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 OF *AMICI CURIAE* NATIONAL VETERANS LEGAL SERVICES PROGRAM, RESERVE ORGANIZATION OF AMERICA, AND ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the National Veterans Legal Services Program, the Reserve Organization of America, and the Enlisted Association of the National Guard of the United States.

Founded in 1981, the National Veterans Legal Services Program (NVLSP) is a nonprofit organization that works to ensure that the Nation's 25 million veterans and active-duty service members have access to the federal benefits to which their military service entitles them. NVLSP does so in part by serving as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. For the last 18 years, NVLSP has published the 1,900-page *Veterans Benefits Manual*, the leading practice guide on the subject. NVLSP also is a veterans service organization recognized by the Secretary of Defense to assist veterans in the preparation, presentation, and prosecution of veterans' benefits claims. *See* 38 U.S.C. § 5902. In addition, NVLSP has filed numerous amicus briefs in this Court and others, seeking to provide assistance in cases that present issues of broad importance to veterans and the VA benefits system. *See*, *e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016); *Henderson ex rel. Henderson v. Shinseki*, 562

[1] No counsel for a party authored any part of this brief, and no person other than amici, their members, or their counsel made a monetary contribution intended to fund its preparation or submission. Amici curiae timely provided notice of intent to file this brief to all parties, and all parties have consented to the filing of this brief.

U.S. 428 (2011); *Shinseki v. Sanders*, 556 U.S. 396 (2009).

The Reserve Organization of America (ROA) has served since 1922 as America's only exclusive advocate for the Reserve and National Guard—all ranks, all services. With a sole focus on support of the Reserve and National Guard, ROA promotes the interests of Reserve Component members, their families, and veterans of Reserve service. ROA provides tools and resources to reservists and their families and advocates for reforms from Capitol Hill to the Department of Veterans Affairs to the Pentagon. ROA also regularly files briefs as part of this advocacy—including in cases before this Court. *See*, *e.g.*, *Torres v. Tx. Dep't of Pub. Safety*, No. 20-603 (Mar. 2021); *Nat'l Coalition for Men v. Selective Serv. Sys.*, No. 20-928 (Feb. 2021).

The Enlisted Association of the National Guard of the United States (EANGUS) was founded in 1970 by a group of senior non-commissioned officers. Its goal is to increase the voice of enlisted persons in the National Guard. It is dedicated to promoting the status, welfare, and professionalism of enlisted members of the National Guard by promoting adequate pay, benefits, entitlements, equipment, staffing, and installations for the National Guard. EANGUS represents all 54 states and territories, with a constituency base of over 414,000, as well as thousands of retired members. It has frequently supported members of the National Guard as amicus curiae in this Court. *See*, *e.g.*, *Nat'l Coalition for Men v. Selective Serv. Sys.*, No. 20-928 (Feb. 2021); *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003).

Amici appear in support of Petitioner to explain the nature and history of the dual-status military technician position. That role is, and has long been, irreducibly military. From the uniforms they wear to the jobs they perform, there is little that distinguishes dual-status technicians from active-duty soldiers. Petitioner is thus correct that technicians perform "service as a member of a uniformed service," triggering an exception to the Windfall Elimination Provision (WEP). Amici also trace the long history and interpretive significance of the pro-veteran canon of construction, which plays a vital role in legislation related to servicemembers and veterans. If there were any ambiguity about the scope of the WEP exception, the pro-veteran canon would resolve it in favor of covering dual-status technicians. Finally, drawing on decades of experience in the courts, amici highlight how excluding dual-status technicians from the WEP exception would clash with the way technicians are treated in other contexts. The *Feres* doctrine, for example, restricts technicians' right to sue for workplace harm precisely because their work is fundamentally military in nature. The same service that triggers those limitations also qualifies dual-status technicians for benefits like the WEP exception's augmented social security payouts.

INTRODUCTION AND SUMMARY OF ARGUMENT

To ensure that social security benefits track pre-retirement income, the WEP provides that earnings from certain jobs trigger reductions in social security payouts. *See* 42 U.S.C. § 415(a)(7)(A). But the WEP does not apply to earnings from jobs in the uniformed services, including the National Guard. Congress enacted that rule to avoid "inequitable" treatment of servicemembers and veterans. H.R. Rep. No. 103-506, at 67 (1994). And it drafted the rule in straightforward terms, exempting from the WEP any payment "based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). Applying that rule here is equally straightforward: Payments to dual-status military technicians, who work full-time as members of the National Guard and provide services essential to mission readiness, are exempt from the WEP.

