No. 20-480

IN THE
Supreme Court of the United States

DAVID BABCOCK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

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

BRIEF FOR PETITIONER DAVID BABCOCK

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QUESTION PRESENTED

Dual-status military technicians in the National Guard are members of the National Guard. They serve in uniform, observe military protocol, are required to maintain a military grade appropriate for their role, and are available for active deployment with their unit. A provision of the Social Security Act exempts payments from adverse treatment if they are "a payment based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III).

The question presented is:

Is a civil-service pension payment based on dual status military technician service to the National Guard a payment based wholly on service as a member of a uniformed service?

PARTIES TO THE PROCEEDING

David Babcock, petitioner on review, was the plaintiff-appellant below.

The Commissioner of Social Security, respondent on review, was the defendant-appellee below.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

For nearly 34 years, David Babcock's sole job was to serve the Michigan National Guard and ensure that it would be ready to deploy when a national or military emergency arose. His title was dual-status technician. The "dual-status" nomenclature reflects two basic facts. First, the position was fundamentally military in nature: Babcock was required, as a condition of his employment, to maintain enlistment in the Guard; his duties related only to maintaining the Guard's readiness to deploy; and he reported to the adjutant general of the Michigan National Guard. Second, for bookkeeping purposes, the position was classified as civilian. This meant that many, though

not all, of the laws governing the federal civil service applied to Babcock.

Given his three-plus decades as a member of the National Guard, serving the Guard day in and day out, Babcock was surprised by the Social Security Administration's (SSA) processing of his application for retirement benefits. The SSA agreed he was entitled to social security benefits, but at a reduced level through application of the so-called windfall elimination provision. The windfall elimination provision reduces benefits if an applicant receives other retirement payments for employment in which he did not pay into Social Security. But the provision does not apply if those payments are "based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). Babcock earned a Civil Service Retirement System (CSRS) pension for his work as a dual-status technician, and he was not required to pay Social Security taxes during that time. Because this pension was based entirely on his employment as a dual-status technician, which required him to maintain membership in and serve the National Guard, Babcock thought he fell within the plain terms of this exception. Pet. App. 44a.

His layman's reading of the statute is the right one. Through a series of cross-references, "uniformed service" includes members of the National Guard. *See* 42 U.S.C. § 415(a)(7)(A)(III); *see also id.* § 410(m); 38 U.S.C. § 101(27). Babcock thus performed his dual-status technician work "as a member of a uniformed service": Dual-status technicians cannot hold that position unless they maintain enlistment in the National Guard and indeed must be members of the same Guard unit they serve as dual-status

technicians; their job exists to serve the Guard; the head of their Guard supervises their work as dual-status technicians; and they wear their Guard uniform and observe military protocol when performing their job. And Babcock's CSRS pension payments are "based wholly on" his dual-status technician work: He did not earn that pension for any other federal employment.

In arguing otherwise, the SSA reads an additional requirement into the text of the uniformed-services exception that does not exist. Although its arguments take several forms, all boil down to this: Dual-status technicians have *two* "statuses," one of which is civil, and so an exception for "service as a member of a unfirmed service" does not apply to them. Although there are several responses, all boil down to this: The statutory text does not care what an employee's "status" is for administrative bookkeeping purposes; it merely requires that work be performed "as a member of a uniformed service," and dual-status technicians fit that bill. The SSA prefers an exception that is limited to purely military work—whatever that may mean—based on its view of congressional purpose, but that is not the exception that Congress enacted.

Babcock was entitled to his full Social Security benefits, without any reduction based on the CSRS pension that he earned for his many years of service as a dual-status technician. This Court should reverse the Sixth Circuit's judgment affirming the SSA's decision.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 959 F.3d 210. Pet. App. 1a–16a. The Magistrate Judge's report and recommendation to affirm the SSA's decision is unreported, *id.* at 23a–31a, and the District Court's

order adopting the report and recommendation and affirming the SSA's decision is also unreported, *id.* at 17a–22a.

JURISDICTION

The Sixth Circuit entered judgment on May 11, 2020. Pet. App. 1a–16a. On March 19, 2020, the Court extended the time for filing a petition for a writ of certiorari to 150 days from the date of the lower court's denial of a timely petition for rehearing, to and including October 8, 2020. The petition for a writ of certiorari was filed on October 8, 2020, and granted on March 1, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Social Security Act and the principal statutes governing National Guard technicians are reprinted in the appendix to the petition for certiorari. Pet. App. 54a–70a.

STATEMENT

A. Statutory Background

1. The role of military technicians in ensuring the readiness of the National Guard

The National Guard is "an integral part of the first line defenses of the United States." 32 U.S.C. § 102; *accord* 50 U.S.C. § 3801(d). Tracing back to the colonial militias, the National Guard took its modern form in 1903. *See* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 195–196 & n.73 (1940). That year, Congress organized the militia into the National Guards of each state, territory, and the District of Columbia, and conformed their structure, armament, and discipline to the

national army. *See* Militia Act of 1903, Pub. L. No. 57-33, §§ 1, 3, 32 Stat. 775, 775–776. And it authorized the President to call the Guard into service to repel invasion, suppress rebellion, or execute the law within the Nation. *Id.* § 4, 32 Stat. at 776.

World War I drove home the pressing need for military readiness, including the important role the National Guard played in achieving that goal. The National Guard cannot be effectively called into service during a crisis unless the transition from state to federal service is seamless. *See* S. Rep. No. 73-135 (1933). To smooth that transition, Congress designated the National Guard as a reserve component of the Army of the United States. *See* 32 U.S.C. § 101(4) (defining "Army National Guard" as "that part of the organized militia of the several States"); *id.* § 101(5) (defining "Army National Guard of the United States" as "the reserve component of the Army all of whose members are members of the Army National Guard"). Since then, "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).

Over the years, Congress took further action to ensure that the Guard can serve its crucial role in military readiness. In line with "traditional military policy," it required that "the strength and organization of the Army National Guard and the Air National Guard * * * be maintained and assured at all times." 32 U.S.C. § 102. In service of that policy, a federal National Guard Bureau creates training requirements and monitors the State National Guards. 10 U.S.C. § 10503. The overarching goal of this system is straightforward: "to provide well-trained and well-

equipped units capable of augmenting the active forces in time of war or national emergency." *Id.* § 10503(5).

Military technicians have long played an essential role in guaranteeing that the National Guard will be ready the moment it is needed. The technician positions began as "caretakers and clerks," with limited responsibilities over equipment and supplies. *See* Maj. Michael J. Davidson & Maj. Steve Walters, *Neither Man nor Beast: The National Guard Technician, Modern Day Military Minotaur*, Army Law., Dec. 1995, at 49, 51. Over time, these technicians were tasked with the administration, training, and maintenance needed to keep the National Guard ready to face foreign threats. These ongoing duties could not be accomplished in the limited periods of mandatory Guard weekend duty and training. *See id.*; *see also* 32 U.S.C. § 502 (setting out drill and field exercise requirements).

