No. 20-480

IN THE
Supreme Court of the United States

DAVID BABCOCK,
Petitioner,

v.

KILOLO KIJAKAZI, ACTING COMMISSIONER OF SOCIAL SECURITY,
Respondent.

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

REPLY BRIEF FOR PETITIONER DAVID BABCOCK

RONALD M. BAHRIE
JUSTIN M. BAHRIE
NICHOLAS A. KIPA
BAHRIE LAW, PLLC
6810 S. Cedar St., Ste. 2C
Lansing, MI 48911

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
REEDY C. SWANSON
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THE PLAIN TEXT OF THE UNIFORMED-SERVICES EXCEPTION APPLIES TO DUAL STATUS TECHNICIANS 3

A. The word "as" does not limit the uniformed-services exception to a subset of dual-status technicians' service 4

B. There is no other textual basis for excluding dual-status technicians from the uniformed-services exception 7

C. Legislative history cannot rescue Respondent's atextual interpretation of the uniformed-services exception 12

II. IT IS IRRELEVANT THAT DUAL-STATUS TECHNICIANS ARE CLASSIFIED AS "CIVILIAN" EMPLOYEES 15

III. RESPONDENT'S RULE COULD PROVE DIFFICULT TO ADMINISTER 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES:

Am. Fed'n of Gov't Emps. AFL-CIO, Loc. 2953 v. *Fed. Lab. Rels. Auth.*, 730 F.2d 1534 (D.C. Cir. 1984) 3, 4, 18

Ass'n of Civilian Technicians v. *Fed. Labor Rels. Auth.*, 250 F.3d 778 (D.C. Cir. 2001) 18

Astrue v. *Ratliff*, 560 U.S. 586 (2010) 5, 6

Azar v. *Allina Health Servs.*, 139 S. Ct. 1804 (2019) 13

Bostock v. *Clayton County*, 140 S. Ct. 1731 (2020) 14

Dep't of Homeland Sec. v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) 2

Epic Sys. Corp. v. *Lewis*, 138 S. Ct. 1612 (2018) 13

Feres v. *United States*, 340 U.S. 135 (1950) 19

Hardt v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010) 6

Henderson ex rel. Henderson v. *Shinseki*, 562 U.S. 428 (2011) 15

Meghrig v. *KFC Western, Inc.*, 516 U.S. 479 (1996) 6

Milner v. *Dep't of the Navy*, 562 U.S. 562 (2011) 13

TABLE OF AUTHORITIES—Continued

Page(s)

Perpich v. *Dep't of Def.*,
496 U.S. 334 (1990) 6

United States v. *Oregon*,
366 U.S. 643 (1961) 14, 15

STATUTES:

5 U.S.C. § 2101 16
5 U.S.C. § 2105(a)(1)(F) 8
5 U.S.C. § 8332(b) 16
5 U.S.C. § 8332(b)(6) 17
10 U.S.C. § 101(d)(5) 5
10 U.S.C. § 101(d)(7) 5
10 U.S.C. § 701(a) 5
10 U.S.C. § 723(a) 5
10 U.S.C. § 10107 ..... 5, 6, 12
10 U.S.C. § 10216(a)(1)(B) 3
10 U.S.C. § 10216(a)(2) 18
10 U.S.C. § 10216(a)(3) 21
10 U.S.C. § 12107(b) 9, 10
10 U.S.C. § 12107(b)(1) 3
10 U.S.C. § 12107(b)(2) 3
10 U.S.C. § 12107(c) 9, 10
10 U.S.C. § 12107(c)(1) 3
10 U.S.C. § 12107(c)(2) 3
10 U.S.C. § 12602(a)(1) 6, 12
10 U.S.C. § 12602(a)(3) 12
26 U.S.C. § 3101(a) (1970) 14

TABLE OF AUTHORITIES—Continued

Page(s)

26 U.S.C. § 3121(b)(6)(A) (1970) 14
26 U.S.C. § 3121(m)(1) (1970) 14
32 U.S.C. § 101(19) 5
32 U.S.C. § 325(c) 12
32 U.S.C. § 709(a)(3) 21
32 U.S.C. § 709(b)(2) 3, 10
32 U.S.C. § 709(b)(3) 3
32 U.S.C. § 709(b)(4) 3, 19
32 U.S.C. § 709(e) 18
32 U.S.C. § 709(f) 18
32 U.S.C. § 709(f)(4) 11, 16, 21
32 U.S.C. § 709(g) 18
32 U.S.C. § 709(h) 19
32 U.S.C. § 709(j)(1) 11, 16, 21
37 U.S.C. § 101(3) 17, 18
37 U.S.C. § 101(24) 18
37 U.S.C. § 204(a)(1) 17
37 U.S.C. § 206 11
38 U.S.C. § 101(27) 3, 12, 16
42 U.S.C. § 410(m) ..... *passim*
42 U.S.C. § 415(a)(7)(A)(III) 1, 3

