No. 20-480

In the Supreme Court of the United States

DAVID BRYON BABCOCK, PETITIONER

v.

KILOLO KIJAKAZI, ACTING COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a civil service pension received for federal civilian employment as a "military technician (dual status)," 10 U.S.C. 10216(a)(1)-(2); 32 U.S.C. 709, is "a payment based wholly on service as a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III), for the purposes of the Social Security Act's windfall elimination provision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 959 F.3d 210. The order of the district court (Pet. App. 17a-22a) is not published in the Federal Supplement but is available at 2019 WL 2205712. The report and recommendation of the magistrate judge (Pet. App. 23a-31a) is not published in the Federal Supplement but is available at 2018 WL 8495723.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150

[1] Acting Commissioner Kilolo Kijakazi is automatically substituted as a party for her predecessor in office pursuant to Rule 35.3 of the Rules of this Court.

days from the date of the lower court judgment or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on October 8, 2020, and was granted on March 1, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-17a.

STATEMENT

A. Legal Background

1. This case concerns the treatment, under certain provisions in the Social Security Act, 42 U.S.C. 301 *et seq.*, of the federal civilian position of "military technician (dual status)," 32 U.S.C. 709. Those employees perform service assisting the state National Guards.

a. Congress first authorized the use of civilian technicians in 1916, when it reconstituted state militias into the National Guard and provided that "[a] sum of money shall hereafter be appropriated annually * * * for the support of the National Guard." National Defense Act of 1916, ch. 134, § 67, 39 Stat. 199; see §§ 57-61, 39 Stat. 197-198. Congress permitted States to use such funds to employ the predecessors of modern dual status technicians, providing that federal funding could be utilized "for the compensation of competent help for the care of the material, animals, and equipment." § 90, 39 Stat. 205-206.

By 1968, States employed approximately 42,000 such technicians, who were "full-time civilian employees of the National Guard." S. Rep. No. 1446, 90th Cong., 2d Sess. 1 (1968) (1968 Senate Report); see H.R. Rep. No. 1823, 90th Cong., 2d Sess. 1 (1968) (1968 House Report).

Approximately 95% of those technicians were "required to hold concurrent National Guard membership as a condition for their civilian employment." 1968 House Report 1-2. Such a technician "serve[d] concurrently in three different ways": the technician "[f]irst, perform[ed] his full-time civilian work in his unit; second, perform[ed] his military training in his unit; and, third, [was] available at all times to be called to active Federal service." 114 Cong. Rec. 23,251 (1968). But while technicians were paid with federal funds, they were considered employees of the States, and thus were subject to a patchwork of different state laws—including those providing for retirement and fringe benefits. See 1968 House Report 2, 4-5; 1968 Senate Report 2, 3-4; 114 Cong. Rec. at 23,251, 23,255; see also 114 Cong. Rec. at 23,254 (describing technicians as being "in a legal 'no-man's land'").

In 1968, Congress converted those technicians from state employees to federal civilian employees, provided them with federal retirement and fringe benefits, and provided coverage under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for acts or omissions that occur within the scope of their federal employment—while permitting the States to continue to supervise the technician program. National Guard Technicians Act of 1968 (Technicians Act), Pub. L. No. 90-486, 82 Stat. 755; see 1968 House Report 1; 1968 Senate Report 1. Congress also provided that technician service performed before the federalization of the role would be credited toward the technician's federal retirement benefits. Technicians Act § 3(c), 82 Stat. 757. And Congress maintained the distinction between the majority of technicians, who were required to hold National Guard membership as a condition of their civilian

employment, and the small percentage of technicians who were not subject to that requirement. See 1968 House Report 3 (noting that the Technicians Act would "[c]onver[t] National Guard technicians to a Federal employee status with the authority for requiring National Guard []membership as a condition for civilian employment," and that "[a]bout 95 percent of the technician force would be in this latter category"); see also 1968 Senate Report 20-21. Congress later gave the title "military technician[s] (dual status)" to those technicians who are required to maintain National Guard membership as a condition of their employment. 32 U.S.C. 709(b)(1); see 10 U.S.C. 10216(a).

b. i. Under current federal law, a dual status military technician is "a Federal civilian employee" who "is assigned to a civilian position as a technician" while maintaining membership in the National Guard. 10 U.S.C. 10216(a)(1)(C); see 10 U.S.C. 10216(a)(1)(A). Dual status technicians are primarily responsible for "organizing, administering, instructing, [and] training * * * the National Guard" and "maint[aining] and repair[ing] * * * supplies issued to the National Guard or the armed forces." 32 U.S.C. 709(a)(1)-(2). And "to the extent that the performance of" "additional duties" "does not interfere with the performance of" those primary duties, technicians may be called on to "[s]upport * * * operations or missions undertaken by the technician's unit"; "[s]upport" certain "Federal training operations or Federal training missions"; and "[i]nstruct[] or train[]" service members and employees outside of their National Guard units. 32 U.S.C. 709(a)(3); see 10 U.S.C. 10216(a)(3).

Dual status technicians are "authorized and accounted for as a separate category of civilian employees," 10 U.S.C. 10216(a)(2), and are employees of both the United States and either the Department of the Army or the Department of the Air Force, 32 U.S.C. 709(e). Consistent with prior state practice, see 1968 House Report 1-2, such technicians are "required as a condition of [their] employment to maintain" National Guard membership; they also must hold the appropriate military rank for their positions and wear the military uniform appropriate for their grade and component of the armed forces while working as technicians. 10 U.S.C. 10216(a)(1)(B); see 32 U.S.C. 709(b). To maintain the National Guard membership that is a prerequisite for their civilian positions, dual status technicians must participate in periodic drills and training, see 32 U.S.C. 502(a), and are subject to being called up for active duty military deployment, cf. 32 U.S.C. 709(g)(2). A technician's civil service work is separate from work performed in the National Guard, however, and a technician is not subject to the Uniform Code of Military Justice when performing work in his technician role. See 10 U.S.C. 802(a)(3)(A)(ii), 12403, 12405; see also The Judge Advocate Gen.'s Legal Ctr. & Sch., Nat'l Sec. Law Dep't, *Operational Law Handbook* 429-430 (2020), https://go.usa.gov/x6Fhx.

ii. An individual who is employed as a dual status technician receives compensation from different sources depending on whether he is working in his federal civil service technician role, or instead is performing drills, training, or active duty military service as a member of the National Guard. As federal civil servants, dual status technicians receive civil service pay and retirement

benefits for their work in that role, just like other members of the federal civil service. See 5 U.S.C. 2105, 5105, 5332, 5342, 8332(b)(6), 8401(30). Dual status technicians' pay is pegged to the General Schedule (GS), the basic pay schedule for federal civil servants. See 5 U.S.C. 5332. But an individual who is employed as a dual status technician receives military pay when he participates in drills, training, or active duty service as a National Guard member. See 37 U.S.C. 204, 206. Like any other member of the National Guard, a technician cannot receive pay or retirement benefits for either military service or training and drills unless he is under a written order placing him into a pay duty status. See 37 U.S.C. 206; Dir., Air National Guard, *Air National Guard Instruction 36-2001*, at 7, 10 (Apr. 30, 2019), https://go.usa.gov/xFjXp; see also *Clark* v. *United States*, 656 F.3d 1317, 1321-1322 (Fed. Cir. 2011).

Upon retirement, a dual status technician who, like petitioner, was hired before 1984 likewise receives two streams of retirement benefits: (1) Civil Service Retirement System (CSRS) pension payments from the Office of Personnel Management (OPM) based on his civilian work as a dual status technician, and (2) military retirement pay from the Defense Finance Accounting Service (DFAS) based on his inactive duty military service in the state National Guard and any active duty service if he was called up to federal service. OPM makes CSRS pension payments to retired dual status technicians under the authority of Title 5 of the United States Code, which governs the pay and benefits of civil service employees. See 5 U.S.C. 8332(b)(6); cf. 5 U.S.C. 8336. The DFAS makes military retirement payments under the authority of Title 10, which governs the armed forces. Cf. 10 U.S.C. 113 (2021); 32 C.F.R. 352a.4 (2016).

iii. A dual status technician has certain rights and may be entitled to additional benefits as a result of the civilian nature of the technician role. Like many other civil service employees, dual status technicians can join a union, and certain conditions of a technician's employment may be covered by a collective bargaining agreement. Cf. *Association of Civilian Technicians* v. *Federal Labor Relations Auth.*, 250 F.3d 778, 781-782 (D.C. Cir. 2001). With some exceptions, if a dual status technician is the victim of a discriminatory practice while acting in his civilian capacity, he can file a complaint with the Equal Opportunity Employment Commission (EEOC), and, if the EEOC does not take action, file a civil suit. 32 U.S.C. 709(f)(5); see 42 U.S.C. 2000e-16.