Congress enacted the National Guard Technicians Act in 1968, reflecting the growing importance of the technicians' role. As the Chief of the National Guard Bureau explained at the time: "[T]he splendid showing of the National Guard in its mobilization for service in Korea and Berlin was due in large measure to the competence of its full-time technicians." *Reserve Components of the Armed Forces and National Guard Technicians, Hearings on H.R. 2 Before the S. Comm. on Armed Servs.*, 90th Cong. 180 (1967) (statement of Gen. Winston P. Wilson, Chief, National Guard Bureau, Departments of the Army and Air Force). Yet, despite their importance, technicians experienced a haphazard system of pay and benefits. *See id.* The Act set out the requirements and responsibilities of

the technician position, converted technicians to federal employees, defined their pay and benefits, and clarified the authorities of the Secretary of the Army and adjutant generals over these technicians. *See generally* National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755.

Congress did so in a way that inextricably bound technicians to the National Guard. These technicians were required, "while so employed," to "be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position." *Id.* sec. 2, § 709(b), 82 Stat. at 755. A technician who did not maintain those requirements was required to be separated (that is, terminated) from that position. *See id.* sec. 2, § 709(e)(1)-(2), 82 Stat. at 755–756. And a technician's chain of command ran through the adjutant general, who could, "at any time," separate him "from his technician employment for cause." *Id.* sec. 2, § 709(e)(3), 82 Stat. at 756.

Military technicians, now called dual-status technicians,[1] have only become more entwined with the National Guard over time. Congress has required the National Guard to employ a minimum number of dual-status technicians. *See, e.g.*, 10 U.S.C. § 115 note (End Strengths for Military Technicians (Dual Status)); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 413, 119 Stat. 3136, 3221 (providing for minimum of 66,035 dual-status technicians). As of 2018, dual-status technicians

[1] The dual-status moniker exists because Congress also authorized a limited number of technicians who could be hired *without* membership in the National Guard. *See* 10 U.S.C. § 10217(a). A phase out of the *non*-dual status technician position began in in September 2017. *See id.* § 10217(e).

nearly matched those serving in the Army Active Guard Reserve and outpaced those serving in the Air Active Guard Reserve. *See* Dep't of Defense, Defense Manpower Requirements Report Fiscal Year 2020, at 12 tbl. 2-3 (Apr. 2019) ("DOD FY 2020 Manpower Report") (reporting 30,300 Active Guard Reserve members, 26,600 dual-status technicians, and 1,300 civilian employees for the Army National Guard and 16,000 Active Guard Reserve members, 22,800 dual-status technicians, and 1,100 civilian employees for the Air National Guard).

A dual-status technician is "a Federal civilian employee" employed by the Department of the Army or the Department of the Air Force. 10 U.S.C. § 10216(a)(1)–(2); *see also* 32 U.S.C. § 709(b)(1), (e). However, dual-status technician positions are "authorized and accounted for" separately from other civilian employees. 10 U.S.C. § 10216(a)(2); *see also* DOD FY 2020 Manpower Report at 12 tbl. 2-3 (listing "dual-status technicians" and "civilians" as separate categories). They are "exempt from any requirement * * * for reductions in Department of Defense civilian personnel and shall only be reduced as part of military force structure reductions." 10 U.S.C. § 10216(b)(3).[2]

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[2] The Army Reserve and Air Force Reserve, which are exclusively federal organizations distinct from the National Guard, also employ dual-status technicians. *See* Cong. Rsch. Serv., RL30802, Reserve Component Personnel Issues: Questions and Answers 5 tbl.2 (2020), https://bit.ly/3bzIpe4; DOD FY 2020 Manpower Report at 12 tbl. 2-3 (reporting numbers of dual-status technicians in the reserve components). Their employment parallels that of dual-status technicians in the National Guard: They also must "maintain membership in the Selected Reserve," are classified as civilian employees, and may perform only duties that support the

The dual-status technician position exists solely to serve the National Guard. These technicians are employed in "the organizing, administering, instructing, or training of the National Guard" or "maintenance and repair of supplies issued to the National Guard or the armed forces." 32 U.S.C. § 709(a)(1)-(2). They may also be called upon for "[s]upport of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense"; "[s]upport of Federal training operations"; and instructing or training "active-duty members of the armed forces," "members of foreign military forces," or Department of Defense personnel, but only if doing so would not interfere with their National Guard-focused duties. *Id.* § 709(a)(3).

A dual-status technician can remain employed in that role only so long as he maintains his military status. Technicians "must * * * [b]e a member of the National Guard," "[h]old the military grade specified by the Secretary concerned for that position," and "[w]hile performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces." *Id.* § 709(b)(2)-(4).[3] If a technician "is separated from the National Guard or ceases to hold the military grade specified * * * for that position," he "shall be

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readiness of their reserve component. 10 U.S.C. § 10216(a)(1), (b), (d). This case involves a National Guard dual-status technician, and so this brief generally focuses on the National Guard. Any distinction between a technician who serves in the National Guard versus the Army or Air Force Reserve does not affect the statutory interpretation question here.

[3] Because of the National Guard requirement, these technicians are hired outside of the competitive service system that governs mine-run federal civilian employment. *See* 32 U.S.C. § 709(e).

promptly separated from" his "employment by the adjutant general." *Id.* § 709(f)(1)(A)-(B).

Though dual-status technicians are technically employees of the Army or Air Force, the head of their day-to-day chain of command is the same as the head of their National Guard command: the adjutant general of the State National Guard. *See id.* § 314(a). The adjutant general "may, at any time," fire a dual-status technician "for cause." *Id.* § 709(f)(2). The adjutant general carries out any "reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation." *Id.* § 709(f)(3). And the adjutant general is the final stop for a dual-status technician who seeks to appeal an adverse personnel action that "concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components." *Id.* § 709(f)(4); *see also id.* § 709(f)(5) (stating that for other activity, provisions of the Civil Service Reform Act and Title VII apply).

Dual-status technicians remain, as they were designed to be, part of an "organization organized and operated along military lines." H.R. Rep. No. 90-1823, at 13 (1968).

2. The use of the windfall elimination provision to reduce Social Security benefits

The Social Security system provides American workers a basic safety net. A person who works and pays into the system for a sufficient number of years receives, upon reaching retirement age, a monthly payment that replaces a portion—not all—of his pre-retirement income. Nearly 90% of older Americans

receive these payments. *See* Soc. Sec. Admin., Fact Sheet at 1 (2020), https://bit.ly/3nKC305.

For Social Security purposes, a retiree's employment history falls into two categories: covered and noncovered employment. In covered employment, a worker pays Social Security taxes on her earnings. In noncovered employment, a worker does not, often because the worker's job is part of a separate retirement system. *See, e.g.*, 42 U.S.C. § 410(a)(7) (exempting certain categories of state and local employment from the definition of "employment" for which Social Security taxes must be paid).