Several courts of appeals, including the Sixth Circuit below, have rejected this simple logic. Their theory is that dual-status technicians somehow are not sufficiently "military" to perform work "as a member of" the National Guard. *E.g.* Pet. App. 10a-11a. As Petitioner explains, that defies the statute's plain text, which unambiguously covers all "service"—however military in nature—performed by members of the National Guard, including dual-status technicians. Pet. Br. 22-26. But even if the statute could be read to require service that is military in nature, the work of dual-status technicians unquestionably qualifies. In concluding otherwise, the Sixth Circuit and others

have made factual, interpretive, and doctrinal errors.

Factually, dual-status technicians are no less "military" than any other member of the National Guard. They serve in a distinctly military context that governs every aspect of their position. They report to and serve military commanders. They wear a military uniform and must follow military protocol. Their jobs are central to the effectiveness and efficiency of their units. And when their units deploy in the face of a natural disaster or foreign threat, they are deployed with them. In short, thanks in part to military requirements imposed by Congress, dual-status technicians are effectively indistinguishable from their active-duty peers.

As a matter of statutory interpretation, reading Congress's broad language to exclude such fundamentally military service—on the ground that it is still not military *enough*—squarely contravenes the pro-veteran canon of construction. This Court has long held that "provisions for benefits to members of the Armed Services," like the WEP exception, "are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Congress crafted the WEP exception against the background of that interpretive rule, and it compels a reading of the statute that encompasses dual-status technicians as well as other members of the National Guard. Circuits have held otherwise only by flatly ignoring the pro-veteran canon, a fundamental error of statutory construction that only this Court can correct.

Doctrinally, moreover, the idea that dual-status technicians are not sufficiently military under the WEP exception cannot be squared with their treatment in other contexts, including the *Feres* doctrine. For decades, *Feres* has barred dual-status technicians from filing workplace tort or discrimination claims—precisely because they, like their active-duty colleagues, are "irreducibly military in nature." *Fisher v. Peters*, 249 F.3d 433, 439 (6th Cir. 2001); *see Feres v. United States*, 340 U.S. 135 (1950). Courts have inexplicably abandoned that logic when applying the WEP exception, creating an unfair doctrinal clash that subjects dual-status technicians to the restrictions of military work while denying them the benefits.

In short, the theory on which courts have excluded dual-status technicians from the WEP exception is flawed several times over. This Court should instead read the statute to cover all payments based on service as a dual-status technician.

ARGUMENT

I. The Work Of Dual-Status Technicians Is Fundamentally Military And Essential To The National Guard's Mission Readiness.

A. The history of the dual-status technician program demonstrates its fundamentally military nature.

For over 50 years, the dual-status military technician program has been essential to the military readiness of our armed forces. Its history underscores how fundamentally military the job is.

1. Dual-status military technicians descended from state militia personnel. After the start of World War I, Congress sought to establish the state militias as a reliable force by reconstituting them into a "'federalize[d]'" National Guard that provided federal funds for certain employees. *See Perpich v. Dep't of Def.*, 496 U.S. 334, 342-44 (1990). That force included animal caretakers and clerks who provided supplies and equipment to the state militias. H.R. Rep. No. 90-1823, at 5 (1968); Cong. Rsch. Serv., RL30487, Military Technicians: The Issue of Mandatory Retirement for Non-Dual-Status Technicians 3 (2000) (hereafter "2000 CRS Report"). During and after World War II, those clerks became even more fundamental to military operations, taking on responsibility for "training, employment in State headquarters, air defense, military support of civil defense, and aircraft operations." S. Rep. No. 90-1446, at 5 (1968). Although their roles evolved, they remained state employees whose salaries were paid with federal funds and who received state benefits. H.R. Rep. No. 90-1823, at 4; *Larson v. Saul*, 967 F.3d 914, 923-24 (9th Cir. 2020). Over the next several decades, a similar program developed administratively within the Army and Air Force Reserves. *See* 2000 CRS Report at 3; *Am. Fed'n of Gov't Emps. v. Hoffman*, 543 F.2d 930, 932-36 (D.C. Cir. 1976).

Because these support personnel were integral to the military readiness of the units they served, they were also required to enlist in those units, subject to few exceptions. *Maryland for Use of Levin v. United States*, 381 U.S. 41, 47 n.14 (1965). In the National Guard, for instance, about 95 percent of technicians

were required to be enlisted military members. H.R. Rep. No. 90-1823, at 4.