Dual status technicians also can earn compensatory time off for working additional hours; receive workers' compensation pursuant to the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, for on-the-job injuries; and obtain disability benefits under Title 5. See 5 U.S.C. 8337(h), 8451; 32 U.S.C. 709(h); Nat'l Guard Bureau, U.S. Dep't of Def., *Chief National Guard Bureau Instruction: National Guard Technician Injury Compensation Program* CNGBI 1400.25, Vol. 800 (Aug. 9, 2018), https://go.usa.gov/xA95b. But if it is necessary for a technician to fulfill his National Guard service requirements during his workweek—for either active or inactive duty—he must take military leave, annual leave, or leave without pay like any other federal civilian employee who is a member of the National Guard. See 5 U.S.C. 6323(a) (authorizing 15 days of paid military leave for federal civilian employees); 5 U.S.C. 6323(b) (authorizing an additional 22 days of military leave under certain circumstances); Nat'l Guard Bureau, U.S. Dep't of Def., *Chief National*

Guard Bureau Instruction: National Guard Technician Absence and Leave Program CNGBI 1400.25, Vol. 630 (Aug. 6, 2018), https://go.usa.gov/xG57X.

2. The Social Security Act includes a "windfall elimination provision" that may reduce the amount of retirement benefits a beneficiary receives if he worked part of his career in employment not covered by the Act, like federal civil service employees hired before 1984, who were subject to the CSRS retirement system. The Act also contains an exception to that windfall elimination provision called the "uniformed services exception." This case involves the question whether an employee's civilian work performed in the dual status technician role triggers the uniformed services exception.

a. Employment that results in income that is subject to tax under the Federal Insurance Contributions Act (FICA), 26 U.S.C. 3101 *et seq.*, and counts toward the payment of benefits under the Social Security Act is known as "covered employment." See 42 U.S.C. 415(a)(1)(A); 26 U.S.C. 3101, 3102, 3111. The retirement benefits that the Social Security Administration (SSA) provides to an individual are based on a percentage of his indexed monthly earnings, averaged over a 35-year averaging period in covered employment. See 42 U.S.C. 415(a)(1)(A); 20 C.F.R. 404.221(c). Wages from "non-covered" employment are not subject to FICA and are not included when calculating an individual's Social Security retirement benefit. See 42 U.S.C. 415(b). The Social Security Act provides for retirement benefits to be calculated according to a progressive formula, which results in lower-income workers receiving a higher rate of return on their Social Security contributions than higher-income workers. See 42 U.S.C. 415(a)(1)(A).

Before 1984, that progressive formula resulted in a benefits windfall for workers who split their careers between covered and noncovered employment. That group of workers included many federal civil servants. Most federal civil service jobs for employees hired before 1984 were categorized as noncovered employment; individuals in such positions generally did not pay Social Security taxes and instead participated in separate federal retirement systems. See 42 U.S.C. 410(a)(5); 20 C.F.R. 404.1018. Upon retirement, civil servants who had participated in those separate systems received an annuity that typically was more generous than comparable pensions for employment covered by the Social Security Act, because the annuity was "generally designed to take the place both of [S]ocial [S]ecurity and a private pension plan for workers who remain[ed] in noncovered employment throughout their careers." H.R. Rep. No. 25, 98th Cong., 1st Sess. Pt. 1, at 22 (1983) (1983 House Report).

Until 1984, the Social Security Act failed to take into account such annuities for individuals who did not work in noncovered employment for their entire careers and thus had low total covered earnings—and therefore low average monthly earnings when spread over the 35-year averaging period for purposes of calculating Social Security retirement benefits. Such an individual would receive both an annuity (based on noncovered employment) *and* a heavily weighted Social Security retirement benefit (based on low average covered earnings). That combination often resulted in the "unintended windfall[]" of a total retirement income that would "greatly exceed that of a worker with similar earnings all under [S]ocial [S]ecurity." 1983 House Report 22; see S. Rep. No. 23, 98th Cong., 1st Sess. 15 (1983); H.R.

Conf. Rep. No. 47, 98th Cong., 1st Sess. 120 (1993). For example, if an individual spent 20 years in noncovered employment and 15 years in covered employment, his "earnings history of 15 years" would be "spread over the 35-year averaging period for benefits, * * * result[ing] in a heavily weighted [Social Security] benefit, even if the worker was not a low-wage earner." 1983 House Report 22.

To correct that unintended advantage, Congress in 1983 enacted the windfall elimination provision. See Social Security Amendments of 1983, Pub. L. No. 98-21, § 113, 97 Stat. 76-79 (42 U.S.C. 415(a)(7)(A)). The windfall elimination provision modifies the standard Social Security retirement benefits formula for a recipient who is also receiving a "monthly periodic payment" that "is based in whole or in part upon his or her earnings" for noncovered employment. 42 U.S.C. 415(a)(7)(A). Application of the windfall elimination provision may result in a monthly Social Security benefits reduction between $0 and $498, depending on an individual's age at retirement, the number of years he spent in covered employment, and the size of the pension he receives for noncovered employment. SSA, *Retirement Benefits*, https://go.usa.gov/xFYHy (last visited July 26, 2021).

b. In 1994, Congress adopted an exception to the windfall elimination provision known as the uniformed services exception. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 308(b), 108 Stat. 1522-1523 (42 U.S.C. 415(a)(7)(A)(III)). The uniformed services exception provides that the modified formula in the windfall elimination provision is not triggered by "a payment based wholly on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III). A "'member of a uniformed

service'" includes "any person appointed, enlisted, or inducted in a component of the Army, * * * including a reserve component," 42 U.S.C. 410(m), such as the Army National Guard of the United States, 38 U.S.C. 101(27)(G) (2021).

Before Congress enacted the uniformed services exception in 1994, inactive military service performed after 1956 but before 1988 triggered application of the windfall elimination provision as originally enacted, but active duty service during or after that period did not. See 42 U.S.C. 410(*l*)(1)(A). And all inactive military service—such as training or drills—performed in 1988 and thereafter did not trigger application of the windfall elimination provision. See 42 U.S.C. 410(*l*)(1)(B). Thus, before Congress adopted the uniformed services exception at issue here, the only military pension that still triggered application of the windfall elimination provision "[wa]s a pension based on inactive duty after 1956 and before 1988." H.R. Conf. Rep. No. 670, 103d Cong., 2d Sess. 125 (1994) (1994 House Conf. Report); H.R. Rep. No. 506, 103d Cong., 2d Sess. 67-68 (1994) (1994 House Report) (same); 60 Fed. Reg. 56,511, 56,512 (Nov. 9, 1995) (similar).

The House Committee Reports that accompanied Congress's adoption of the uniformed services exception to the windfall elimination provision indicate that the purpose of the exception was to correct that anomaly and "conform[] the[] treatment" of military retirees who receive a pension based on inactive military duty after 1956 and before 1988 "with that of other military retirees." 1994 House Report 48; see *id.* at 67 (explaining that, under the law then in effect, application of the windfall elimination provision "produces arbitrary and inequitable results for a small, closed group of people

who receive military pensions based, at least in part, on noncovered military reserve duty after 1956 and before 1988"); see also 1994 House Conf. Report 125. The preamble to SSA's contemporaneous regulations likewise explains that, as a result of the uniformed services exception, inactive duty military service, "which was not covered before 1988 and was used to determine your noncovered pension payment based wholly on service as a member of a uniformed service," would no longer trigger the windfall elimination provision. 60 Fed. Reg. at 56,512; see SSA, *Program Operations Manual System (POMS): RS 00605.383 Exclusion of Military Reservists from WEP* B. (May 6, 1999), https://go.usa.gov/xEuGJ ("The [windfall elimination provision] will not apply because of pensions based on military reserve service before 1988 and after 1956, but may still apply because of the receipt of another non-covered pension.").

3. Before 1984, dual status technicians did not pay Social Security taxes on their civil service pay because the term "employment" for purposes of Social Security coverage excluded work performed by federal civilian employees who participated in a federal retirement system, and dual status technicians hired before that date participated in CSRS. 42 U.S.C. 410(a)(6)(A) (1970); see 26 U.S.C. 3121(b)(6)(A) (1970). The issue in this case is whether the windfall elimination provision applies to those CSRS pensions earned by dual status technicians. That issue arises only when a dual status technician's pension is based on service rendered before 1984 or is

based on service that began before 1984 and was rendered continuously until after that date. See 42 U.S.C. 410(a)(5)(B)(i); 20 C.F.R. 404.1018(a)(1)(i).[2]

B. Proceedings Below

1. Petitioner joined the Michigan Army National Guard in 1970 and continued to serve in the National Guard until his retirement in 2009; at the time of his retirement, petitioner was a Warrant Officer. Pet. App. 2a, 39a. He received military pay for his full-time active duty service in Iraq and his part-time inactive duty training, including weekend drills. *Id.* at 3a. As required under the provisions of the Social Security Act that were in effect at the relevant times, petitioner paid Social Security taxes on his pay for his active duty service in Iraq and on his pay for his inactive duty training and drills after 1987, Pet. App. 3a; see 42 U.S.C. 410(*l*)(1).

From 1975 until 2009, petitioner was also employed on a full-time basis as a National Guard dual status technician. His final position was that of Aircraft Flight Instructor at grade 13, step 10, of the GS pay scale. Pet. App. 2a-3a. As a dual status technician, petitioner received civil service pay and participated in CSRS, the civilian retirement system for employees hired prior to 1984. *Ibid.* Petitioner did not pay Social Security taxes on his civil service pay because, when he entered the federal civil service in 1975, work performed by federal

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[2] Dual status technicians hired after 1983, just like other federal civil service employees hired after that date, are assessed Social Security taxes on their federal civilian pay and earn their federal pension payments under the Federal Employees' Retirement System (FERS) pension system. See 42 U.S.C. 410(a). That service is covered employment under Social Security. FERS pension payments therefore do not trigger application of the windfall elimination provision.

civilian employees who participated in a federal retirement system was not subject to Social Security coverage; and because petitioner maintained continuous civil service employment from 1975 until his retirement in 2009, that exclusion continued to apply to him. See pp. 12-13, *supra*. Since retiring from both his National Guard position and his civilian dual status technician position in 2009, petitioner has received retirement pay from two distinct sources: military retirement payments from the DFAS (for his National Guard service) and monthly CSRS retirement payments from OPM (for his work as a dual status technician). Pet. App. 3a.