The Social Security Administration (SSA) applies a progressive formula to calculate a retiree's monthly benefit. It first determines his "average indexed monthly earnings" (AIME) based on the retiree's 35 years of highest pre-retirement income from covered employment. 42 U.S.C. § 415(b); *Social Security Benefit Amounts*, Soc. Sec. Admin., https://bit.ly/3ynlfRL (last visited May 20, 2021). The SSA then divides the AIME among three brackets (analogous to the brackets for taxable income). *See, e.g.*, *Primary Insurance Amount*, Soc. Sec. Admin., https://bit.ly/2R9yPr0 (last visited May 20, 2021) ("For 2021 these portions are the first $996, the amount between $996 and $6,002, and the amount over $6,002."). The SSA calculates a "primary insurance amount" by adding up 90% of the first bracket, 32% of the second bracket, and 15% of the third bracket. *See* 42 U.S.C. § 415(a). That amount, subject to a few adjustments, is the monthly Social Security payment the retiree receives. *See, e.g.*, *id.* § 415(i) (cost-of-living adjustments).

A quirk in the AIME formula can benefit a worker who splits her career between covered and noncovered

employment. When a worker has less than 35 years of covered employment, the SSA makes up the difference by treating the retiree as having earned no income in those years. *See id.* § 415(b)(1). For example, take a policeman with 25 years of noncovered employment from his primary job, for which he will earn a pension, and 10 years of covered employment from a second job he began after that. His AIME will reflect the 10 years of his covered earnings and 25 years of "0" earnings. And he will have a lower AIME than a private security guard who earned the same total wages over the same time period, whose AIME will reflect 35 years of covered earnings and no years of "0" earnings.

A lower AIME means that the primary insurance amount for that policeman will replace more of the policeman's AIME (proportionally speaking) than the private security guard's AIME. That is because more, if not all, of the policeman's AIME will fall in the first bracket, for which Social Security replaces 90% of that income. *See* Francine Lipman & Alan Smith, *The Social Security Benefits Formula and the Windfall Elimination Provision: An Equitable Approach to Addressing "Windfall" Benefits*, 39 J. Legis. 181, 192–193 (2013) (illustrating this outcome). The upshot is that some workers like our hypothetical policeman will receive a proportionally higher income-replacement payment from the Social Security system and an additional payment from a separate retirement system.

Congress responded to this result with the windfall elimination provision, which reduces Social Security payments for retirees who receive separate retirement payments based on noncovered employment. *See* Social Security Amendments of 1983, Pub. L. No. 98-21,

§ 113(a), 97 Stat. 65, 76–78. The windfall elimination provision applies to a retiree who is eligible "for a monthly periodic payment * * * which is based in whole or in part upon * * * earnings for" noncovered employment. 42 U.S.C. § 415(a)(7)(A). That is, it applies to a retiree who receives a pension outside of the Social Security system.

Unlike the formula used to calculate Social Security benefits, the windfall elimination provision is regressive. If the windfall elimination provision applies, a different formula is used to calculate the primary insurance amount. Instead of the 90%-32%-15% formula, s*ee id.* § 415(a)(1)(A), the windfall elimination provision imposes a 40%-32%-15% formula. *See id.* § 415(a)(7)(B). That is, under the windfall elimination provision, Social Security payments will replace less of a worker's income because the provision reduces the replacement rate for average wages that fall within the first bracket. *See* Cong. Rsch. Serv., Social Security: The Windfall Elimination Provision (WEP) 3 tbl.2 (2021), https://bit.ly/3tu80uT (illustrating the payments a hypothetical retiree receives with and without the windfall elimination provision). As a result, for lower-wage workers—that is, people whose AIME falls entirely, or mostly, within the first bracket—the windfall elimination provision imposes a proportionally higher reduction of their Social Security payments.

The windfall elimination provision contains a backstop against particularly harsh outcomes. The reduction to a retiree's primary insurance amount cannot exceed "an amount equal to one-half of the portion of the monthly periodic payment" that triggers the windfall elimination provision "which is attributable to

noncovered service." 42 U.S.C. § 415(a)(7)(B)(i). In other words, a retiree's monthly Social Security benefit cannot be reduced by more than half of the monthly pension he receives for his noncovered employment.

The windfall elimination provision contains several exceptions. It does not apply to a retiree with 30 years of covered employment. *See id.* § 415(a)(7)(D). For retirees with 21 to 29 years of covered employment, the reductions applied under the windfall elimination provision are lowered. *See id.* The provision does not apply to certain employees who were brought into the Social Security system by the Social Security Amendments of 1983. *See id.* § 415(a)(7)(E). And it does not apply to some pensions owed to railroad employees or paid by a foreign Social Security equivalent. *See id.* § 415(a)(7)(A).[4]

The provision at issue here is another exception that Congress built into the windfall elimination provision, referred to as the unformed-services exception. The definition of covered employment created a patchwork of coverage for military-related pay. *See* 42 U.S.C. § 410(*l*)(1)(A) (active duty service performed after December 1956); *id.* § 410(*l*)(1)(B) (inactive duty training performed after December 1987). Some retirees thus received pension payments that were based in part on noncovered work they had performed in uniform. *See* H.R. Rep. No. 103-670, at 125 (1994) (Conf. Rep.). Congress considered the application of the windfall

[4] The SSA's Program Operations Manual System (POMS)—its internal guidance for processing benefits—lists an additional exception: The windfall elimination provision does not apply to pensions based on service as a minister. *See* POMS RS 00605.362(D) Windfall Elimination Provision (WEP) Exceptions, Soc. Sec. Admin. (Nov. 09, 2017), https://bit.ly/3nLNCUT.

elimination provision to reduce Social Security payments in these circumstances "inequitable." H.R. Rep. No. 103-506, at 67 (1994). And so, it enacted the uniformed-services exemption to the windfall elimination provision. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 308(a)-(b), 108 Stat. 1464, 1522–23 (codified at 42 U.S.C. §§ 402, 415).

That exemption states that the windfall elimination provision is not triggered by a "payment based wholly on service as a member of a uniformed service (as defined in section 410(m) of this title)." 42 U.S.C. § 415(a)(7)(A)(III). Section 410(m), in turn, defines "member of a uniformed service" to include "any person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard (including a reserve component as defined in [38 U.S.C. § 101(27)]), * * * or as a commissioned officer of the Coast and Geodetic Survey,[5] the National Oceanic and Atmospheric Administration Corps, or the Regular or Reserve Corps of the Public Health Service." *Id.* § 410(m). The term "reserve component" includes the Army and Air National Guards of the United States. *See* 38 U.S.C. § 101(27)(G)-(H).

[5] The Coast and Geodetic Survey has been replaced by the National Oceanic and Atmospheric Administration Corps. *See* Reorganization Plan No. 2 of 1965, §§ 3(a), 6, 79 Stat. 1318, 1318–19 (rolling Coast and Geodetic Survey officers into the Environmental Science Services Administration); Reorganization Plan No. 4 of 1970, § 4(c)-(d), 84 Stat. 2090, 2092 (converting the Environmental Science Services Administration into the National Oceanic and Atmospheric Administration Corps).