2. In 1968, Congress sought to bring uniformity to this system by establishing the full-time role of "dual-status military technicians" in the National Guard Technicians Act of 1968. *See* Pub. L. No. 90-486, 82 Stat. 755, 755-60 (Aug. 13, 1968) (codified principally at 32 U.S.C. § 709); *see also* Michael J. Davidson & Steve Walters, *Neither Man Nor Beast: The National Guard Technician, Modern Day Military Minotaur*, 1995 Army Law 49, 50-52 (Dec. 1995).

One of the core "purposes" of the Act was to "recognize the military requirements … [of] the technician program." H.R. Rep. No. 90-1823, at 1. The technician position was intended first and foremost to be a job "in a military organization." *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980). They would continue to provide some maintenance and administrative work at the same time that they would conduct military training and be integrated with their units by conducting military drills. H.R. Rep. No. 90-1823, at 2. Critical to that military-oriented mission, technicians would be available to enter active service when their units were called. *Id.*; Davidson, *supra*, at 50-51. To recruit top talent, Congress also provided a "nominal" federal employment status so that technicians would receive competitive compensation. *Am. Fed'n of Gov't Emps.*, 730 F.2d at 1543; *see* H.R. Rep. No. 90-1823, at 1.

By statutorily requiring military technicians to meet these conditions, Congress conveyed that it "required [a military technician] to be a military selected

reservist first and a Federal employee second." Letter from Director Krieger, U.S. General Accounting Office, to Secretary of Defense, at 2 (Feb. 26, 1979). Congress intended the military character of technicians to be "extensive." *Walch v. Adjutant Gen.'s Dep't of Tx.*, 533 F.3d 289, 296-97 (5th Cir. 2008). Military technicians would serve as employees of the Army or Air Force and the National Guard. Pub. L. No. 90-486, § 709(a), (d), 82 Stat. at 755. They would hold their position only so long as they also were a member of that service, with an equivalent military grade. *Id.* §§ 709(b),(e),(f), 82 Stat. at 756. They would report solely to the state Adjutants General, who in turn would be designated by the Secretaries of the Army and Air Force. *Id.* § 709(c), 82 Stat. at 755.

3. Each time Congress has sought to modify the dual-status military technician scheme, it has only further cemented its inherently military function. In 1996, for instance, Congress required technicians to wear their military uniforms "while performing duties as a technician." National Defense Authorization Act, Pub. L. No. 104-106, § 1038, 110 Stat. 186, 432 (Feb. 10, 1996). It did so on the strength of evidence that technicians "fill a military role" and the uniform "promotes military values in the workforce." Letter from Mark E. Gebicke, Director of Military Operations and Capabilities Issues, to U.S. Senate, at 2 (Aug. 23, 1996), https://tinyurl.com/6abzju4n. In 1997, Congress withdrew authority from the Secretary of Army and Airforce to make exceptions to the requirement that technicians be members of the service, ensuring that technicians could be deployed with their units and shoring up the reserves' military readiness. Pub. L. No. 105-85, § 522(c), 111 Stat. 1629,

1735 (Nov. 18, 1997); 2000 CSR Report at 19. And, as Congress expanded the role of dual-status technicians, it also sought to phase out *non*-dual-status technicians who did not deploy with their units and thus "undermin[ed] the readiness of reserve units." 2000 CRS Report at 1; *see also id.* at 24 n. 63 (collecting Department of Defense Appropriations Acts that further limited the number of non-dual-status technicians); 10 U.S.C. § 10217(e) (requiring the Secretary of Defense to phase out the non-dual status program by converting their positions and barring new hires after 2017).

Recent congressional debate about reducing the statutorily authorized number of dual-status technicians further underscores the military nature of the job. Congress considered a reduction in 2015. *See* Dep't of Def. Appropriations for 2015: Hearings before a Subcomm. Of the Comm. on Appropriations, Part 2, 113 Cong. 226-28 (2014). Assessing the costs of such a change, Lieutenant General Stanley Clarke, then the director of the Air National Guard, testified that losing dual-status technicians "would be devastating to the Guard, because they provide such an important function of training and administrating the part-time force." *Id.* at 227. Major General Judd Lyons, then Acting Director of the Army National Guard, drove the point home. He testified that the work of dual-status technicians is fundamentally "tied together" with the National Guard's "force structure." *Id.* Technicians are the "foundation of our formations" and "absolutely vital to what we do"—so much so that any reduction in their numbers would compel "a corresponding" reduction in overall forces. *Id.*