After retiring from those positions, petitioner was employed in the private sector for several years, and his private-sector pay was covered by Social Security. Pet. App. 3a-4a.

2. In 2014, following his retirement from his private-sector employment, petitioner applied for Social Security retirement benefits based on his covered employment in the National Guard and his covered employment in the private sector. See Pet. App. 3a-4a. SSA granted petitioner's application but found that his CSRS pension triggered the windfall elimination provision, and thus that petitioner's Social Security retirement benefits would be reduced. *Id.* at 4a. Specifically, SSA determined that, as of January 2015, petitioner was entitled to a Social Security payment of $1030.10 per month, but noted that the monthly payment amount would have been $1128.80 if the windfall elimination provision had not been applied. D. Ct. Doc. 9-2, at 93 (June 28, 2018).

Petitioner sought reconsideration by SSA, arguing that his CSRS pension is "a payment based wholly on service as a member of a uniformed service," 42 U.S.C.

415(a)(7)(A)(III), and thus falls within the uniformed services exception to the windfall elimination provision. See Pet. App. 4a. The agency declined to alter its original determination; an administrative law judge upheld the agency's decision; and the Appeals Council granted review and affirmed. See *id.* at 4a-5a, 32a-47a.

Petitioner filed suit in district court, seeking review of the reduction of benefits and reiterating the contention that his CSRS pension falls within the uniformed services exception. See Pet. App. 18a, 24a-25a. A magistrate judge recommended that the district court uphold the agency's determination, *id.* at 23a-31a, and the district court did so, *id.* at 17a-22a.

3. A unanimous panel of the court of appeals affirmed. Pet. App. 1a-16a.

The court of appeals "construe[d] [the] statutory terms in accordance with their plain and ordinary meaning," finding that "the word 'wholly' plainly means 'to the full or entire extent' or 'to the exclusion of other things,'" and that "the word 'as' in this context 'limit[s] the uniformed services exception only to payments for work performed in one's capacity or role as a member of the uniformed services.'" Pet. App. 10a (citations omitted; third set of brackets in original). Petitioner's CSRS pension "[wa]s not such a payment," the court reasoned, because petitioner could participate in the CSRS only because he was a "'[f]ederal civilian employee[]'" who was "'assigned to a civilian position.'" *Id.* at 11a (quoting 10 U.S.C. 10216(a)(1)(C)). The court therefore concluded that, "by its very nature, a dual-status technician's CSRS pension is not a payment based exclusively on employment in the capacity or role of a uniformed-services member." *Id.* at 11a-12a.

The court of appeals further found that "[t]he broader statutory context" supported its reading. Pet. App. 12a. The court reasoned that "the various provisions of the Social Security Act, taken together, make plain that the [windfall elimination provision] is meant to apply to former federal employees receiving a CSRS pension." *Ibid.* The court also noted that, in addition to his CSRS pension from OPM, petitioner "receives a separate military pension" from the DFAS "to which the uniformed-services exception applies," and that the treatment of that separate military pension "bolsters the conclusion that his CSRS pension does not qualify for the uniformed-services exception." *Id.* at 13a.

The court of appeals rejected petitioner's argument that his work as a dual status technician was "wholly indistinguishable from military employment" because he was required to maintain National Guard membership, hold the appropriate military grade, wear a military uniform, and be prepared to deploy on active duty. Pet. App. 13a. The court acknowledged that the job requirements of a dual status technician may overlap with those of members of the military, and that the work may be similar to military service, but found that the "plain language of the uniformed-services exception * * * instructs us to look at 'a payment' and ask whether that payment is based exclusively on employment in the capacity or role of a member of a uniformed service." *Id.* at 13a-14a (quoting 42 U.S.C. 415(a)(7)(A)(III)).

The court of appeals also found that petitioner's "designation as a 'civilian' employee of the United States * * * is meaningful—and more than a mere 'status'—in the context of Social Security retirement benefits." Pet. App. 14a. The court noted that, unlike

positions held by members of the military that are covered by Social Security, petitioner's position as a dual status technician was subject to the same GS pay scale as other federal civilian employees, and that, as a federal civilian employee hired before 1984, petitioner did not have Social Security taxes deducted from his GS-based civilian pay. *Ibid.*

Finally, the court of appeals rejected as inapposite cases applying the *Feres* doctrine, see *Feres* v. *United States*, 340 U.S. 135 (1950), under the FTCA to actions of dual status technicians. The court reasoned that the fact that "the work of a dual-status technician is 'irreducibly military' for purposes of suing other military personnel or the government does not resolve whether the role is wholly service as a member of [the] uniformed service for purposes of calculating Social Security retirement benefits"—which "focuses critically on the types and sources of a claimant's earnings." Pet. App. 15a.

SUMMARY OF ARGUMENT

I. A. 1. The uniformed services exception provides that the windfall elimination provision is not triggered by any "payment based wholly on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III). The phrase "based * * * on service as a member of a uniformed service," is an adjectival phrase that modifies the noun "payment." And the term "wholly" is an adverb that modifies that adjectival phrase. When the terms are given their plain meaning, the exception provides that the windfall elimination provision is not triggered by any payment that is exclusively or solely based on work performed in the capacity of a member of a uniformed service.

2. A dual status technician receives his CSRS payments because he was classified by statute as a federal civilian employee. OPM makes CSRS pension payments to retired dual status technicians under the authority of Title 5 of the United States Code, which solely governs the pay and benefits of civil servants. Indeed, because Title 5 defines "'civil service'" to exclude "positions in the uniformed services," 5 U.S.C. 2101(1), OPM is barred from issuing CSRS retirement payments based on work performed in an individual's capacity as a member of a uniformed service. And while at various points in time National Guard members hold different roles—including civilian, state militia, and army roles—a member of the National Guard ordinarily can actively perform work in only one role at any given time. Dual status technicians thus do not earn CSRS retirement payments based on work performed in their capacity as members of the National Guard; instead, they earn those payments based on civilian work.

B. 1. For purposes of the uniformed services exception, "'member of a uniformed service'" includes "any person appointed, enlisted, or inducted in a component of the Army * * * (including a reserve component as defined in [38 U.S.C. 101(27) (2021)])." The cross-referenced definition of "'reserve component'" includes "the Army National Guard of the United States," 38 U.S.C. 101(27)(G) (2021), but that definition does not include the Army National Guard. Those are two different entities. The term "Army National Guard" refers to *state* National Guard units, while "Army National Guard of the United States" refers to a separate *federal* entity—composed of the state Army National Guard units and their members. Although a member of the National Guard is a member of both organizations at all

times, Congress has made clear that such a member generally serves in only one capacity at a time. A dual status technician like petitioner only performs federal service (that is, in his capacity as a member of the Army National Guard of the United States) when called to federal active duty status by Congress or the President. Other service that an individual performs in his National Guard capacity is performed in his state status (that is, in his capacity as a member of the Army National Guard). Petitioner's arguments thus fail for an independent reason: any relevant service on which his CSRS payments could possibly have been based would, at most, have been performed in his capacity as a member of the state Army National Guard unit in Michigan, which does not constitute qualifying service for purposes of the uniformed services exception.

2. Dual status technicians are likewise not "appointed, enlisted, or inducted in" their dual status technician positions. Those three terms have specific meanings indicative of membership in the armed services in certain capacities. But when a dual status technician is hired into that role, he is appointed in the civil service—not appointed, enlisted, or inducted as required by the uniformed services exception.

II. A. Petitioner's contrary interpretation suffers from numerous flaws. Petitioner ignores entirely Congress's use of the term "as" to refer to the capacity in which the person performs the relevant service. Petitioner also misinterprets the statutory term "wholly," wrongly suggesting that an attenuated but-for causal relationship between a dual status technician's National Guard membership and his distinct employment as a

dual status technician (and his resulting CSRS retirement payments) suffices for those payments to be based "wholly" on uniformed service.

B. Petitioner also does not appropriately account for the civilian nature of a dual status technician's employment. The technician's civilian attributes strongly indicate that work performed in that role does not constitute qualifying service. Title 5 draws a clear and relevant distinction between "civil service" and "uniformed service." And the fact that Congress included commissioned officers of the National Oceanic and Atmospheric Administration (NOAA) Corps and Public Health Service (PHS) Corps within the definition of "member of a uniformed service" supports the distinction between civilian and uniformed service because those officers do not generally have civilian characteristics and receive military pay and retirement benefits.

C. Petitioner's reliance on the *Feres* doctrine is misplaced, because whether a particular injury arises out of activity incident to military service for purposes of sovereign immunity under the FTCA is an entirely separate question from whether a technician's CSRS payments trigger the uniformed services exception. And the pro-veteran canon of interpretation is irrelevant here because there is no ambiguity for the Court to resolve and because applying that canon on these facts would turn the canon on its head and create inequitable results.