B. Factual Background

1. David Babcock served as a full-time pilot and pilot instructor in the National Guard for over three decades. Pet. App. 2a. He first joined the Michigan National Guard in 1970 as an enlisted soldier. *Id*. Babcock then attended flight school to become a licensed pilot. *Id.* He began working as a dual-status technician in the National Guard in 1975, a position he held until 2009. *Id.* at 2a–3a, 36a–37a.

To hold his dual-status technician position, Babcock was also required to, and did, hold membership in the Michigan National Guard. *Id.* at 36a–37a. Over the years, Babcock saw other dual-status technicians lose their jobs because they did not maintain their positions in the National Guard. *See id.* at 37a (discussing people who "did not meet [the] height/weight standard" or were fired after being released from the Guard). Babcock made sure that he did what he needed to do to maintain his Guard membership, which enabled him to stay in his dual-status technician position. *See id.* at 41a–42a (stating that "[e]very year I had to sweat it out come March" waiting for a decision on whether he was "no longer needed in the Michigan National Guard").

While working as a dual-status technician, Babcock acted like any other National Guard member. He wore a uniform displaying his rank and National Guard unit, and he observed military protocol. *Id.* at 38a ("I had to wear my rank at all times, to loop people, call people sir, yes, sir when refer[ring] to higher ranking officers."). "There was no difference between [him] and someone on active duty or on post." *Id.* He was "in the military" as far as he was concerned. *Id.* at 45a.

Babcock also participated in the full range of National Guard service. He attended mandatory weekend drills. *Id.* at 2a–3a. He was available to support any operation or mission undertaken by his unit. And he served an active-duty deployment to Iraq between 2004 and 2005. *Id.* at 3a. For his service, Babcock received numerous decorations, including the Bronze Star, Army Achievement Medal, and Global War on Terrorism Expeditionary Medal. *Id.* at 50a.

After leaving his dual-status technician position, Babcock's service to his community did not end. He worked for several years flying medical-evacuation helicopters for private hospitals. *Id.* at 3a–4a. He fully retired in 2014. *Id.* at 4a.

At that time, Babcock was eligible for three separate retirement payments. He received a military pension based on the income he had earned for time spent in active duty and other mandatory National Guard service. *Id.* at 3a, 13a; *id.* at 42a (noting that he paid Social Security taxes on those wages). He received a pension through the Civil Service Retirement System (CSRS) for the wages he earned as a dual-status technician. *See id.* 3a (noting that Babcock "did not pay Social Security taxes * * * on his civil-service wages").[6] And he was entitled to Social Security retirement

[6] Babcock's entire CSRS pension was based on noncovered employment. When he began working as a dual-status technician, Congress had defined covered employment to exclude federal employees like him, who were covered by a separate retirement system (the CSRS system). *See* 42 U.S.C. § 410(a)(6)(A) (1970). Congress later defined essentially all federal employment as covered employment in 1983; however, it grandfathered in employees and did not require them to pay Social Security taxes so long as they remained continually employed in their civil service positions, which Babcock did. *See* 42 U.S.C. § 410(a)(5)(B)(i).

payments, as he had paid into the Social Security system during his mandatory National Guard service and civilian helicopter pilot employment.

2. When he fully retired, Babcock applied for Social Security retirement benefits.

In granting his application, the SSA applied the windfall elimination provision because of his CSRS pension and reduced his benefits. Pet. App. 4a. Babcock pursued an administrative appeal. He explained that his CSRS pension fell within the uniformed-services exception because it was based on his dual-status technician role. *Id.* at 4a–5a.

The SSA denied his appeal. *Id.* The Eighth Circuit had, by that time, addressed whether the windfall elimination provision applied to CSRS pensions earned by dual-status technicians and held that it did not because these technicians fell within the uniformed-services exception. *See Petersen* v. *Astrue*, 633 F.3d 633 (8th Cir. 2011). But the SSA disagreed and so, though it acquiesced in the decision in the Eighth Circuit, it decided that it would apply the windfall elimination provision to dual-status technicians who, like Babcock, resided outside the Eighth Circuit. *See* SSAR 12-X(8), 77 Fed. Reg. 51,842 (Aug. 27, 2012).

3. Babcock sought review in federal court. By then, the Eleventh Circuit had endorsed the SSA's interpretation. *See Martin* v. *Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1168 (11th Cir. 2018) (per curiam) (holding that the uniformed-services exception does not apply to dual-status technicians' CSRS payments). The Magistrate Judge recommended that the District Court follow the Eleventh Circuit's view of the uniformed-services exception. Pet. App. 23a–30a. The District Court agreed and affirmed the SSA's decision

to reduce Babcock's benefits through the windfall elimination provision. *Id.* at 17a–22a.

The Sixth Circuit affirmed. Pet. App. 2a, 16a. It held that "the uniformed-services exception is cabined to payments that are based exclusively on employment in the capacity or role of a uniformed-services member." *Id.* at 10a–11a. The court found that Babcock's CSRS pension payments did not fall within that category because his dual-status technician role was classified as civilian employment. *Id.* at 11a–12a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The plain terms of the uniformed-services exception cover dual-status technicians. Under the exception, the windfall elimination provision does not apply to "a payment based wholly on service as a member of a uniformed service (as defined in section 410(m) of this title)." 42 U.S.C. § 415(a)(7)(A)(III).

Dual-status technicians serve the National Guard, which is "a uniformed service" as defined in Section 410(m). *See id.* § 410(m) (including "a reserve component as defined in [38 U.S.C. §] 101(27)"); 38 U.S.C. § 101(27)(G)-(H) (referring to "the Army National Guard of the United States" and "the Air National Guard of the United States").

Dual-status technicians perform their work "as a member of a uniformed service." Membership is in their job description: A "person employed" as a dual-status technician "must meet" certain requirements, including that he "[b]e a member of the National Guard," "[h]old the military grade specified by the Secretary concerned for that position," and "wear the uniform appropriate for the member's grade and

component of the armed forces." 32 U.S.C. § 709(b)(2)-(4). Their entire job exists solely to serve the Guard: They "may be employed" in "organizing, administering, instructing, or training of the National Guard" or "the maintenance and repair of supplies issued to the National Guard or the armed forces" and may perform other tasks only if doing so would not interfere with their core Guard-focused duties. *Id.* § 709(a)(1)-(3). And they report to the leader of the State National Guard, the adjutant general, who is responsible for making personnel decisions about their employment and hearing any employment grievances. *See id.* § 709(f). Congress has thus structured the position of a dual-status technician in a way that makes membership in the National Guard essential, at all points, to his employment.