EXECUTIVE MATERIALS:

SSAR 12-X(8), 77 Fed. Reg. 51,842 (Aug. 27, 2012) 13, 21

TABLE OF AUTHORITIES—Continued

Page(s)

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LEGISLATIVE MATERIALS:

H.R. Rep. No. 95-451 (1977) 14

H.R. Rep. No. 103-506 (1994) 13, 14

H.R. Rep. No. 103-670 (1994) (Conf. Rep.) 13

Dep't of Def. Appropriations for 2015, Hearings Before the Subcomm. on Def. of the H. Comm. on Appropriations, pt. 2, 113th Cong. 227 (2014) 20

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REPLY BRIEF FOR PETITIONER DAVID BABCOCK

INTRODUCTION

Petitioner David Babcock served in uniform for nearly his entire professional life. As a dual-status technician in the National Guard, he played an essential role in ensuring military readiness, all while meeting a congressional requirement to maintain his own Guard membership and rank. He therefore sensibly understood a provision of the U.S. Code that applies to "service as a member of a uniformed service" to apply to his dual-status technician service. 42 U.S.C. § 415(a)(7)(A)(III); *see* Pet. App. 44a-45a. Yet Respondent has consistently denied him the benefit of that provision.

In justifying that decision, Respondent invokes (at 21) "[t]he ordinary meaning of the relevant terms," but in truth relies almost exclusively on just one: "as." After all, there can be no dispute that Babcock's work as a dual-status technician was "service," or that he was at all relevant times "a member of a uniformed service." Respondent is therefore left to argue that Babcock's service as a dual-status technician is not truly service "as" a member of a uniformed service because it was not service in that particular "capacity."

That argument strains the statutory text beyond its breaking point. Congress requires dual-status technicians to maintain membership in a uniformed service. That mandate is not incidental to the job—it is essential and reflects the fundamentally military role that dual-status technicians play. And, as a textual matter, multiple provisions in the U.S. Code demonstrate that when Congress wants to refer to aspects of Guard service performed in a particular "capacity" or "status," it says exactly that.

The animating force of Respondent's argument is not the word "as," but Respondent's own reading of ambiguous legislative history and belief that "uniformed" service must be tantamount to "military" service. Neither of those views has any basis in the congressionally enacted text.

Babcock's experience exemplifies why this Court requires the government to "turn square corners in dealing with the people," *Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) (internal quotation marks omitted)—particularly veterans. The Court should enforce the text as enacted rather than Respondent's belief grounded in extratextual considerations.

ARGUMENT

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

The windfall elimination provision does not apply to any "payment based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). It specifically defines the full phrase "member of a uniformed service" to include "*any* person appointed, enlisted, or inducted in a component of the" Army National Guard of the United States. *Id.* § 410(m) (emphasis added); *see also* 38 U.S.C. § 101(27).

That statutory definition decides this case for Babcock. Dual-status technicians are required by statute, as a condition of employment, to maintain a position in a uniformed service, such as the Army National Guard of the United States. 32 U.S.C. § 709(b)(2); 10 U.S.C. § 12107(b)(1), (c)(1); *see also* 10 U.S.C. § 10216(a)(1)(B). [1] Indeed, dual-status technicians must literally serve in "the uniform * * * of the armed services." 32 U.S.C. §709(b)(4). They must, as Babcock did, maintain the military rank corresponding to the work they perform as technicians. *See id.* § 709(b)(3); Pet. App. 39a. And, as government and military officials have emphasized time and again in other contexts, dual-status technicians are essential for and inextricable from military readiness and operations. *See Am. Fed'n of Gov't Emps. AFL-CIO, Loc.*

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[1] A similar requirement applies to dual-status technicians in the Air National Guard. *See* 10 U.S.C. §§ 10216(a)(1)(B); 12107(b)(2), (c)(2). Because Babcock was in the Army National Guard, however, this brief uses the statutes applicable to the Army side as illustrative.