ARGUMENT

I. CIVIL SERVICE PENSION PAYMENTS BASED ON WORK PERFORMED AS A CIVILIAN DUAL STATUS TECHNICIAN DO NOT QUALIFY FOR THE UNIFORMED SERVICES EXCEPTION TO THE SOCIAL SECURITY ACT'S WINDFALL ELIMINATION PROVISION

A. The Plain Text Of The Uniformed Services Exception Establishes That It Does Not Apply To Work Performed In The Dual Status Technician Role

The uniformed services exception provides 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 [42 U.S.C. 410(m)])." 42 U.S.C. 415(a)(7)(A)(III). That "language itself," along with "the specific context in which that language is used, and the broader context of the statute as a whole," establishes that payments based on work performed by a dual status technician acting in that capacity are not payments based wholly on service as a member of a uniformed service. *Yates* v. *United States*, 574 U.S. 528, 537 (2015) (plurality opinion) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

1. The ordinary meaning of the relevant terms of the uniformed services exception establishes that it does not encompass payments based on civilian service as a dual status technician. The ordinary meaning of "wholly" is "[e]xclusively" and "solely." *The American Heritage Dictionary of the English Language* 2039 (3d ed. 1992) (*American Heritage*) (emphasis omitted); see *Webster's Third New International Dictionary of the English Language* 2612 (1993) (*Webster's*) ("to the exclusion of other things" and "solely") (capitalization and emphasis omitted); 20 *The Oxford English Dictionary* 296 (2d ed. 1989) (*Oxford*) ("[e]ntirely, so as to exclude everything

else; hence practically equivalent to 'exclusively, solely, only'") (emphasis omitted). The term "service," as used in the Social Security Act, means employment or work. See, *e.g.*, 42 U.S.C. 410(a) (defining covered "'employment'" as "any service performed" that meets specific criteria). And when used in the phrase here, "as" has the ordinary meaning of "[i]n the role, capacity, or function of." *American Heritage* 106 (emphasis omitted); see *Webster's* 125 ("in the character, role, function, capacity, condition, or sense of") (emphasis omitted); 1 *Oxford* 674 ("[i]n the character, capacity, or role of") (emphasis omitted).

The phrase "based * * * on service as a member of a uniformed service," is an adjectival phrase that modifies the noun "payment." 42 U.S.C. 415(a)(7)(A)(III). The term "wholly" is an adverb that modifies that adjectival phrase. *Ibid.* And when the definitions of the terms are substituted in, the uniformed services exception provides that the windfall elimination provision is not triggered by any payment that is based exclusively or solely on work performed in the capacity of a member of a uniformed service.

2. By its plain terms, just discussed, the uniformed services exception does not apply to a dual status technician's civilian work. A dual status technician hired before 1984 receives two distinct forms of retirement pay: (1) military retirement pay from the DFAS based on the technician's inactive duty military service in the National Guard and any active duty if he was called up to federal service, and (2) CSRS payments from OPM based on the technician's civilian work as a dual status technician. See p. 6, *supra.* A technician's military retirement pay is "a payment based wholly on service as a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III), and

thus falls within the uniformed services exception to the windfall elimination provision. That treatment of a technician's military retirement pay is neither disputed nor otherwise at issue here.

A dual status technician receives his separate CSRS payments because he was classified by statute as "a Federal civilian employee," who was "assigned to a civilian position as a technician" while maintaining membership in the National Guard. 10 U.S.C. 10216(a)(1)(C); see 10 U.S.C. 10216(a)(1)(A). OPM makes CSRS pension payments to retired dual status technicians under the authority of Title 5 of the United States Code, which solely governs the pay and benefits of civil service employees. Thus, Section 8332 provides that an employee's service "shall be credited," for purposes of calculating the employee's eligibility for and amount of his CSRS retirement annuity, "from the date of original employment to the date of separation on which title to annuity is based *in the civilian service of the Government*." 5 U.S.C. 8332(b) (emphasis added). And that Section then specifically provides that such "service includes * * * employment under section 709 of title 32"—the section providing for employment of National Guard technicians. 5 U.S.C. 8332(b)(6); cf. 5 U.S.C. 8336. By contrast, federal law bars payment of CSRS retirement benefits based on work performed in an individual's capacity as a member of a uniformed service because Title 5 defines "'civil service'" to exclude "positions in the uniformed services." 5 U.S.C. 2101(1). Petitioner's CSRS payments therefore do not trigger the "uniformed service" exception.

3. That conclusion is reinforced by the broader statutory framework governing a dual status technician's work. This Court has long recognized that National

Guard members "must keep three hats in their closets —a civilian hat, a state militia hat, and an army hat— only one of which is worn at any particular time." *Perpich* v. *Department of Def.*, 496 U.S. 334, 348 (1990). An individual who is a dual status technician wears his state militia hat when he performs Title 32 weekend drills and annual training; for that service he receives military pay and benefits, which all agree trigger the uniformed services exception. He wears his army hat when called to federal active duty status under Title 10; for that service he also receives military pay and benefits, which all agree trigger the uniformed services exception. And he wears his civilian hat when he works as a dual status technician in the federal civil service; for that service he receives civilian pay and benefits under Title 5— including CSRS pension payments. Indeed, when a dual status technician performs work in his technician capacity, he is not under a written order placing him into a pay duty status, and thus is doubly ineligible for any form of military pay or retirement benefits for his technician service. See p. 6, *supra*.

Thus, while petitioner was at all relevant times a member of the National Guard, he did not earn his CSRS retirement payments based on work performed in his capacity as a member of the National Guard. He earned those payments based on his civilian work under Title 5, performed in his capacity as an employee of the Department of the Army and the United States. See 32 U.S.C. 709(e). Such payments are "based * * * on" service as a member of the civilian workforce, rather than service as a member of a uniformed service. 42 U.S.C. 415(a)(7)(A)(III).

4. Congress's use of the word "wholly" strengthens that straightforward reading. To be sure, National

Guard membership is a necessary (but not sufficient) condition for holding the position of a dual status technician, and therefore for later receiving CSRS pension payments upon retirement. That condition of *membership* in the National Guard, however, does not mean that the CSRS pension is based upon *service* in the National Guard. See *Kientz* v. *Commissioner*, 954 F.3d 1277, 1283, 1285 (10th Cir. 2020) (finding that "service for which a dual status technician receives a pension payment must have been *in the capacity of a National Guard member* to qualify for the uniformed services exception" and that "federal civilian employment as a dual status technician [is] not wholly as a member of the National Guard because [a technician] cannot simultaneously act wholly in two distinct capacities") (emphasis added). But even if that condition underlying the civilian employment could somehow suggest that the CSRS pension payments the technician receives upon retirement are attributable to *service* in the National Guard, they clearly are not based "wholly"—solely or exclusively —on such service.

B. The Definition Of "Uniformed Service" That Is Cross-Referenced In The Uniformed Services Exception Confirms That It Does Not Apply To Work Performed In The Dual Status Technician Role

The definition of "uniformed service" incorporated in the uniformed services exception confirms that Congress did not intend the exception to apply to the civilian role of a dual status technician. That definition provides that the term "'member of a uniformed service'" includes "any person appointed, enlisted, or inducted in a component of the Army * * * (including a reserve component as defined in [38 U.S.C. 101(27) (2021)])." 42 U.S.C. 410(m). But technicians are not operating in a

"reserve component" role when performing their technician work, nor are they "appointed, enlisted, or inducted" into the technician position when serving in the National Guard.

1. a. Section 410(m) of Title 42 defines a "reserve component" by reference to Section 101(27) of Title 38, which provides that "'reserve component'" includes "the Army National Guard of the United States," 38 U.S.C. 101(27)(G) (2021), but that definition does not include the Army National Guard. "Army National Guard" and "Army National Guard of the United States" refer to two different entities. The term "Army National Guard" refers to *state* National Guard units, while "Army National Guard of the United States" refers to a separate *federal* entity—composed of the state Army National Guard units and their members. Compare 10 U.S.C. 101(c)(2) (defining "'Army National Guard'" to include the "part of the organized militia of the several States" that meets additional requirements), with 10 U.S.C. 101(c)(3) (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"), and 10 U.S.C. 10105(1) (similar); cf. *In re Sealed Case*, 551 F.3d 1047, 1054 (D.C. Cir. 2009) (Kavanaugh, J., concurring in the judgment) (noting that a state Army National Guard "is not itself a 'reserve component' of the Army" as defined in 10 U.S.C. 10101(1), which is the same in relevant part as 38 U.S.C. 101(27)(G) (2021), because "[t]he statute does not list state National Guards as reserve components"). Congress created those "two overlapping but distinct organizations" in 1933, in response to problems that had been created by the draft of individual National Guard

members into the Army during World War I. *Perpich*, 496 U.S. at 345.