These objections grew louder after Congress passed the 2016 National Defense Appropriations Act, which required "conversion" of 20% of "military technician (dual-status) positions to civilian positions." Pub. L. No. 114-92, § 1053, 129 Stat. 981 (Nov. 25, 2015) (capitalization altered). The National Guard issued a report finding that the conversion would "degrade military readiness and undermine the vital role that the National Guard plays in emergency response." Dep't of Def. Appropriations for Fiscal Year 2018: Hearing before a Subcomm. Of the Comm. on Appropriations, 115 Cong. 45 (2017) (hereinafter "2017 Appropriations Hearing"). Soon after, the Department of Defense independently concluded that the National Guard could preserve its mission readiness only by retaining over 95 percent of dual-status technicians, converting just a small fraction who were dedicated to certain administrative tasks. *Id.* State governors urged Congress to minimize any required conversion for similar reasons. Nat'l Governors Ass'n, *Military Technicians*, available at https://tinyurl.com/53mx3cwz. The consensus was clear: Dual-status technicians are fundamentally integrated with, and indispensable to, the National Guard's military operations. Congress ultimately agreed. The 2018 National Defense Appropriations Act slashed the conversion requirement considerably. *See* Pub. L. No. 115-91, § 1083, 131 Stat. 1283, (Dec. 12, 2017).

In short, the history of dual-status military technicians confirms that they serve "as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III).

B. Dual-status technicians are no less "military" in nature than their active-duty colleagues.

1. Dual-status technicians continue to be essential to the nation's reserve forces today. At last count, nearly 63,000 dual-status technicians were in service. *See* Dep't of Def., FY 2020 Manpower Report, at 12 tbl. 2-3 (Apr. 19, 2019). In the National Guard alone, technicians made up 46% of the Army National Guard and 57% of the Air National Guard. *Id.* Choose two members of the National Guard at random, and one is bound to be a technician. It is thus no surprise that Congress has called dual-status technicians "[o]ne of the most important factors influencing reserve component readiness"—"[t]he largest single source of full-time support" in the form of "day-to-day management, administration, training and maintenance." H.R. Rep. No. 95-451, at 91-92 (1977).

Nonetheless, the Sixth Circuit concluded that dual-status technicians are insufficiently "military" because they are classified as civilian employees for purposes of compensation. Pet. App. 11a. As courts have long recognized, however, that classification is only "nominal." *Am. Fed'n of Gov't Emps.*, 730 F.2d at 1543. It does not alter the fundamentally military nature of the job. As Congress has recognized, "[T]echnicians perform military work in the same place, with the same training, and in the same way as active duty military personnel. The technician job and its military counterpart responsibility are one in the same." H.R. Rep. No. 95-451, at 97-98. Or as the then-director of the Air National Guard put it in recent testimony, "you wouldn't be able to tell the difference"

between dual-status technicians and full-time reservists. Hearing before a Subcomm. of the Comm. on Appropriations., Part 2, 113 Cong. 227 (statement of Lt. Gen. Stanley Clarke).

The federal civilian system has little to no influence on the daily life of a dual-status technician. It is "military regulations, standard operating procedures, and active-duty military officers [that] control[] how the shop [is] run." *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988). This "distinctly military context" pervades every aspect of a military technician's job—from how they are hired, to the duties they perform on the job, to how they are required to behave, to the sacrifices they make in service to the country. *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3d Cir. 1982).

Military technicians are "accounted for as a separate category of civilian employees." 10 U.S.C. § 10216(a)(2). They are "outside the competitive service," meaning that technicians are hired outside the open and competitive examination and skill evaluation scheme. 32 U.S.C. § 709(e). Technicians also do not receive a veteran's preference in hiring or retention, precisely because it is incompatible with "an organization organized and operated along military lines." H.R. Rep. No. 90-1823, at 3, 13; *see* Nat'l Guard Bureau, *National Guard Technician Handbook* 1 (Jan. 2017), https://tinyurl.com/wwub4n4 (hereafter "National Guard Handbook"). They must maintain their military status and hold a corresponding "military grade" as a condition of their employment. 32 U.S.C. § 709(b), (f)(1)(A). And they receive less protection than their fully civilian counterparts if the state

Adjutant General terminates that status. Such a termination decision is "'military-unique'" and may not be appealed to the Merits Systems Protection Board, unlike termination decisions for federal civilian employees. *Dyer v. Dep't of the Air Force*, 971 F.3d 1377, 1382-83 (Fed. Cir. 2020); 32 U.S.C. § 709(f)(4).

To maintain their military membership, technicians must maintain their military professional qualifications and perform certain statutorily prescribed duties. Military technicians must meet "all the mental and physical standards … prescribed by the military departments." H.R. Rep. No. 90-1823, at 1; *see Petersen v. Astrue*, 633 F.3d 633, 635 (8th Cir. 2011). And they must participate in weekend drills and annual military training just like any other solider. *See Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1158 (11th Cir. 2018).