2953 v. *Fed. Lab. Rels. Auth.*, 730 F.2d 1534, 1544-46 (D.C. Cir. 1984); Opening Br. 32-34; Br. of *Amici Curiae* Nat'l Veterans Legal Servs. Program et al. 10-15 ("Veterans' Br."). Service as a dual-status technician is therefore "service as a member of a uniformed service." And because there is no dispute that Babcock's Civil Service Retirement System (CSRS) payments derive "wholly" from his time as a dual-status technician, they are exempt from the windfall elimination provision.

Respondent's contrary argument rests primarily, if not exclusively, on the word "as"—placing far more weight on that word than it can bear. This textual figleaf cannot obscure the true source of Respondent's position: legislative history—and ambiguous legislative history at that. This Court does not rely on opaque statements buried in House Reports to supersede enacted text, particularly when interpreting a statute affecting veterans' benefits.

A. The word "as" does not limit the uniformed-services exception to a subset of dual-status technicians' service.

Respondent argues that when Congress referred to "service *as* a member of a uniformed service," it introduced a fine-grained distinction between service that dual-status technicians perform "in [their] capacity" as members of the National Guard and other aspects of the job that they perform in a "civilian" capacity. Resp. Br. 21-22, 33 (emphasis added).

This substantially overreads "as." The very definitions Respondent cites establish that the word "as" introduces many types of relationships. It denotes not just a rigid, particular "capacity," but refers as well to things "[a]fter the manner of, in the likeness of, the

same as," or "like" the antecedent. *As (adv.; conj. and rel. pron.)*, Oxford English Dictionary (2d ed. 1989); *see also As (prep.)*, Webster's Third New International Dictionary of the English Language 125 (1993) ("after the manner of : the same as : like"); *As (prep.)*, American Heritage Dictionary of the English Language 106 (3d ed. 1992) ("In a manner similar to; the same as"). There is no basis for Respondent's assumption that Congress intended the most restrictive possible sense of the word.

In fact, when Congress wants to, it knows how to make exactly the kind of status-based distinction that Respondent reads into the statute. *See Astrue* v. *Ratliff*, 560 U.S. 586, 595 (2010) (drawing inference based on the "stark contrast" created when certain "language" is found in one provision and "absen[t]" in another). Numerous U.S. Code provisions illustrate how Congress refers to a Guard member's work in a particular "capacity" or "status": Congress uses exactly those words. *See, e.g.*, 32 U.S.C. § 101(19) ("'Full-time National Guard duty' means training or other duty * * * performed by a member of the Army National Guard of the United States * * * *in the member's status as* a member of the National Guard of a State or territory"); 10 U.S.C. §§ 101(d)(5) (same), (7) ("The term 'inactive-duty training' * * * includes those duties when performed by Reserves *in their status as* members of the National Guard."); 701(a) (calculating leave for armed forces in part based on "[f]ull-time training, or other full-time duty * * * by a member of the Army National Guard of the United States * * * *in his status as* a member of the National Guard"); 723(a) (imposing certain requirements on Guard members "employed *in the capacity of*" responding "to a civil disturbance"); 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."); 12602(a)(1) (deeming "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" to be "Federal service as a Reserve of the Army" for purposes of certain "benefits") (emphases added throughout). Congress' choice not to use similar language when crafting the uniformed-services exception should be honored. *See Astrue*, 560 U.S. at 595; *accord Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010); *Meghrig* v. *KFC Western, Inc.*, 516 U.S. 479, 484-485 (1996).

This Court's opinion in *Perpich* v. *Department of Defense*, 496 U.S. 334 (1990), does not lead to a different conclusion. The Court's observation, invoked by Respondent (at 24), that Guard members wear only one "hat * * * at any particular time" related to the *constitutional* status of Guard members at a given time. *Perpich*, 496 U.S. at 348. *Perpich* did not consider whether the multiple "hats" assigned to Guard members are mutually exclusive for all purposes. *See id.* Nor did it address the unique structure of the dual-status technician position, which Congress has expressly linked to membership and service in the National Guard. *See id. Perpich* simply does not speak to the question here.

Even applying Respondent's preferred definition of "as" does not lead to the restrictive meaning Respondent proposes. Respondent reads "as" to mean "[i]n the role, capacity, or function of." Resp. Br. 22 (alteration in original and internal quotation marks omitted).

Although Respondent recites that full definition, *id.*, the balance of the brief treats "role," "capacity," and "function" interchangeably. *See, e.g.*, *id.* at 22-25. But having a particular "role" can simply mean holding a particular "position." *See Role*, American Heritage Dictionary of the English Language 1563 (3d ed. 1992). And because Congress required dual-status technicians to hold a "position" in the National Guard, *supra* p. 3, a person serving as a dual-status technician is serving "in the *role* of a member" of—that is, "in the *position* of a member of"—the Guard. This confirms that the word "as" cannot bear the dispositive weight that Respondent places on it.