As this Court has recognized, "[s]ince 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." *Perpich*, 496 U.S. at 345; see 10 U.S.C. 12107(b)(1) ("[A] person who enlists in the Army National Guard * * * shall be concurrently enlisted * * * as a Reserve of the Army for service in the Army National Guard of the United States."). But although an individual who is a member of the Army National Guard is simultaneously a member of that state organization and the Army National Guard of the United States, that individual generally serves in only one capacity at a time. Federal law provides that "each member of the Army National Guard of the United States * * * who is ordered to active duty is relieved from duty in the National Guard of his State" unless "the President authorizes such service in both duty statuses" and the governor of the State "consents to such service in both duty statuses." 32 U.S.C. 325(a). Thus, as this Court noted in *Perpich*, "the dual enlistment system means that the members of the National Guard of [a State] who are ordered into federal service with the National Guard of the United States lose their status as members of the state militia during their period of active duty." 496 U.S. at 347. But when not on active federal duty, members of state National Guard units are considered state employees, and their daily operations are controlled by the States (although their positions are funded by the federal government). See 10 U.S.C. 10107 ("When not on active duty, members of the Army National Guard of the United States shall be administered, armed, equipped, and trained in their status as

members of the Army National Guard."); see also 32 U.S.C. 106 (providing for federal funding of the Army National Guard). And federal law elsewhere also distinguishes between duty performed in the state capacity of the Army National Guard and duty performed in the federal capacity of the Army National Guard of the United States. See, *e.g.*, 10 U.S.C. 10107; 32 U.S.C. 325(c).

b. The foregoing distinction reinforces the conclusion that petitioner is not covered by the uniformed services exception. For even if petitioner were correct in asserting that CSRS payments received by a retired dual status technician should be regarded as based on service performed as a member of the National Guard, but see pp. 22-25, *supra*, his conclusion that such payments trigger the uniformed services exception would still fail for an independent reason: any relevant service on which such payments could be based would have been performed in his state capacity as a member of the Army National Guard of Michigan.

As discussed, National Guard members have different "hats," "only one of which is worn at any particular time." *Perpich*, 496 U.S. at 348. Dual status technicians like petitioner only wear their federal army hats—and thus only perform work in their capacities as members of the Army National Guard of the United States—when called to federal active duty status by Congress or the President. Other service that an individual performs in his National Guard capacity is performed while wearing his state hat (that is, in his capacity as a member of the Army National Guard). Assuming *arguendo* that CSRS payments are wholly based on work performed in a technician's National Guard capacity, that

work would (at most) have been performed in the individual's *Army National Guard* capacity. But because the uniformed services exception's cross-referenced definition of "member of a uniformed service" generally excludes members of the Army National Guard, see pp. 26-28, *supra*, a payment that is based on work in an individual's technician capacity would still not be a "payment based wholly on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III).

Contrary to petitioner's assertion (Br. 35-36), the fact that a dual status military technician is *also* enlisted in the Army National Guard of the United States does not transform work performed in his technician role into work performed *as a member* of the Army National Guard of the United States. Petitioner's reading ignores the role that the words "service" and "as" play in the uniformed services exception; those terms indicate that the relevant payment must be solely based on work carried out in the technician's "role" or "capacity" in the Army National Guard of the United States. See p. 22, *supra*. To read the exception otherwise would suggest that a member of the National Guard who also holds a position in the private sector could be thought to perform ongoing service in the Army National Guard of the United States, even when performing work in his private-sector position—merely because the individual is at all times a member of that organization. That would rewrite the uniformed services exception and reimagine what constitutes service in the National Guard. Petitioner is thus incorrect to assert (Br. 36) that "the nature of [a National Guard member's] duty status on any given day" is irrelevant to determining the nature of the service performed and the

payments (including retirement payments) received for that service.

This analysis is not undermined by Section 12602 of Title 10, which provides for federal pay and benefits for certain Army National Guard service, such as training, drills, and other services, and which is why members of the National Guard like petitioner receive DFAS retirement payments based on that service. See 10 U.S.C. 12602(a)(1) and (3). Section 12602 provides that

> [f]or the purposes of laws providing benefits for members of the Army National Guard of the United States[,] * * * military training, duty, or other service performed by a member of the Army National Guard of the United States in his status as a member of the Army National Guard for which he is entitled to pay from the United States shall be considered military training, duty, or other service, as the case may be, in *Federal service* as a Reserve of the Army.

10 U.S.C. 12602(a)(1) (emphasis added); see 10 U.S.C. 12602(a)(3) (similar for inactive duty training). Section 12602 does not apply to work performed in the dual status technician capacity because such work is not military training, duty, or other service performed in his "status as a member of the Army National Guard." 10 U.S.C. 12602(a)(1) and (3). Unlike training and drills, work in the technician role is therefore not "considered" by statute to be "Federal service as a Reserve of the Army." *Ibid.* And the provisions of Title 5 that provide CSRS retirement benefits to dual status technicians are not "laws providing benefits for members of the Army National Guard of the United States." 10 U.S.C. 12602(a). For this reason as well those CSRS payments

are not "based wholly on service as a member of a uniformed service" for purposes of the windfall elimination provision.

2. Dual status technicians are likewise not "appointed, enlisted, or inducted in" their dual status technician positions as required by the definition of "member of a uniformed service" in 42 U.S.C. 410(m)—which again indicates that their dual status technician work does not constitute "service as a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III).

As the Second Circuit has recognized, the terms appointment, enlistment, and induction "have specific meanings, delineating membership" in the armed services "in specific capacities—as an appointed officer, enlisted member, or inductee." *Linza* v. *Saul*, 990 F.3d 243, 250 (2021). The term "appointment" refers to the appointment of officers in the Army National Guard by a state official, pursuant to specific authority in Titles 10 and 32. See 10 U.S.C. 12201 (discussing the "qualifications for appointment" of "officer[s] of a reserve component") (emphasis omitted); see also 10 U.S.C. 12211, 32 U.S.C. 305-312 (governing federal recognition of appointed officers and the appointment oath). The term "enlistment" refers to the enlistment of noncommissioned members of the Army National Guard, again pursuant to specific provisions in Titles 10 and 32. See 10 U.S.C. 12102(a) (discussing the "qualifications" "[t]o become an enlisted member of a reserve component") (emphasis omitted); see also 10 U.S.C. 12107, 32 U.S.C. 302-304 (governing the federal recognition of enlisted members, enlistment in general, and the enlistment oath). And the term "induction" refers to entry into military service after an individual is called up through the Selective Service System. See 10 U.S.C.

513(c) (referring to "[a] person who is under orders to report for induction into an armed force under the Military Selective Service Act (50 U.S.C. 3801 et seq.)"); 10 U.S.C. 1049(2) (referring to "selective service registrants called for induction").

When an individual is employed as a dual status technician, he is not "appointed, enlisted, or inducted in" a military position in the National Guard or another uniformed service. Rather, he is "appointed in the civil service" to his technician position under Title 5 by an adjutant general designated by the Secretary of the Army to employ and administer technicians. 5 U.S.C. 2105(a)(1)(F); see 32 U.S.C. 709(c) and (d). His technician work therefore does not constitute "service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III). And it follows that CSRS retirement payments received for that work are not even partly, much less "wholly," "based * * * on" work "as a member of a uniformed service." *Ibid.*; see *Newton* v. *Commissioner Soc. Sec.*, 983 F.3d 643, 650 & nn.27-31 (3d Cir. 2020) ("There is no evidence to suggest that [the dual status technician] was appointed, enlisted, or inducted into the Army National Guard for his dual status technician work. * * * [D]ual status technicians are appointed to their civilian positions under the civil service appointment authority."); *Linza*, 990 F.3d at 250 (similar).

II. PETITIONER'S CONTRARY INTERPRETATION RUNS AFOUL OF THE TEXT AND CONTEXT OF THE UNIFORMED SERVICES EXCEPTION

A. Petitioner Misconstrues The Plain Meaning Of The Text Of The Uniformed Services Exception

1. Petitioner's arguments that payments for his technician work fall within the uniformed services exception lack merit. Perhaps most fundamentally, petitioner ignores the significance of the word "as" in the exception. That term, when defined according to its ordinary meaning, means "[i]n the role, capacity, or function of." *American Heritage* 106 (emphasis omitted); see p. 22, *supra*. Work thus must be performed in the role, capacity, or function of an individual's National Guard position to constitute "service *as* a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III) (emphasis added). If work is not performed in that capacity, any retirement payments based on that work cannot be "wholly" "based * * * on" work as a member of a uniformed service. *Ibid.* And as we have explained, an individual's work performed in that civilian role is *not* work performed in the capacity of a National Guard member.

Petitioner's reading would delete "as" from the statute and rewrite the uniformed services exception to cover a much broader group of payments: payments "based wholly on service *performed by* a member of a uniformed service," or payments made "*to* a member of a uniformed service." See *Martin* v. *Social Sec. Admin.*, 903 F.3d 1154, 1164 (11th Cir. 2018) (per curiam). But that is not the text that Congress enacted. And although petitioner asserts (Br. 34) that under his "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," petitioner fails to explain how the text of the uniformed services exception actually draws the line that he would draw between work performed by technicians in their federal civilian technician roles and work performed by other members of the National Guard in other federal civilian roles. And petitioner's reliance (*ibid.*) on the "military side of dual-status technicians' service" ignores Congress's choice to make technician work meaningfully civilian, see pp. 36-43, *infra*, and to separate work performed in that role (and retirement payments for that work) from National Guard work and retirement payments. It is therefore petitioner who asks (Br. 31) the Court to consider whether a dual status technician is "military *enough*" rather than consider the text of the relevant statutory provisions.

