* at 4. If Congress wished to give preferential Social Security treatment for that type of reserve service, it is hardly obvious that it would not also want to include the service of dual-status

technicians who dedicate their careers to "organizing, administering, instructing, or training of the National Guard." *See* 32 U.S.C. § 709(a)(1).

3. Last, the Government makes the novel contention that when Babcock was serving in uniform as a military pilot for the National Guard, it was not uniformed service at all. *See* Opp. 4, 13-14. It says that the definition of "reserve component" incorporated by reference in the uniformed-services exception includes "the Army National Guard of the United States," but not "the Army National Guard." 38 U.S.C. § 101(27)(F). The Government is correct that these are occasionally defined as distinct in the U.S. Code, *e.g.*, 10 U.S.C. § 101(c)(2)-(3), but that is a distinction without a difference because the two have been coterminous for nearly a century. "Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." *Perpich* v. *Dep't of Def.*, 496 U.S. 334, 345 (1990).[5] Indeed, " 'Army National Guard of the United States' means the reserve component of the Army *all of whose members are members of the Army National Guard*." 32 U.S.C. § 101(5)

[5] The Government (at 15) quotes *Perpich*'s statement that National Guard members "must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time." 496 U.S. at 348. The Court made this statement to identify which Militia Clause of Article I a member is serving under at a given time, *see id.*, not to say the three Guard roles are mutually exclusive. To the contrary, the central point of *Perpich* was that "every member" of the National Guard has simultaneously joined her State's National Guard and "the National Guard of the United States," "thereby becom[ing] a member of the Reserve Corps of the Army." *Id.* at 347.

(emphasis added); *see also* 10 U.S.C. § 101(c)(3) (same). Since the federalization of the National Guard, "[t]he Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units." *Perpich*, 496 U.S. at 351. The dual-status technician program is part of that effort, as Congress sought to create uniform national support for the National Guard by employing military technicians to support Guard units. *See* H.R. Rep. No. 90-1823 (1968), *reprinted at* 1968 U.S.C.C.A.N. 3318, 3320-21. Babcock's service, then, was in *both* the Army National Guard *and* the Army National Guard of the United States, and so it was uniformed service.

It is notable that the Government now leans on this additional new argument that no court of appeals has embraced. This is of a piece with the Government's acknowledgement that the circuits that have agreed with it have adopted "different rationales." Opp. 21 n.4; *see* Pet. 11-14. Whether or not these differences would themselves warrant certiorari, the lower courts' inability to coalesce around one basis to reject the Eighth Circuit's straightforward textual reading is telling. This Court should intervene to vindicate the "cardinal canon" that the "legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The many thousands of dual-status-technician veterans outside the Eighth Circuit who stand to have the WEP improperly applied to them deserve to have the benefit of the uniformed-services exception's plain text.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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