And dual-status technicians' CSRS payments that result solely from employment as a dual-status technician are "based wholly on" that service. Some retirees, like Babcock, will receive a CSRS pension based on only one federal job, their dual-status technician service. For these retirees, the entire CSRS pension falls within the uniformed-services exception and thus the windfall elimination provision is not triggered at all. Other retirees may have held additional federal employment, and so their CSRS pension will be based on their dual-status technician service and their other federal service. For these retirees, only the portion of their CSRS pension attributable to their dual-status technician job falls within the uniformed-services exception, and thus the windfall elimination provision is still triggered by the other portion of their CSRS pension.

The contrary interpretation, which would exclude dual-status technician pensions from the uniformed-services exception, relies on inserting a "non-civilian status" requirement into the exception. In the SSA's view, the exception does not apply to any employment that is "civilian." Because dual-status technicians are classified as civilian employees for some administrative purposes, the SSA says the exception does not apply to them.

The first route to this interpretation involves a misunderstanding of the role the word "wholly" plays in the uniformed-services exception. As courts that have embraced the SSA's interpretation have reasoned, dual-status technicians' work is not "wholly" done "as a member of a uniformed service" because a dual-status technician is classified as "a Federal civilian employee." 10 U.S.C. § 10216(a)(1). But "wholly" in the uniformed-services exception is not an invitation to some kind of existential assessment of the nature of a dual-status technician. It instead simply directs the SSA to determine the *source* of the payments at issue: To the extent they are wholly from service as a member of a unformed service, and not from any other employment, they fall within the exception.

Equally problematic, the uniformed-services exception is simply not concerned with an employee's "status." The exception refers to "service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). If an employee performs their work as a member of a uniformed service, that is all the exception requires.

Even taken on its own terms, the idea that dual-status technicians' technical classification as civilian employees means they lack "military status" is wrong. For one thing, the very reason they are referred to as

"dual"-status technicians is because of their military status. For another, as the government has itself told this Court, these technicians' work cannot be cleanly portioned off into "civilian" and "military" work—it is all "military" work, done to further the military mission of the National Guard. *Cf.* Br. in Opp. at 14–17, *Neville* v. *Dhillon*, No. 19-690 (U.S. Feb. 28, 2020), 2020 WL 1313286.

II. Finally, the SSA's interpretation is not entitled to deference. The SSA laid out its view that the uniformed-services exception does not apply to dual-status technicians less than ten years ago, in an informal notice that relied entirely on snippets of legislative history for support. This kind of casual analysis does not warrant deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). And that SSA reached this view only recently and has, over the years, offered new and shifting rationales to bolster its original notice makes clear that its interpretation does not warrant even the lesser deference applied under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

ARGUMENT

I. THE UNIFORMED-SERVICES EXCEPTION APPLIES TO DUAL-STATUS TECHNICIANS.

A. The plain text of the exemption covers a pension for dual-status technician employment.

"Statutory interpretation * * * begins with the text * * * ." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). The task is "to afford the law's terms their ordinary meaning." *Niz-Chavez* v. *Garland*, 141 S. Ct.

1474, 1480 (2021). That the government may prefer a different interpretation does not outweigh clear text. *See id.*

The windfall elimination provision is triggered if a retiree is eligible for "a monthly periodic payment * * * which is based in whole or in part upon his or her earnings for" noncovered employment "excluding * * * a payment based wholly on service as a member of a uniformed service (as defined in section 410(m) of this title)." 42 U.S.C. § 415(a)(7)(A).

The plain language of the uniformed-services exception contains only two requirements. The first is a sourcing requirement: A payment is excluded from the windfall elimination provision only if it is "based * * * on service as a member of a uniformed service," that is, if the retiree is entitled to the payment because of that service. The second is a tracing requirement: A payment is exempt from the windfall elimination provision only to the extent that it is based "wholly" on that service, that is, not on any other employment. Pension payments based entirely on work as a dual-status technician meet both requirements.

As to the first requirement, the uniformed-services exception requires that a retiree's "service as a member of a unformed service" be the cause of the payment at issue. The words "based * * * on service as a member of a uniformed service" form a phrasal adjective that modifies the noun "payment." Thus, "service as a member of a uniformed service" must be a but-for cause of the payment for it to fall within the exception. *See Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 (2020) (reading "based on age" in the phrase "discrimination based on age" to mean that "age must be a but-for cause of [the] discrimination").

This precisely describes dual-status technicians' pension payments. As used in the Social Security statutes, the word "service" is synonymous with work. *See Soc. Sec. Bd.* v. *Nierotko*, 327 U.S. 358, 365–366 (1946) (interpreting "service" to mean "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer").

Recall that the windfall elimination provision defines the "uniformed services" to include the National Guard. 42 U.S.C. § 410(m); 38 U.S.C. § 101(27)(G)-(H). Any "person employed" as a dual-status technician "*must*" as a condition of that employment "[b]e a member of the National Guard," "[h]old the military grade specified by the Secretary concerned for that position," and "wear the uniform appropriate for the member's grade and component of the armed forces." 32 U.S.C. § 709(b)(2)-(4) (emphasis added); *see also* 10 U.S.C. § 10216(a)(1)(B).[7] And dual-status technicians may *only* perform work that involves "the organizing, administering, instructing, or training of the National Guard," "the maintenance and repair of supplies issued to the National Guard or the armed forces," or "additional duties" that do not interfere with those National Guard-focused roles. 32 U.S.C. § 709(a). A dual-status technician thus earns his pension for work he performs as a member of a uniformed service.

As to the second requirement, the uniformed-services exception applies to pension payments that flow solely from this service. The word "wholly" describes

[7] Dual-status technicians are also "required as a condition of that employment to maintain membership" not in just *any* reserve unit but in the *specific* reserve unit they serve in their dual-status technician role. *See* 10 U.S.C. § 10216(d)(1).

the extent to which the payment at issue must be "based * * * on" the specified service. Giving the word wholly its ordinary meaning of "fully," *Wholly*, Black's Law Dictionary (11th ed. 2019), results in a requirement that the payment not flow from *other*, non-uniformed service employment. The word "wholly" thus identifies *which* payments that would otherwise trigger the windfall elimination provision nonetheless fall outside of it: those *wholly* based on work as a member of a uniformed service. If, for instance, a retiree worked as a dual-status military technician and as a non-uniformed federal employee, and then draws a CSRS pension based on all of his federal service, he could not avoid application of the windfall elimination provision to the portion of his pension earned for his non-uniformed federal employment. *See infra* at 26 & n.9.