2. Petitioner also does not accurately account for Congress's use of the phrase "based * * * on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III). Petitioner notes (Br. 23) that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 (2020) (quoting *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007)) (brackets in original). But the operative phrase here is "*payment* based * * * on *service* as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III) (emphases added). In "common talk," *Babb*, 140 S. Ct. at 1173 (citation omitted), that phrasing plainly refers to payments for and measured by "service as a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III). For dual status technicians, the pay they receive while working and pensions they receive

upon retirement are *for* and are *measured by* their civilian service. Moreover, the "based * * * on" phrase here does not stand alone; rather, it is modified by the term "wholly." *Ibid.* Thus, "service as a member of a uniformed service" must be the exclusive or sole basis for a dual status technician's CSRS payments—not merely a necessary condition for the civilian service that later renders the individual eligible for a CSRS pension. *Ibid.*

To the extent petitioner suggests (Br. 25-26) that Congress included the word "wholly" to address the situation in which a retired federal civil servant receives CSRS payments based partly on work performed as a dual status technician and partly on work performed in a different civil service role, petitioner is mistaken. Petitioner asserts that in such a scenario, the uniformed services exception "removes only the portion of his CSRS pension attributable to his dual-status technician employment from the reach of the windfall elimination provision," Pet. Br. 26, pointing to internal SSA guidance regarding the treatment of pensions based on both covered and noncovered service, *id.* at 26 n.8 (citing SSA, *Program Operations Manual System (POMS): RS 00605.370 WEP Guarantee* (*POMS RS 00605.370)* (Apr. 17, 2003), https://go.usa.gov/xA5gm).

That SSA is able to separate CSRS payments based on a dual status technician's work from other CSRS payments based on other civilian work does not suggest that payments based on work performed in the technician role are "payment[s] based wholly on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III). Indeed, nothing in the internal guidance that petitioner cites suggests that it is even intended to address dual status technicians. Instead, the

guidance is necessary for other situations in which a single "pension is based on both covered and non-covered service"—such as "[w]hen a pension is based on both [the] Federal Employees' Retirement System" (which is the system that replaced CSRS and generally makes all federal civilian service covered service) *and* "CSRS service." SSA, *Program Operations Manual System (POMS): RS 00605.364 Determining Pension Applicability, Eligibility Date, and Monthly Amount* C.6. (Nov. 12, 2020), https://go.usa.gov/xA5gV (referring to *POMS RS 00605.370* B.2. as containing the method by which SSA will prorate a pension in such a situation). In such situations, proration is necessary for purposes of the windfall elimination provision's guarantee that limits the reduction in Social Security benefits to one-half of the monthly payment attributable to non-covered employment. See 42 U.S.C. 415(a)(7)(B).

B. Petitioner Does Not Account For The Inherently Civilian Nature Of Dual Status Technician Employment

1. Petitioner suggests that the categorization of dual status technicians as civilian employees is a matter of "administrative bookkeeping" that is irrelevant to determining whether service in the technician role qualifies for the uniformed services exception. Pet. Br. 3; see *id.* at 1, 21. But as the court of appeals explained, a dual status technician's "designation as a 'civilian' employee of the United States * * * is meaningful—and more than a mere 'status'—in the context of Social Security retirement benefits," and "distinguish[es] [a dual status technician's] service as a dual-status technician from that of other National Guard members." Pet. App. 14a.

Congress made dual status technicians federal civil servants in 1968 in order to provide them with the attendant benefits of that role: federal civil service pay

and benefits, federal civil service retirement, and FTCA coverage. See p. 3, *supra*. As a result of the civilian nature of the role, a dual status technician is permitted to join a union, see p. 7, *supra*, while on-duty members of the National Guard cannot, see 10 U.S.C. 976. A technician can earn compensatory time off when he works additional hours and receive workers' compensation for on-the-job injuries, see p. 7, *supra*, but none of those benefits are available to a member of the National Guard performing active service or participating in inactive training or drills, see 5 U.S.C. 8101(1); 32 U.S.C. 709(h); 37 U.S.C. 204(g)(1). And if a dual status technician is ordered to serve on inactive or active duty, including training, during his civilian workweek, he must take annual leave, military leave, or leave without pay from his technician position in order to do so. See pp. 7-8, *supra*. Those different rights, obligations, and benefits underscore that Congress's decision to include a dual status technician's pay and benefits within Title 5's comprehensive structure governing the federal civil service was not a matter of "mere classification" or "administrative bookkeeping." Pet. Br. 3, 37.

When Congress determined that dual status technicians should no longer be employees of the States, it could have made the position like the full-time Active Guard Reserve position. Individuals who hold full-time Active Guard Reserve positions with the Army National Guard perform service in the National Guard during the workweek for military pay. See 10 U.S.C. 101(b)(16); 32 U.S.C. 328, 502(f). But Congress chose not to make technicians' work National Guard service, and it also chose not to provide technicians with military pay and benefits. Congress's choice matters, and the civilian nature of the dual status technician position reinforces the

conclusion that work performed in that capacity is not service conducted as a member of a uniformed service.

2. Title 5 defines "'civil service'" to include "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services." 5 U.S.C. 2101(1). Title 5 in turn defines "'uniformed services'" as "the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration," and it defines "'armed forces'" as "the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard." 5 U.S.C. 2101(2)-(3) (2021). Title 5 also provides that "the civilian service of the Government * * * includes * * * employment under section 709 of title 32 or any prior corresponding provision of law." 5 U.S.C. 8332(b)(6).

Petitioner makes two arguments based on those definitions, neither of which supports his reading of the uniformed services exception.

Petitioner first dismisses (Br. 37) Title 5's distinction between civil service and uniformed service as irrelevant to the question presented because Congress did not cross-reference Title 5 when defining "uniformed service" in the Social Security Act's uniformed services exception. But by the time Congress enacted that exception in 1994, the dual status technician position and role had been recognized as civilian for a variety of purposes—including for Title 5 purposes, see, *e.g.*, 5 U.S.C. 8332(b)(6)—for over 25 years. There was thus no need for Congress to cross-reference Title 5's exclusion of "uniformed service" from the federal civil service to indicate the civilian nature of the technician's work.

Nor was there any need for Congress to include redundant language—such as spelling out that the exception applies only to "a member of a uniformed service who is not classified as a civilian employee" or to a payment based wholly on "non-civilian service as a member of a uniformed service." Pet. Br. 30 (citation and emphases omitted).

Petitioner next asserts (Br. 37) that a member of the civil service, working for pay and benefits under Title 5, can simultaneously perform "service as a member of a uniformed service" for purposes of the Social Security Act in Title 42. Petitioner speculates (*ibid.*) that if Congress intended dual status technicians to be deemed civilian employees for all purposes, Congress would not have needed to provide expressly that technician service "shall be credited" toward a CSRS pension. 5 U.S.C. 8332(b)(6). Petitioner's arguments are misguided.

Section 8332(b)(6) is one in a list of 17 categories of service that are specifically "include[d]" within the "civilian service of the Government." 5 U.S.C. 8332(b). That list includes other forms of service that, like dual status technician service, clearly fall within the general definition of civil service, such as service performed "as a substitute in a postal field service" and "service as a justice or judge of the United States." 5 U.S.C. 8332(b)(1) and (12). Congress's decision to expressly designate service performed by dual status technicians as falling within the "civilian service of the Government," 5 U.S.C. 8332(b), thus further bolsters the conclusion that such service is *not* service as a member of a uniformed service. Similarly, the fact that Congress explicitly provided that only a handful of the many provisions in Title 5 do not apply to dual status technicians, see Pet. Br. 37 (citing 32 U.S.C. 709(f)(5), (g), and (h)),

further shows that the technician role is fundamentally civilian.

Petitioner's speculation (Br. 37) about why Congress enacted Section 8332(b)(6) is unfounded. In its entirety, Section 8332(b)(6) provides that "the civilian service of the Government * * * includes * * * employment under section 709 of title 32 *or any prior corresponding provision of law*." 5 U.S.C. 8332(b)(6) (emphasis added). Congress adopted that provision as part of its 1968 legislation federalizing the technician role. Technicians Act § 3(c), Stat. 757. Section 8332(b)(6) ensured that technicians, who had previously been state employees and received only benefits made available by the State that employed them, see pp. 2-3, *supra*, would receive CSRS credit for all of their service as technicians—whether that service was performed before or after the technician role was federalized. See 114 Cong. Rec. at 23,252-23,253; 1968 House Report 8-11.

3. The uniformed services exception's definition of "member of a uniformed service" includes commissioned officers of the NOAA Corps and PHS Corps. 42 U.S.C. 410(m). Petitioner asserts (Br. 38) that those "services * * * are comprised entirely of uniformed, civilian officers," which apparently, in his view, is because they "generally serve under the command of civilian authorities." On that basis, he asserts (*ibid.*) that because Congress included those individuals within the definition of "'member[s] of a uniformed service,'" "the 'civilian' character of a position is beside the point when determining whether a person is serving" in such a role. That assertion incorrectly attributes a civilian status to commissioned officers of the NOAA Corps and PHS Corps, ignores the non-civilian nature of the payments

and benefits that those officers receive, and fails to account for Congress's express inclusion of those officers within the definition of "member of a uniformed service." 42 U.S.C. 410(m).