B. There is no other textual basis for excluding dual-status technicians from the uniformed-services exception.

Respondent attempts to shore up her reading by highlighting several additional features of the statutory text. By and large, these points are simply the same argument about the word "as" in new garb, and none provides any meaningful support for Respondent's position.

1. Respondent (at 25-32) latches on to two aspects of the definition of "uniformed service": the description of uniformed-service members as "appointed, enlisted, or inducted" into the relevant component of the armed forces, 42 U.S.C. § 410(m), and the definition of "reserve component" as "the Army National Guard of the United States." According to Respondent, these phrases reflect a formal distinction between dual-status technicians' "capacity" as Guard members as opposed to as technicians. With respect to both phrases, however, Respondent's arguments depend entirely on her reading of the word "as," because it is undisputed

that Babcock was first "enlisted" and then "appointed" into the National Guard, and "appointed" as a dual-status technician. Without Respondent's restrictive reading of "as," then, these arguments lose their force.

a. Start with Respondent's argument concerning Section 410(m)'s use of "appointed, enlisted, or inducted." According to Respondent, this word choice is telling because one cannot be "appointed," "enlisted," or "inducted" in the relevant sense into a position as a dual-status technician, meaning that work as a dual-status technician cannot be "service *as* a member of a uniformed service." Resp. Br. 31-32 (emphasis added and internal quotation marks omitted).

This is a red herring. There is no dispute that Babcock first "enlisted"—and was later "appointed"—into the Army National Guard of the United States within the meaning of Section 410(m). Indeed, Respondent conceded as much below. *See* Br. for Appellee at 22, *Babcock* v. *Comm'r of Soc. Sec.*, 959 F.3d 210 (6th Cir. 2020) (No. 19-1687), ECF No. 17 (recognizing "[Babcock] initially 'enlisted' in the National Guard" and "the governor of Michigan later 'appointed' [Babcock] to the military rank of Chief Warrant Officer"). Respondent likewise recognizes that dual-status technicians are "appointed" into their technician positions by "an adjutant general." *See* Resp. Br. 32; 5 U.S.C. § 2105(a)(1)(F). Thus, there is nothing inherently incompatible about the words "appointed, enlisted, or inducted" and service as a dual-status technician. Respondent's *real* argument is that dual-status technicians are not acting in their capacities as members of the "National Guard or another uniformed service" when they are performing technician work. Resp. Br. 32. This argument therefore duplicates and depends

on Respondent's misguided reading of the word "as." *Id.*; *see supra* pp. 4-7.

b. The same is true of Respondent's argument concerning the distinction between the "Army National Guard" and the "Army National Guard of the United States"—a theory that Respondent developed only at the certiorari stage in this case. *See* Br. for Appellee at 20-33, *Babcock*, 959 F.3d 210 (No. 19-1687). On this theory, the uniformed-services exception to the windfall elimination provision should *only* apply to Guard members working "in their capacities as members of the Army National Guard of the United States"—that is, "when called to federal active duty status by Congress or the President." Resp. Br. 28.

This argument does not even track how Respondent administers the statute: As Respondent elsewhere admits, the government has understood the uniformed-services exception to apply to payments "based on * * * *inactive* duty military service in the state National Guard" in addition to "active duty service." *Id.* at 6 (emphasis added); *see also id.* at 24.

In any event, despite Respondent's effort (at 19) to cast this distinction as an "independent" basis to affirm, this argument also hinges on Respondent's reading of "as." After all, it is once again undisputed that all members of a State's National Guard are required by statute to maintain concurrent membership in the National Guard of the United States. *See id.* at 27; 10 U.S.C. § 12107(b)-(c). Thus, as Respondent's language ultimately betrays, this argument succeeds only if service "as" a dual-status technician is not service "as" a member of the National Guard of the United States. *See* Resp. Br. 29 (contending that membership in the Army National Guard of the

United States does not "transform work performed in [a] technician role into work performed *as a member* of the Army National Guard of the United States" (emphasis in original)).

For the same reasons that argument fails as to National Guard membership in general, *supra* pp. 3-7, it fails specifically as to membership in the National Guard of the United States. Membership in both organizations is a mandatory condition of employment as a dual-status technician. 32 U.S.C. § 709(b)(2); 10 U.S.C. § 12107(b)-(c). This is not a formality: Dual-status technicians are an integral part of ensuring that Guard units remain ready at all times for federal deployment. Opening Br. 6-10; Veterans' Br. 8-11. Service as a dual-status technician therefore constitutes "service *as* a member of" the National Guard of the United States, regardless of whether it is on "active duty" status.