In performing that work, military technicians "accept[] the responsibilities inherent in military discipline and the other facets of military life." H.R. Rep. No. 95-451, at 95. They report to military command. On the job, technicians observe military protocol, such as "saluting superior officers" and other "[m]ilitary courtesies." *Fisher*, 249 F.3d at 434. They wear a uniform to work, 32 U.S.C. § 709(b)(4), which must be "clean, serviceable, and roll-pressed," Army Regs. 670-1, at 3-6. That uniform must clearly show their military rank. And they must "ensur[e] their appearance reflects the highest level of professionalism" to maintain "esprit de corps and morale within a unit." *Id.* at 1-1. These regulations are extensive. Men can be sanctioned if their hair is not "neat and conservative," meaning tapered, shaved, or trimmed closely to

the scalp. *Id.* at 3-2. Similarly, women must adhere to strict length-limits on their hair and are authorized to use only certain hair-holding devices. *Id.* Technicians' nails must be clean and trimmed. Boots must be shined. Medals and ribbons must be clean and not frayed. *Id.* Even after-hours, technicians must follow military "customs and courtesies" while in uniform. *See* National Guard Handbook, *supra*, at 2.

Military technicians understand that their central role is to ensure that the National Guard can quickly and effectively deploy to address natural disasters and wartime needs. *Am. Fed'n of Gov't Emps.*, 730 F.2d at 1544-46. They serve as the "primary source of immediate manpower when governors call on the Guard to respond to natural disasters and adaptive human threats." Nat'l Governors Ass'n, Letter to House Armed Services Committee (Apr. 18, 2017), available at https://tinyurl.com/53mx3cwz; *see, e.g.*, Jim Garamone, *In Face of Shutdown, National Guard Leaders Worry About Readiness*, Nat'l Guard (Oct. 11, 2013), https://tinyurl.com/hk4tky4e (technicians provide "critical support," including during Tropical Storm Karen when thousands of technicians "assist[ed] with disaster response actions").

And when their units are deployed overseas in armed conflict, technicians deploy with them—no different from their active-duty peers. 32 U.S.C. § 709(a)(3)(A)-(B). They are similarly eligible for military decorations and honors for their service. *See* Pet. Br. 17 (awarded Bronze Star, Army Achievement Medal, and Global War on Terrorism Expeditionary Medal for service).

2. Petitioner's story exemplifies the experience and skills possessed by military technicians that are integral to their units' mission readiness. David Babcock joined the National Guard as an enlisted soldier, attended flight school, and became a licensed pilot. Pet. Br. 16.[2] He then served as a pilot and flight instructor. *Id.* His experience was typical; many dual-status technicians conduct and manage military training programs. *See* 10 U.S.C. § 10216; Lawrence Kapp, Cong. Res. Serv., RL 30802, Reserve Component Personnel Issues, 5 (June 15, 2020), https://tinyurl.com/44xhxj2b ("Some [military technicians]s may also perform certain operational support duties and provide training to active component personnel, [Department of Defense or "DOD"] contractors, DOD civilians, and foreign military personnel."). Technicians often "maintain planes, helicopters and tanks," "run armories," and "keep records for the National Guard and the reserves," Davidson, *supra*, at 60 n.30, as part of their mission to maintain "air defense, military support of civil defense, and aircraft operations." S. Rep. No. 90-1446, at 5 (1968). On top of that, Petitioner Babcock was later deployed on active duty to Iraq with his National Guard unit. Pet. Br. 17; *see also Larson*, 967 F.3d at 917 (dual-status technician deployed overseas).

In short, military technicians, although nominally considered federal civilian employees, serve "'in

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[2] Petitioner's job duties were similar to those of other dual-status technicians. *See, e.g.*, *Kientz v. Comm'r, SSA*, 954 F.3d 1277, 1278 (10th Cir. 2020) (mechanic on electronic measurement equipment); *Neville v. Lipnic*, 778 F. App'x 280, 282 (5th Cir. 2019) (serviced F-16 fighter jets).

a distinctly military context, implicating significant military concerns.'" *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

II. The Pro-Veteran Canon Of Construction, Which Courts Of Appeals Have Improperly Ignored, Compels Petitioner's Reading Of The WEP Exception.