As an initial matter, petitioner's suggestion (Br. 38) that commissioned officers of the NOAA Corps and PHS Corps hold civilian roles because they are under civilian command is wrong. *All* uniformed services are under civilian command—including those that are wholly military, which fall under the command of civilian authorities in the Department of Defense, and ultimately the President. See U.S. Const. Art. II, § 2, Cl. 1. That commissioned officers of the NOAA Corps and PHS Corps are under civilian command in the Department of Commerce and the Department of Health and Human Services does not suggest that their roles are more "civilian" for present purposes than those performed by an officer in the Army or Navy.

Additionally, Congress conferred numerous military characteristics on commissioned Corps officers that distinguish them from members of the federal civil service. Unlike dual status technicians, who receive civil service pay and benefits, commissioned officers of the NOAA Corps and PHS Corps receive pay and retirement benefits that track the pay and retirement benefits received by members of the armed forces. See 37 U.S.C. 101(3) (2021); 37 U.S.C. 204(a)(1) (together including commissioned officers of the NOAA Corps and PHS Corps within the same pay structure governing members of the Army, Navy, Air Force, Marine Corps, Space Force and Coast Guard); 33 U.S.C. 3071 (2020) (providing that various provisions in Title 10 that apply to members of the armed forces apply to NOAA officers, including benefits and retirement provisions); 42 U.S.C. 213a

(2020) (similar provision for PHS officers); see also 33 U.S.C. 3072; 42 U.S.C. 213. Accordingly, unlike dual status technicians, who are subject to the same GS pay scale as other federal civilian employees, the pay of commissioned officers of the NOAA Corps and PHS Corps is pegged to the federal military scale, and they receive the same basic allowance for housing and subsistence that members of the military receive. See 37 U.S.C. 101(3), 201 (2021); 37 U.S.C. 401 *et seq.*; see also 42 U.S.C. 204(a)(2). And unlike members of the federal civilian workforce, who generally work a 40-hour civilian work week, commissioned Corps officers are generally considered on duty and subject to a call to return to their place of duty 24 hours a day, seven days a week—just like active duty members of the armed services. Cf. 33 U.S.C. 3071(a)(1) (2020); 10 U.S.C. 701 *et seq.*

Even if commissioned officers of the NOAA Corps and PHS Corps are thought to exhibit civilian characteristics, Congress chose to expressly include them within the definition of "member of a uniformed service." Congress first defined "member of a uniformed service" to include a commissioned officer of the Coast and Geodetic Survey (the precursor to NOAA) Corps and PHS Corps in 1956, over a decade before it federalized the dual status technician position and made technicians eligible for federal civil service pay and benefits. See Servicemen's and Veterans' Survivor Benefits Act, ch. 837, 70 Stat. 857. Congress also included members of the Army, Navy, Air Force, Marine Corps, and Coast Guard, which are wholly military services, in that same definition. 42 U.S.C. 410(m). But Congress did not amend that definition to include dual status technicians after it federalized the technician position in 1968. Nor did it amend that definition after it created the windfall

elimination provision in 1983, or after it created the uniformed services exception in 1994. Thus, the express inclusion of commissioned officers of the NOAA Corps and PHS Corps, but not dual status technicians, in the term "member of a uniformed service" undermines—rather than supports—petitioner's position.

C. Petitioner's Remaining Arguments Do Not Undermine The Plain-Text Meaning Of The Uniformed Services Exception

1. Petitioner notes (Br. 33-34) that in cases involving the *Feres* doctrine under the FTCA, see *Feres* v. *United States*, 340 U.S. 135 (1950), the government has argued that dual status technicians' work is "military in nature and integral to the military mission." Br. in Opp. at 17, *Neville* v. *Dhillon*, 140 S. Ct. 2641 (2020) (No. 19-690) (citation omitted). But the treatment of dual status technicians for purposes of the *Feres* doctrine has no bearing on whether their technician work triggers the uniformed services exception, and the government's arguments regarding the *Feres* doctrine in cases involving technicians do not conflict with the government's arguments here.

In *Feres*, this Court found that sovereign immunity bars members of the military from suing the government under the FTCA for injuries that "arise out of or are in the course of activity incident to [military] service." 340 U.S. at 146; see *United States* v. *Johnson*, 481 U.S. 681, 686 (1987). The Court has explained that such claims cannot proceed "because they are the 'type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Johnson*, 481 U.S. at 690 (quoting *United States* v. *Shearer*, 473 U.S. 52, 59 (1985)) (emphasis omitted; brackets in

original); see *Chappell* v. *Wallace*, 462 U.S. 296, 298-299 (1983). Because of that and related considerations, "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *Shearer*, 473 U.S. at 57-58.

Whether a particular injury suffered in the course of a dual status technician's work "arise[s] out of or [is] in the course of activity incident to [military] service" for purposes of the FTCA and sovereign immunity, *Feres*, 340 U.S. at 146, is an entirely separate question from whether a technician's CSRS retirement benefits are "payment[s] based wholly on service as a member of a uniformed service" for purposes of the Social Security Act, 42 U.S.C. 415(a)(7)(A)(III). The first question is addressed by a case-specific inquiry that accounts for the impact that subjecting the government to tort suits might have on the military's structure and operations, see *Shearer*, 473 U.S. at 57; the second is addressed by an analysis of the text of the uniformed services exception in the Social Security Act, other statutes that it references, and its context. Thus, as the court of appeals explained, the fact that the work of a dual status technician may be "'irreducibly military' for purposes of suing other military personnel or the government does not resolve" the question presented in this case—"which focuses critically on the types and sources of a claimant's earnings." Pet. App. 15a; see *Kientz*, 954 F.3d at 1285 n.6 ("*Feres* and its progeny * * * do not bear on the interpretation of the uniformed services exception.").

For the same reasons, the fact that the government has argued, on the facts of particular cases, that dual status technicians who were performing work in that role suffered injuries that "ar[ose] out of or [were] in

the course of activity incident to [military] service," *Feres*, 340 U.S. at 146, does not create any conflict with the government's arguments here. Indeed, in the brief that petitioner cites, the government repeatedly emphasized the civilian nature of dual status technician employment. See, *e.g.*, Br. in Opp. at 4, *Neville*, *supra* (No. 19-690) ("Dual-status technicians perform full-time work as civilians."); *id.* at 7 ("As a dual-status military technician, petitioner was considered to be in a civilian position during the regular work week."); *id.* at 17 (referring to the petitioner's "military and civilian capacities" in her technician role). And it is the civilian nature of dual status technicians' employment that is relevant to the question presented in this case.

2. Petitioner asserts that, "to the extent the [uniformed services] exception is ambiguous, it should be read to include dual-status technicians," based on the "pro-veteran canon" of statutory interpretation. Pet. Br. 27-28. But as petitioner recognizes, see *ibid.*, that canon provides that "interpretive *doubt* is to be resolved in the veteran's favor," and it therefore has no application in the absence of statutory ambiguity. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (emphasis added); see, *e.g.*, *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 438-441 (2011) (referencing the pro-veteran canon only after considering the text and context of the statutory provision that was at issue); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (noting the existence of the canon but declining to interpret the statutory provisions at issue in the veteran's favor because doing so "would distort the language of these provisions"). Here, there is no ambiguity, so the canon never comes into play.

Even if there were any ambiguity here, however, the canon is inapplicable because the treatment of CSRS pension payments resulting from work performed in the civil service does not implicate the concerns that underlie the canon's application. This Court has indicated that the canon reflects "Congress['s] * * * expressed special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). But dual status technicians like petitioner already receive such solicitude when they benefit from the application of the uniformed services exception to their DFAS military retirement payments for work performed in a military capacity. See pp. 16, 24, *supra*. To apply the pro-veteran canon of statutory interpretation in order to give dual status technicians the benefit of that exception for their civil service pension payments—in addition to their military retirement pay—would turn the canon's role as a proxy for congressional intent on its head, undermining Congress's express instruction that technicians receive *civilian* pay and benefits, along with attendant rights and privileges. And applying the canon here would create inequitable results, showing solicitude only to veterans who held one specific federal civilian position (the dual status technician position), while denying such solicitude to veterans who held any other federal civilian position, even if they did so while also members of the National Guard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 2101 (2021) provides:

Civil service; armed forces; uniformed services

For the purpose of this title—

(1) the "civil service" consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services;

(2) "armed forces" means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard; and

(3) "uniformed services" means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

2. 5 U.S.C. 8332(b)(6) provides:

Creditable service

(b) The service of an employee shall be credited from the date of original employment to the date of separation on which title to annuity is based in the civilian service of the Government. Except as provided in paragraph (13)[1] of this subsection, credit may not be allowed for a period of separation from the service in excess of 3 calendar days. The service includes—

[1] So in original. Probably should be paragraph "(14)".

(6) employment under section 709 of title 32 or any prior corresponding provision of law;

3. 10 U.S.C. 101(c)(1)-(3) provides:

Definitions

(c) RESERVE COMPONENTS.—The following definitions relating to the reserve components apply in this title:

(1) The term "National Guard" means the Army National Guard and the Air National Guard.

(2) The term "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(3) The term "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

4. 10 U.S.C. 10216 provides:

Military technicians (dual status)

(a) IN GENERAL.—(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve; and

(C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

(3) A military technician (dual status) who is employed under section 3101 of title 5 may perform the following additional duties to the extent that the performance of those duties does not interfere with the performance of the primary duties described in paragraph (1):

(A) Supporting operations or missions assigned in whole or in part to the technician's unit.