The rest of the windfall elimination provision confirms this grammatical cue that the word "wholly" serves a tracing function. *See, e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) ("[l]ooking to other neighboring provisions"). The windfall elimination provision uses a parallel phrase "based in whole or in part" to identify payments that, because of their source, trigger the provision in the first place. The trigger is "a payment * * * which is based in whole or in part upon his or her earnings for" noncovered employment. 42 U.S.C. § 415(a)(7)(A). The phrase "in whole or in part" makes clear that a payment based only in part on noncovered employment will still trigger the windfall elimination provision. *See id.* § 415(a)(7)(B)(i) (directing the SSA to use "the portion of the monthly periodic payment" that triggered the windfall elimination provision "which is attributable to noncovered service" to calculate the

provision's backstop). Congress used the phrase "in whole or in part" in the provision and the word "wholly" in the exception in exactly the same way: to identify the source of the payments that are at issue.[8]

Pension payments for work as a dual-status technician meet this tracing requirement. As Babcock's pension shows, some dual-status technicians will avoid the windfall elimination provision entirely. His dual-status technician service in the National Guard is the sole basis for his CSRS pension. *See* Pet. App. 3a. That entire payment is thus "wholly" based on his service as a member of the uniformed services. And if any technician earned a mixed CSRS pension (one for both dual-status technician employment and non-uniformed federal employment), the exception removes only the portion of his CSRS pension attributable to his dual-status technician employment from the reach of the windfall elimination provision.[9]

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[8] Respondent also understands this nearby, parallel phrase—"based in whole or in part"—to refer to the *source* of the payments that can trigger the windfall elimination. The POMS contains instructions for how to prorate a pension that is based in part on covered employment and in part on noncovered employment to determine whether to apply the windfall elimination provision backstop (which SSA calls the "WEP guarantee"). *See* POMS RS 00605.370(A) WEP Guarantee, Soc. Sec. Admin. (Apr. 17, 2003), https://bit.ly/34Njfpt ("If the pension is based on both covered and non-covered service, the attributable amount is calculated by prorating the pension to the number of non-covered service months.").

[9] This is how Respondent applies the uniformed-services exception to a multi-source pension within the Eighth Circuit. *See* POMS RS 00605.380(B)(4) National Guard Civilian Pensions for Dual Status Technicians: *Petersen* Court Case, Soc. Sec. Admin. (Feb. 14, 2019), https://bit.ly/3vEDZtO (stating that the provision

If any doubt existed over this straightforward reading of the text, the pro-veteran canon would resolve it. "The solicitude of Congress for veterans is of long standing." *United States* v. *Oregon*, 366 U.S. 643, 647 (1961). Recognizing as much, this Court applies a rule of thumb when interpreting a statute designed to benefit those who serve in this nation's military. "[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (internal quotation marks omitted). Congress enacts statutes against the backdrop of this canon. *See, e.g.*, *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction * * * .").

The uniformed-services exception is undoubtedly a provision designed to benefit those who serve in the military. Congress has recognized dual-status technicians' work "is vital to our entire military effort." *Am. Fed'n of Gov't Emps. AFL-CIO, Loc. 2953* v. *Fed. Lab. Rels. Auth.*, 730 F.2d 1534, 1545 (D.C. Cir. 1984) (internal quotation marks omitted); *see also Wright* v. *Park*, 5 F.3d 586, 588 (1st Cir. 1993) ("Nor do technicians merely perform tasks that have a military ring to them; the record reflects that fully one-half of appellant's outfit, the 101st Air Refueling Wing, served in Operation Desert Storm or Desert Shield."). And

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applies to a pension "based on both employment as a dual status National Guard technician and other non-covered employment" and directing the SSA to "[p]rorate the pension to determine the months of dual status and the months that are based on other non-covered employment" to calculate the windfall elimination provision backstop).

the uniformed-services exception is an exception to a general rule, the windfall elimination provision, one that favors veterans by avoiding a reduction in Social Security benefits that would otherwise apply. Thus, to the extent the exception is ambiguous, it should be read to include dual-status technicians. *See King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220–221 & n.9 (1991) (explaining that had the statute been ambiguous, this Court "would ultimately read the provision * * * under the canon").

B. The text does not support the SSA's contrary interpretation.

Respondent asks the Court to interpret the uniformed-services exception as not applying to pensions earned for dual-status technician employment. That interpretation requires revising the statute in two ways. *First*, it moves the word "wholly" two words later in the statutory text. *Second*, it reads an unwritten military service gloss into the statutorily-defined term of "uniformed service." But statutes are interpreted by reading the text, not this sort of textual transfiguration.

1. The courts that take Respondent's view of the exception have, nearly uniformly, relied on the view that a dual-status technician's work "is not wholly 'service as a member of a uniformed service.' " Pet. App. 14a–15a. On this reading, because a dual-status technician's work is partially civilian, it is not "wholly" uniformed service. *See Martin*, 903 F.3d at 1165 ("The controversy is ultimately over what it means to perform service *wholly* in one's capacity or role *as a member of a uniformed service*."); *Kientz* v. *Comm'r, SSA*, 954 F.3d 1277, 1283 (10th Cir. 2020) ("any pension payment that Plaintiff receives based on work outside

of his exclusive capacity as a National Guard member does not qualify"); *Larson* v. *Saul*, 967 F.3d 914, 922 (9th Cir. 2020) (deferring to an interpretation that the exception applies only to "payments based on employment that is entirely military in nature"), *petition for cert. filed*, No. 20-854 (Dec. 18, 2020); *Linza* v. *Saul*, 990 F.3d 243, 249 (2d Cir. 2021) ("the work he performed must have been conducted exclusively in the capacity of a member of the National Guard"). But the text does not categorically rule out payments for work performed as a member of a uniformed service that has some civilian characteristics.

To read the text that way requires rewriting the statute. The exception actually covers: "a payment based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A). As written, the word "wholly" modifies payment. *See supra* at 24–26. To make the exception turn on the nature of the *service* that earns a pension payment, the text must be revised, as follows: "a payment based ~~wholly~~ on service wholly as a member of a uniformed service." As newly rewritten, the word "wholly" would indeed modify service.

But revising statutes is not a task for courts. *See Lewis* v. *City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for us to rewrite the statute * * * ."). The task is instead to "presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461–462 (2002) (internal quotation marks omitted). And as written, to the extent a payment is tied to service as a member of a uniformed service, the statute is indifferent to whether that same service also had civilian characteristics.

Indeed, taking stock of the other drafting choices that Congress could have made only supports giving effect to the words it actually enacted. If Congress had wanted the exception not to apply to any employment with any civilian characteristics at all, it could have easily said so. It could, for example, have limited the exception to a "payment based wholly on service as a member of a uniformed service *who is not classified as a civilian employee*." Or it could have referred to a payment based wholly on "*non-civilian* service as a member of a uniformed service." *Petersen* v. *Astrue*, No. 4:08CV3178, 2009 WL 995570, at *3 (D. Neb. Apr. 14, 2009), *aff'd*, 633 F.3d 633 (8th Cir. 2011). But it chose to enact different text, and that text includes dual-status technicians.