Given the fundamentally military nature of a dual-status technician's work, it plainly qualifies as "service as a member of a uniformed service" under the WEP exception. 42 U.S.C. § 415(a)(7)(A)(III). Thus, as the Eighth Circuit has held, the WEP exception covers payments "based wholly" on a technician's work. *Id.*; *see Petersen*, 633 F.3d at 637-38. The case should end there. Whether a technician's work could be further sub-divided into relatively "military" and "civilian" tasks, *see* BIO 10-11, is beside the point. The statute draws no such distinction. *See Petersen*, 633 F.3d at 637 ("[A]bsent from the WEP exception is a requirement that the 'service' be only in a non-civilian or military duty capacity."). Certainly, the word "wholly" does not do so. It modifies "payment," not "service," indicating simply that a payment (say, a pension) must be earned entirely by the uniformed job in question—not a combination of that job and distinct employment outside the uniformed services. Pet. Br. 24-26.

If the plain text of the WEP exception created any apparent ambiguity about the scope of coverage, however, a bedrock rule of construction—the pro-veteran canon—would compel inclusion of dual-status technicians. That canon instructs that "provisions for

benefits to members of the Armed Services," like the WEP exception, "are to be construed in the beneficiaries' favor." *King*, 502 U.S. at 220 n.9. And it applies with particular force in this case, where the government attempts to disadvantage certain veterans by importing a hyper-technical distinction that Congress did not clearly endorse—and that no agency has enacted through formal rulemaking. Courts of appeals have ruled in the government's favor only by inexplicably omitting the pro-veteran canon from their analysis, a fundamental error in methodology that cries out for correction by this Court.

A. The pro-veteran canon is a longstanding and essential interpretive tool.

The pro-veteran canon took root at least eighty years ago. Asked to interpret statutes designed to benefit servicemembers and veterans, this Court emphasized that such provisions are "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Lawrence v. Shaw*, 300 U.S. 245, 249-50 (1937). That rule reflects the government's longstanding solicitude toward members of the uniformed services. *Boone*, 319 U.S. at 575. And it remains a critical interpretive canon for this Court. In *Henderson*, this Court declined to read a statute to impose "harsh consequences" on veterans because, "in light of the [pro-veteran] canon," the statute lacked a sufficiently "clear indication" that Congress intended such a result. 562 U.S. at 441 (internal quotation marks omitted).

Indeed, the force of the pro-veteran canon has grown with time. After nearly a century, it is without question a "well established" "common law principle." *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1536 (2017) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). That means courts generally "may take it as given that Congress has legislated with an expectation that the principle will apply." *Id.*; *see King*, 502 U.S. at 220 n.9. The pro-veteran canon is thus essential to a faithful reading of Congress's chosen language, which was shaped by the understanding that courts would resolve any uncertainty in veterans' favor.

B. The pro-veteran canon confirms that the WEP exception covers payments for work performed by dual-status technicians.

This case falls in the heartland of the pro-veteran canon. First, the WEP exception is plainly a provision "for benefits to members of the Armed Services." *King*, 502 U.S. at 220 n.9. Its sole purpose is to increase social security payouts to certain members of the "uniformed services," by undoing reductions that the WEP would otherwise impose. 42 U.S.C. § 415(a)(7)(A)(III). In crafting the statute, Congress sought to resolve an "arbitrary and inequitable" difference in how military retirees were treated: The WEP reduced social security payouts based on certain forms of "active or inactive" "military service," including by "reservists," even though the WEP did not reach other forms of military service. H.R. Rep. No. 103-506, at 67. Congress designed the WEP exception to level the playing field,

and increase benefits to veterans, by exempting all "military reserve duty" from the WEP. *Id.*

Second, there is no question that the phrase "service as a member of a uniformed service" may reasonably be read to cover official duties performed by *all* members of the uniformed services, including dual-status technicians. A majority of circuits to consider the issue have so held. *See Larson*, 967 F.3d at 922-24; *Martin,* 903 F.3d at 1165-66; *Petersen*, 633 F.3d at 637-38. With good reason: Dual-status technicians are required to maintain membership in the National Guard, hold a corresponding "military grade," and "wear the uniform appropriate for the member's grade and component." 32 U.S.C. § 709(b)(2)-(4). As General Clarke recently confirmed, that often makes them indistinguishable from active-duty reservists. *Supra* 12. And the work that dual-status technicians perform—including training, administration, and mission support, 32 U.S.C. § 709(a)(1)-(3)—is essential to the National Guard's operations. *Supra* § I. That is why Congress, at the Department of Defense's urging, recently limited a planned reduction in the number of dual-status technicians. *Supra* 10-11. It is also why courts have held that the work of a dual-status technician is "irreducibly military." *Fisher*, 249 F.3d at 439; *Wright v. Park*, 5 F.3d 586, 588 (1st Cir. 1993); *see infra* § III. Reading the WEP exception's broad language to cover such essential military work is hardly a stretch.