(B) Supporting operations or missions performed or to be performed by—

(i) a unit composed of elements from more than one component of the technician's armed force; or

(ii) a joint forces unit that includes—

(I) one or more units of the technician's component; or

(II) a member of the technician's component whose reserve component assignment is in a position in an element of the joint forces unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) PRIORITY FOR MANAGEMENT OF MILITARY TECHNICIANS (DUAL STATUS).—(1) As a basis for making the annual request to Congress pursuant to section 115(d) of this title for authorization of end strengths for military technicians (dual status) of the Army and Air Force reserve components, the Secretary of Defense shall give priority to supporting authorizations for military technicians (dual status) in the following high-priority units and organizations:

(A) Units of the Selected Reserve that are scheduled to deploy no later than 90 days after mobilization.

(B) Units of the Selected Reserve that are or will deploy to relieve active duty peacetime operations tempo.

(C) Those organizations with the primary mission of providing direct support surface and aviation maintenance for the reserve components of the Army and Air Force, to the extent that the military technicians (dual status) in such units would mobilize and deploy in a skill that is compatible with their civilian position skill.

(2) For each fiscal year, the Secretary of Defense shall, for the high-priority units and organizations referred to in paragraph (1), seek to achieve a programmed manning level for military technicians (dual status) that is not less than 90 percent of the programmed manpower structure for those units and organizations for military technicians (dual status) for that fiscal year.

(3) Military technician (dual status) authorizations and personnel shall be exempt from any requirement (imposed by law or otherwise) for reductions in Department of Defense civilian personnel and shall only be reduced as part of military force structure reductions.

(c) INFORMATION REQUIRED TO BE SUBMITTED WITH ANNUAL END STRENGTH AUTHORIZATION REQUEST.—(1) The Secretary of Defense shall include as part of the budget justification documents submitted to Congress with the budget of the Department of Defense for any fiscal year the following information with respect to the end strengths for military technicians (dual status) requested in that budget pursuant to section 115(d) of this title, shown separately for each of the Army and Air Force reserve components:

(A) The number of military technicians (dual status) in the high priority units and organizations specified in subsection (b)(1).

(B) The number of technicians other than military technicians (dual status) in the high priority units and organizations specified in subsection (b)(1).

(C) The number of military technicians (dual status) in other than high priority units and organizations specified in subsection (b)(1).

(D) The number of technicians other than military technicians (dual status) in other than high priority units and organizations specified in subsection (b)(1).

(2)(A) If the budget submitted to Congress for any fiscal year requests authorization for that fiscal year under section 115(d) of this title of a military technician (dual status) end strength for a reserve component of the Army or Air Force in a number that constitutes a reduction from the end strength minimum established by law for that reserve component for the fiscal year during which the budget is submitted, the Secretary of Defense shall submit to the congressional defense committees with that budget a justification providing the basis for that requested reduction in technician end strength.

(B) Any justification submitted under subparagraph (A) shall clearly delineate the specific force structure reductions forming the basis for such requested technician reduction (and the numbers related to those reductions).

(d) UNIT MEMBERSHIP REQUIREMENT.—(1) Unless specifically exempted by law, each individual who is

hired as a military technician (dual status) after December 1, 1995, shall be required as a condition of that employment to maintain membership in—

(A) the unit of the Selected Reserve by which the individual is employed as a military technician; or

(B) a unit of the Selected Reserve that the individual is employed as a military technician to support.

(2) Paragraph (1) does not apply to a military technician (dual status) who is employed by the Army Reserve in an area other than Army Reserve troop program units.

(3) Paragraph (1) does not apply to a military technician (dual status) who is employed by the Air Force Reserve in an area other than the Air Force Reserve unit program, except that not more than 50 of such technicians may be assigned outside of the unit program at the same time.

(e) DUAL STATUS REQUIREMENT.—(1) Funds appropriated for the Department of Defense may not (except as provided in paragraph (2)) be used for compensation as a military technician of any individual hired as a military technician (dual status) after February 10, 1996, who is no longer a member of the Selected Reserve.

(2) Except as otherwise provided by law, the Secretary concerned may pay compensation described in paragraph (1) to an individual described in that paragraph who is no longer a member of the Selected Reserve for a period up to 12 months following the individual's loss of membership in the Selected Reserve if the Secretary

determines that such loss of membership was not due to the failure of that individual to meet military standards.

(f) AUTHORITY FOR DEFERRAL OF MANDATORY SEPARATION.—The Secretary of the Army and the Secretary of the Air Force may each implement personnel policies so as to allow, at the discretion of the Secretary concerned, a military technician (dual status) who continues to meet the requirements of this section for dual status to continue to serve beyond a mandatory removal date, and any applicable maximum years of service limitation, until the military technician (dual status) reaches age 60 and attains eligibility for an unreduced annuity (as defined in section 10218(c) of this title).

(g) RETENTION OF MILITARY TECHNICIANS WHO LOSE DUAL STATUS DUE TO COMBAT-RELATED DISABILITY.—(1) Notwithstanding subsection (d) of this section or subsections (a)(3) and (b) of section 10218 of this title, if a military technician (dual status) loses such dual status as the result of a combat-related disability (as defined in section 1413a of this title), the person may be retained as a non-dual status technician so long as—

(A) the combat-related disability does not prevent the person from performing the non-dual status functions or position; and

(B) the person, while a non-dual status technician, is not disqualified from performing the non-dual status functions or position because of performance, medical, or other reasons.

(2) A person so retained shall be removed not later than 30 days after becoming eligible for an unreduced annuity and becoming 60 years of age.

(3) Persons retained under the authority of this subsection do not count against the limitations of section 10217(c) of this title.

5. 32 U.S.C. 709 provides:

Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1) the organizing, administering, instructing, or training of the National Guard;

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who—

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a

military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991[1] (42 U.S.C. 2000e-16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at

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[1] See References in Text note below.

least 30 days before the termination date of such employment.

(g)(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(j) In this section:

(1) The term "military pay status" means a period of service where the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term "fitness for duty in the reserve components" refers only to military-unique service requirements that attend to military service generally, including service in the reserve components or service on active duty.

6. 38 U.S.C. 101(27) (2021) provides:

Definitions

For the purposes of this title—

(27) The term "reserve component" means, with respect to the Armed Forces—

(A) the Army Reserve;

(B) the Navy Reserve;

(C) the Marine Corps Reserve;

(D) the Air Force Reserve;

(E) the Space Force Reserve;

(F) the Coast Guard Reserve;

(G) the Army National Guard of the United States; and

(H) the Air National Guard of the United States.

7. 42 U.S.C. 410(m) provides:

Definitions relating to employment

For the purposes of this subchapter—

(m) Member of a uniformed service

The term "member of a uniformed service" means 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 section 101(27) of title 38), or in one of those services without specification of component, or as a commissioned officer of the Coast and Geodetic Survey, the National Oceanic and Atmospheric Administration Corps, or the Regular or Reserve Corps of the Public Health Service, and any person serving in the Army or Air Force under call or conscription. The term includes—

(1) a retired member of any of those services;

(2) a member of the Fleet Reserve or Fleet Marine Corps Reserve;

(3) a cadet at the United States Military Academy, a midshipman at the United States Naval Academy, and a cadet at the United States Coast Guard Academy or United States Air Force Academy;

(4) a member of the Reserve Officers' Training Corps, the Naval Reserve Officers' Training Corps, or the Air Force Reserve Officers' Training Corps, when ordered to annual training duty for fourteen days or more, and while performing authorized travel to and from that duty; and

(5) any person while en route to or from, or at, a place for final acceptance or for entry upon active duty in the military, naval, or air service—

(A) who has been provisionally accepted for such duty; or

(B) who, under the Military Selective Service Act [50 U.S.C. 3801 et seq.], has been selected for active military, naval, or air service;

and has been ordered or directed to proceed to such place.

The term does not include a temporary member of the Coast Guard Reserve.

8. 42 U.S.C. 415(a)(7)(A) provides:

Computation of primary insurance amount

For the purposes of this subchapter—

(a) Primary insurance amount

(7)(A) In the case of an individual whose primary insurance amount would be computed under paragraph (1) of this subsection, who—

(i) attains age 62 after 1985 (except where he or she became entitled to a disability insurance benefit before 1986 and remained so entitled in any of the 12 months immediately preceding his or her attainment of age 62), or

(ii) would attain age 62 after 1985 and becomes eligible for a disability insurance benefit after 1985,

and who first becomes eligible after 1985 for a monthly periodic payment (including a payment determined under subparagraph (C), but excluding (I) a payment under the Railroad Retirement Act of 1974 or 1937 [45 U.S.C. 231 et seq., 228a et seq.], (II) a payment by a social security system of a foreign country based on an agreement concluded between the United States and such foreign country pursuant to section 433 of this title, and (III) a payment based wholly on service as a member of a uniformed service (as defined in section 410(m) of this title)) which is based in whole or in part upon his or her earnings for service which did not constitute "employment" as defined in section 410 of this title for purposes of this subchapter (hereafter in this paragraph and in subsection (d)(3) referred to as "noncovered service"), the primary insurance amount of that individual during his or her concurrent entitlement to such monthly periodic payment and to old-age or disability insurance benefits shall be computed or recomputed under subparagraph (B).