Finally, the narrow-construction canon has no purchase here. *See* Pet. App. 12a (invoking the canon that statutory exceptions are construed narrowly "to preserve the primary operation of the provision" (quoting *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989))). The windfall elimination provision is itself an exception, as it regressively imposes a reduction in Social Security payments that are otherwise distributed under a progressive formula. *See supra* at 13. And it contains four other exceptions, a step-down formula, and a backstop on the size of its reduction. *See supra* at 14. In the windfall elimination provision's reticulated scheme, there is "no textual indication that its exemptions should be construed narrowly." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (internal quotation marks omitted) (viewing the many exceptions in the Fair Labor Standards Act "as much a part of" its purpose as its primary requirements). The uniformed-services exception should simply be given "a fair reading." *Id.*

2. The SSA's backup defense of excluding dual-status technicians from the scope of the uniformed-services exception is that these military technicians are not military *enough*. On this view, service as a dual-status technician is not really service "as" a member of a uniformed service, though dual-status technicians are undeniably members of a uniformed service, because some unspecified percentage of their work is not performed in their capacity as a member of a uniformed service. *See Newton* v. *Comm'r Soc. Sec.*, 983 F.3d 643, 650 (3d Cir. 2020) (stating that "as" limits the exception "only to payments for work performed in one's capacity or role as a member of the uniformed services" (quoting *Martin*, 903 F.3d at 1164)); *see also* Opp. 15. This is wrong, both as a formal and practical matter.

Membership in a uniformed service is, quite literally, part of the dual-status technician job description. *See* 32 U.S.C. § 709(b)(2)-(3) (stating that "a person employed" as a dual-status technician "must * * * [b]e a member of the National Guard"); *see also* 10 U.S.C. § 10216(a)(1)(B). There is no reasonable argument that a dual-status technician does not serve "as a member" of the National Guard when he serves as a dual-status technician. This is made even clearer when this role is compared with that of a *non*-dual-status technician, a position that does *not* require membership in the National Guard as a condition of employment. *See* 32 U.S.C. § 709(b)-(c).

To conclude otherwise would treat the requirement that dual-status technicians maintain National Guard membership as merely a way to increase the size of the National Guard. The story would be, one supposes, that Congress wanted to drive up National

Guard membership and so it required enlistment as a condition of civilian employment. Under this scenario, Congress might have achieved its goal just as easily by requiring all persons employed as attorneys to join and remain in the National Guard, and it just happened to choose dual-status technicians instead. The statutory context refutes this theory.

Congress made National Guard membership central, not incidental, to the dual-status technician role. Mere membership is not enough to hold the position. Dual-status technicians must "[h]old the military grade specified by the Secretary concerned for [their] position." *Id.* § 709(b)(3). They must be members of the *same* National Guard unit that they support as dual-status technicians. *See* 10 U.S.C. § 10216(d)(1)(B). They report to the head of their State National Guard. *See* 32 U.S.C. § 709(d) (designating "adjutants general * * * to employ and administer the technicians"); *see also supra* at 10 (describing the supervisory control of the adjutants general). And additional qualifications for a technician cannot diverge from those for the parallel active guard reserve position. *See id.* § 709(i) (qualifications cannot differ from those "applicable * * * to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved").

This statutory design makes plain that Congress enacted a tight connection between dual-status technicians and the National Guard. *See, e.g.*, *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). "[T]he purpose of the technicians was to insure that the military mission of the National Guard would be carried

out effectively and efficiently." *Am. Fed'n of Gov't Emps. AFL-CIO, Loc. 2953*, 730 F.2d at 1545–46 (holding that a union could not bargain to base promotions on "technician efficiency" and not "military evaluation"). Requiring dual-status technicians to maintain constant, parallel membership in the National Guard is key to ensuring a seamless transition when dual-status technicians (and the National Guard units they serve) are called into federal service. *See id.* at 1546 (referring to "military preparedness" as the *sine qua non* of the Technician Act).

The two sides of a dual-status technicians' employment cannot, contrary to Respondent's suggestion, be hermetically sealed off from one another. *See* Opp. 16 (describing a "civilian workweek"). The government has told this Court exactly that when convenient, for example when arguing that the *Feres* doctrine applies to Title VII suits by dual-status technicians. *See United States* v. *Johnson*, 481 U.S. 681, 687–688 (1987) (describing a line of cases based on *Feres* v. *United States*, 340 U.S. 135 (1950), as "bar[ring] all suits on behalf of service members against the Government based upon service-related injuries"). In that context, the "civilian" aspects of a dual-status technician's employment gives the government no pause. That dual-status technicians serve on base, report to a military officer, perform the same tasks that they perform when called to active duty, and wear military uniforms while on the clock as a dual-status technician is enough to make their work "military in nature and integral to the military mission." Br. in Opp. at 17, *Neville*, No. 19-690 (internal quotation marks omitted). And that a dual-status technician may not be "on drill * * * does not alter the fundamentally military nature of her employment." *Id.*; *accord* Pet. App.

15a (describing dual-status technicians' role as "irreducibly military in nature" and discussing other applications of the *Feres* doctrine to their claims (internal quotation marks omitted)). The government cannot have it both ways.

The military nature of dual-status technicians' employment answers another charge leveled against interpreting the uniformed-services exception to apply to them. True, "if Congress had intended the * * * exception to cover any payments made to someone who had been a member of a uniformed service, it could have * * * except[ed] payments 'to' a member of a uniformed service." *Martin*, 903 F.3d at 1164. But reading the exception to cover dual-status technicians does not require twisting congressional purpose in that way. Congress referred to payments based on "service as a member of a uniformed service," and the military side of dual-status technicians' service means their service is just that. Under the correct reading of the exception, it would not cover pensions earned by any person who happened (unrelated to their job requirements) to have been a member of a uniformed service; that membership would not be the cause, in any way, of their pension. *See supra* at 23 (discussing the meaning of "based * * * on" in the exception).

At bottom, Respondent's objection to applying the uniformed-services exception to dual-status technicians is based not in text, but in legislative history. *See* SSAR 12-X(8), 77 Fed. Reg. at 51,843 (acquiescence ruling, relying on legislative history noting the need to address pension payments for inactive-duty training between 1956 and 1988); Opp. 4–5, 18–19 (describing this purpose). A different exception might align with that purpose: one that referred to

"payments based wholly on inactive-duty training." But Congress chose different words, and where, as here, "a rational Congress could reach the policy judgment the statutory text suggests it did; * * * no amount of policy-talk"—or legislative-history talk—"can overcome a plain statutory command." *Niz-Chavez*, 141 S. Ct. at 1486.

Congress's choice of words was indeed rational. The uniformed-services exception is a carve-out from the windfall elimination provision—meaning Congress intended the exception to give preferential treatment to some groups, and the question is simply whom the exception reaches. Respondent agrees that the exception was meant to restore the "windfall" for retirees who earned wages for inactive duty "training or drills" but did not pay Social Security taxes on those wages. Opp. 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, without whom National Guard "units would be crippled, and unable to perform the mission assigned to them." *Am. Fed'n of Gov't Emps. AFL-CIO, Loc. 2953*, 730 F.2d at 1545 (internal quotation marks omitted).