Several courts of appeals have concluded that another, narrower reading is plausible: that the WEP exception covers only the "wholly" military work of other reservists, while excluding the "irreducibly"

military work of dual-status technicians. *See, e.g.*, *Larson*, 967 F.3d at 923-24. The meaning of that distinction is hard to grasp even in the abstract. "Wholly" and "irreducibly" are synonyms, and as General Clarke made clear, the difference between active-duty reservists and dual-status technicians can be impossible to spot. *Supra* 12. More importantly, the distinction is difficult to map onto the WEP exception's broad language. The statute covers all "service," without qualification, performed "as a member of a uniformed service." It does not purport to exclude *any* type of work by servicemembers, let alone irreducibly military work.

If this Court found that both of these readings were facially plausible, they would present precisely the type of interpretive choice that the pro-veteran canon resolves in favor of potential "beneficiaries," *King*, 502 U.S. at 220 n.9—here, dual-status technicians. Congress crafted the WEP exception with the understanding that its words would be read "liberally" in favor of servicemembers and veterans. *Boone*, 319 U.S. at 575. And it chose to define coverage with the expansive phrase "service as a member of a uniformed service." Given the "common-law" principles at work, *Impression Prods.*, 137 S. Ct. at 1536, Congress's use of that language cannot be understood to withhold benefits from certain National Guard members performing essential military work. Such a narrow exclusion is, at best, a tenuous gloss on the statutory text. The pro-veteran canon compels a more straightforward reading: When Congress said "service as a member of a uniformed service," it meant just that, and nothing less.

A final consideration further bolsters the pro-veteran canon's role in this case: The Social Security Administration (SSA) has not issued a formal interpretation of the WEP exception that might warrant *Chevron* deference. *See Larson*, 967 F.3d at 925. This Court has not resolved how the pro-veteran canon interacts with *Chevron*'s two-step framework. But it need not do so here. There is thus no question that the pro-veteran canon applies with full force.

Instead of formal rulemaking, the SSA offered a glancing assessment of the WEP exception in an acquiescence ruling regarding *Petersen*. *See* Social Security Acquiescence Ruling, 77 Fed. Reg. 51,842 (Aug. 27, 2012). As the Ninth Circuit noted, that analysis is not "detailed," "careful" or "thorough." *Larson*, 967 F.3d at 926. The SSA summarily asserted that the WEP exception is better read not to cover the "civilian work" of dual-status technicians—without offering any explanation for why technicians' work should be considered "civilian" and not "military," or why that distinction matters under the statute's broad language. *See* 77 Fed. Reg. at 51,843. The agency also made no mention of the pro-veteran canon, let alone a sound reason to defy it. *Id.* As the Ninth Circuit acknowledged, these "few sentences" of conclusory analysis are not "imbued with the 'power to persuade.'" *Larson*, 967 F.3d at 926 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

C. Courts of appeals have misconstrued the WEP exception by inexplicably ignoring the pro-veteran canon.

How have several courts of appeals overcome the pro-veteran canon? Simple. They ignored it entirely. Across the four opinions excluding dual-status technicians from the WEP exception, there is not a *single mention* of the pro-veteran canon. Yet these courts have invoked a range of other, less-illuminating interpretive rules to identify the best reading of the statute. In the decision below, for example, the Sixth Circuit leaned on the proposition that "an exception to the general rule … should be construed narrowly." Pet. App. 12a. In the court's view, that meant Congress must have intended the WEP exception to be stingy with benefits. *Id.* The pro-veteran canon shows just the opposite, but the court never considered it.

Worse, the Ninth Circuit effectively *inverted* the pro-veteran canon by faulting Congress for failing to cover dual-status technicians in especially clear terms. The court reasoned that "[i]f Congress had intended civilian technicians to receive retirement payments that were exempt from the WEP, … it could have exempted payments 'based on service *by* a member of a uniformed service,'" language the court considered more precise. *Larson*, 967 F.3d at 922. That de facto clear-statement rule gets things backward. Courts must identify a "clear indication" of congressional intent to *disadvantage* veterans, not to benefit them. *Henderson*, 562 U.S. at 441.

This Court should correct this fundamental interpretive error. To the extent the Court discerns any

ambiguity in the WEP exception, it should hold that the pro-veteran canon resolves the matter in Petitioner's favor.

III. Excluding Dual-Status Technicians From The WEP Exception Creates Inequitable Conflicts With Other Legal Doctrines.

Finally, deeming dual-status technicians insufficiently "military" to qualify for the WEP exception squarely clashes with how they are classified for purposes of other legal doctrines. One particularly inequitable example is the *Feres* doctrine. The Federal Tort Claims Act (FTCA) waives the government's immunity from many tort claims brought by federal employees. 28 U.S.C. §§ 1346(b), 2671-2680. *Feres*, however, prohibits tort claims that "arise out of or are in the course of activity incident to service" in the armed forces. 340 U.S. at 146. That judge-made rule has evolved to "bar all suits on behalf of service members against the Government based upon service-related injuries," *United States v. Johnson*, 481 U.S. 681, 687-88 (1987), including those as severe as sexual assault, *Doe v. United States*, 141 S. Ct. 1498, 1499 (2021) (Thomas, J., dissenting from denial of certiorari). This Court and the courts of appeals have also extended the reasoning of *Feres* to bar claims of service-related discrimination. *See*, *e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 299, 304 (1983) (barring *Bivens* actions); *Fisher*, 249 F.3d at 439, 443 (barring Title VII actions).

When it comes to curbing the right to sue, dual-status technicians—no less than their colleagues in the National Guard—are "service members" engaged

in military duties. *Johnson*, 481 U.S. at 687-88. Courts of appeals have consistently applied the *Feres* doctrine on that basis. They have barred dual-status technicians from seeking judicial relief for serious wrongs, including discrimination, retaliation, and harassment on the basis of both race and gender. *See Overton v. New York State Div. of Mil. & Naval Affs.*, 373 F.3d 83, 85 (2d Cir. 2004); *Fisher*, 249 F.3d at 436-37. In one particularly egregious case, the Fifth Circuit refused to consider a technician's claim that his superior created a hostile work environment by displaying a noose in his office. *Filer v. Donley*, 690 F.3d 643, 649-50 (5th Cir. 2012).

The crux of these decisions is that the work performed by technicians is "irreducibly military in nature." *Fisher*, 249 F.3d at 439; *Wright*, 5 F.3d at 588; *see Overton*, 373 F.3d at 91 ("Despite the fact that their employment may be denominated civilian, the duties that they are performing are typically military in nature."). Time and again, courts have rejected the "balkanization of technicians' work" into military and civilian components, holding that the "ties that bind technicians' civilian and military roles" cannot be "disentangled" to limit the *Feres* doctrine's reach. *Wright*, 5 F.3d at 588; *see Fisher*, 249 F.3d at 439; *Overton*, 373 F.3d at 92 (refusing to "disentangle a plaintiff's civilian and military duties" and apply the *Feres* doctrine "only to suits arising out of the latter"); *see also Walch*, 533 F.3d at 297 (impossible to "disentangle" dual-status technicians' "military role and command structure from their civilian employment"). The technician subjected to the noose display could not sue because his "military capacity" and "civilian

capacity" were indistinguishable. *Filer*, 690 F.3d at 649.

That longstanding body of law simply cannot be reconciled with the recent decisions excluding dual-status technicians from the WEP exception. The Sixth Circuit in this case did precisely what it has refused to do when applying *Feres*. It balkanized a technician's work into "military" and "civilian" components. Pet. App. 9a-13a; *cf. Fisher*, 249 F.3d at 439; *Wright*, 5 F.3d at 588. And it concluded that the civilian dimension means technicians do not serve "as" members of the National Guard, Pet. App. 11a-12a—even though they labor as "service members" for purposes of the *Feres* doctrine, *Johnson*, 481 U.S. at 687-88. The Sixth Circuit tried to wave away the conflict by noting that the *Feres* doctrine serves a different purpose from the WEP exception—namely, determining "whether military personnel can sue their colleagues or the government for injuries resulting from military service." Pet. App. 15a. But that is no answer. Whatever their ultimate purpose, courts in both contexts considered the military nature of a dual-status technician's service, and their conclusions on that front are plainly irreconcilable.

These doctrinal clashes are yet more confirmation that the WEP exception is best read to cover dual-status technicians. Under the status quo, technicians in the Sixth Circuit and several other jurisdictions are subject to significant downsides of military service—including prohibition of workplace tort claims—yet denied the upside of enhanced social security benefits. That inequitable split cannot stand.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioner's opening brief, this Court should reverse the decision of the Sixth Circuit and hold that the WEP exception covers payments to dual-status military technicians for their work in the National Guard.

Respectfully submitted,

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