3. Respondent offers several subsidiary arguments in support of its reading, but none hold up to scrutiny.

On Respondent's reading, there is a simple route to resolving this question that has evaded courts (and even Respondent) for years. Babcock enlisted in and, as a dual-status technician, served *Michigan's* National Guard. The definition of "uniformed service" that the uniformed-services exception incorporates refers to the Army and Air National Guards of the United States. *See* 42 U.S.C. § 410(m); *see also* 38

U.S.C. § 101(27)(G)-(H). Respondent argues that a member of a State's National Guard is not a member of a National Guard of the United States unless she has been "called up to serve on federal active duty status." Opp. 14.

That is wrong. Each State National Guard is a "distinct organization[]" from the National Guard of the United States. *Perpich*, 496 U.S. at 345 (internal quotation marks omitted). But a member of the former is always a member of the latter. By statute, a member of a State National Guard "shall be concurrently enlisted" in the National Guard of the United States for an identical "term." 10 U.S.C. § 12107(b)-(c) (formerly codified at 10 U.S.C. §§ 3261, 8261); *see also id.* §§ 10105(2), 10111(2).

Thus, as this Court recognized in *Perpich*, "all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." 496 U.S. at 345; *see also* Wiener, *supra*, at 208 (recounting Congress's choice to make "the National Guard a part of the Army at all times"). Regardless of the nature of their duty status on any given day, members of a State National Guard are at all times members of the National Guard of the United States. *See In re Sealed Case*, 551 F.3d 1047, 1054–55 (D.C. Cir. 2009) (Kavanaugh, J., concurring in the judgment) (noting that the National Guard and National Guard of the United States "share members"); *see also* Br. in Opp. at 2–3, *Wetherill* v. *McHugh*, No. 10-638 (U.S. Feb. 14, 2011), 2011 WL 515704 ("members of a state National Guard, including National Guard technicians, are also reserve members of the Army").

Respondent also leans on the fact that Title 5 of the U.S. Code distinguishes between "civil service" and "positions in the uniformed service[s]." Opp. 13 (quoting 5 U.S.C. § 2101(1)). This says nothing about the meaning of the uniformed-services exception. To start, the uniformed-services exception incorporates a specific definition of "uniformed service." *See* 42 U.S.C. § 415(a)(7)(A); *see also id.* § 410(m); 38 U.S.C. § 101(27). Congress chose not to cross-reference the separate, narrower provision of Title 5. *See* 5 U.S.C. § 2101(2) (not including the National Guard).

Given that Congress enacted two different definitions of "uniformed service" depending on context, one can be a member of the "civil service" in Title 5 but still perform "service as a member of a uniformed service" for purposes of Title 42. Indeed, a neighboring provision recognizes that technicians' dual statuses may cause confusion and specifies that their service "shall be credited" towards a CSRS pension. 5 U.S.C. § 8332(b)(6). If this were true simply because dual-technicians are deemed to be civilian employees, this clarification would be unnecessary.

Moreover, Congress took pains to distinguish dual-status technicians from the civil service. It deemed a dual-status technician to be "a civilian employee." 10 U.S.C. § 10216(a)(1)-(2); 32 U.S.C. § 709(b)(1), (e). And it then specified which provisions of Title 5, which governs the civil service, do and do not apply to dual-status technicians. *See* 32 U.S.C. § 709(f)(5), (g), (h).

Additional statutory context confirms that mere classification as a "civilian" employee cannot be dispositive of whether the uniformed-services exception applies. *See* Opp. 12. The windfall elimination provision's definition of "uniformed service" includes two

services that are comprised entirely of uniformed, civilian officers: the National Oceanic and Atmospheric Administration Corps and the Public Health Service Corps. *See* 42 U.S.C. § 415(a)(7)(A); *id.* § 410(m). Both generally serve under the command of civilian authorities—NOAA within the Department of Commerce, *see* Reorganization Plan No. 4 of 1970, 84 Stat. 2090 (NOAA); 33 U.S.C. § 3001 (NOAA Corps), and the Public Health Service Corps within the Department of Health and Human Services, 42 U.S.C. §§ 202, 204(a)(3). Members of both may, as with National Guard members, have temporary stints of military service, *see* 33 U.S.C. § 3061; 42 U.S.C. § 217; *see also* 10 U.S.C. § 802(a)(8) (providing NOAA Corps and Public Health Service Corps members are subject to the Uniform Code of Military Justice only "when assigned to and serving with the armed forces"). And yet, Congress chose to define the windfall elimination provision by reference to a definition that includes these two bodies. This further confirms that the "civilian" character of a position is beside the point when determining whether a person is serving as a "member of a uniformed service" for purposes of the uniformed-services exception.

II. THE SSA'S INTERPRETATION DOES NOT WARRANT DEFERENCE.

In defending the decision below, Respondent did not invoke deference, *see* Opp. 16–19, even though it did do so before the Sixth Circuit, *see* Br. for Appellee at 33–38, *Babcock* v. *Comm'r of Soc. Sec.*, 959 F.3d 210 (6th Cir. 2020) (No. 19-1687), ECF No. 17. The decision to retreat from this argument was the right one, because Respondent's interpretation is not entitled to deference.

After the Eighth Circuit's *Peterson* decision, Respondent issued an acquiescence ruling that stated the SSA would apply *Peterson* only in the Eighth Circuit. *See* Ltr. to Clerk Deborah Hunt at 1–2, *Babcock*, 959 F.3d 210 (No. 19-1687), ECF No. 25 ("The agency did not issue a written policy specifically excluding dual status technicians from the application of the Uniformed Services Exception until after * * * *Petersen* * * * ."). That ruling was issued as a "notice" and did not undergo notice and comment rulemaking. SSAR 12-X(8), 77 Fed. Reg. at 51,842. Read generously, the SSA devoted just eight sentences to explaining why it disagreed with *Peterson*'s reading of the uniformed-services exception. *See id.* at 51,843.

This kind of scant, informal explanation does not receive deference under *Chevron*. This notice merely "explain[s] how [the SSA] will apply the holding" in a court of appeals decision. 20 C.F.R. § 404.985(b). It does "not have the force and effect of the law or regulations." *Acquiescence Ruling Definition*, Soc. Sec. Admin., https://bit.ly/3efwio7 (last visited May 20, 2021). It thus falls into the category of "agency manuals" or "enforcement guidelines" that "do not warrant *Chevron*-style deference." *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000).

Nor does this notice warrant even the lesser weight described in *Skidmore*. The explanation for its conclusion—all eight sentences' worth—is terse, not thorough. It relies on a mode of interpretation—the use of legislative history to surmise a narrow purpose for the windfall elimination provision—that this Court disfavors. *See, e.g.*, *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("But the fact that a statute has been applied in situations not expressly anticipated

by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." (alterations and internal quotation marks omitted)). And even Respondent has deemed it lacking, grafting on new explanations for this interpretation over time. *See* Br. for Appellee at 21–30, *Babcock*, 959 F.3d 210 (No. 19-1687) (making additional arguments addressed *supra* at 31–33); Opp. 12–14 (making new argument addressed *supra* at 35–36). None of these features resemble those that give an agency interpretation some "power to persuade." *Skidmore*, 323 U.S. at 140.

CONCLUSION

For these reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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MAY 2021