2. Respondent also looks to the word "wholly," although it is relegated to a near afterthought. *See* Resp. Br. 24-25. According to Respondent, this word indicates that if *any* percentage of a technician's "service" is not provided "in the capacity of" a Guard member, payments based on that service are disqualified from the uniformed-services exception. *See id.* But Respondent's own grammatical analysis agrees that the word "wholly" modifies the extent to which a "payment" is "based on" particular "service." *Compare* Opening Br. 24-25, 29, *with* Resp. Br. 22. Thus, "wholly" does not describe the extent to which particular "service" must be "as a member of a uniformed service." Opening Br. 29.

Given this syntax, "wholly" ensures that the payment in question is derived entirely from uniformed

service, as opposed to other, non-uniformed positions in non-covered employment. *See* Opening Br. 26 & n.9. This issue might arise, for example, with respect to someone who served as a dual-status technician before transitioning to a non-uniformed position in the civil service. Despite Respondent's belief that this problem *should* not arise in that particular context, Resp. Br. 35, Respondent does not ultimately dispute that this problem might arise with respect to CSRS payments based on multiple income streams, *see id.* at 35-36, or that "wholly" is fully functional as an instruction for addressing such scenarios.

3. Finally, Respondent highlights several statutory features that apply to *other* aspects of National Guard service that have no relevance at all to the uniformed-services exception.

First, Respondent notes that, before receiving any pay authorized by Title 37, and any corresponding benefits, Guard members must receive a "written order placing [them] into a pay duty status." Resp. Br. 6 (citing 37 U.S.C. § 206); *id.* at 24. Without such an order, Respondent contends, a Guard member is "ineligible for any form of *military* pay or retirement benefits." *Id.* at 24 (emphasis added).

This requirement is irrelevant to the uniformed-services exception. Although Congress sometimes chooses to link aspects of Guard service to "military pay status," *see* 32 U.S.C. § 709(f)(4), (j)(1), it did not do so in the uniformed-services exception, which is instead pegged to "service as a member of a uniformed service." Respondent's focus on a Guard member's "pay duty status" is therefore beside the point. *See also infra* pp. 16-18.

Second, Respondent highlights statutes that describe a Guard member's change in "status" when moving to and from "active duty." *See* Resp. Br. 27-28 (citing 10 U.S.C. § 10107 and 32 U.S.C. § 325(c)). Tellingly, Respondent declines to spell out how these provisions are relevant to the inquiry here. On the contrary, Respondent elsewhere agrees that Guard members performing *inactive*, "state militia" duties trigger the uniformed-services exception. *Id.* at 24.

Third, Respondent notes (at 30-31) that, for some "benefits," Congress treats certain duties of Guard members performed in their state-militia "status" as "Federal service as a Reserve of the Army." 10 U.S.C. § 12602(a)(1), (3). The uniformed-services exception, however, applies of its own force to members of the "Army National Guard of the United States." 42 U.S.C. § 410(m); 38 U.S.C. § 101(27). Congress's separate choice to make *other* benefits available to Guard members by treating a subset of their service as "Federal" thus does not bear on how Congress crafted the uniformed-services exception.

In the end, these statutory provisions simply confirm that when Congress wants to refer to a Guard member's particular "status" or "capacity," it does so explicitly. *Supra* pp. 5-6. Congress did not do so in the uniformed-services exception, and the word "as" cannot be conscripted into performing the same work.

C. Legislative history cannot rescue Respondent's atextual interpretation of the uniformed-services exception.

1. Given the weakness of Respondent's textual arguments, it is no surprise that—as administrative guidance confirms—the real basis for the government's

position is "legislative history." *See* SSAR 12-X(8), 77 Fed. Reg. 51,842, 51,843 (Aug. 27, 2012).

The House Report accompanying the Act that adopted the uniformed-services exception describes the exception as ensuring "that military pensions based on service performed in the military reserves before 1988 would not trigger application of the * * * [windfall elimination provision] to the individual's Social Security benefits." H.R. Rep. No. 103-506, at 68 (1994). The Conference Report further suggests that "[t]he only military pension which triggers the [windfall elimination provision] is a pension based on inactive duty after 1956 and before 1988." H.R. Rep. No. 103-670, at 125 (1994) (Conf. Rep.).

These reports are a classic example of why this Court does not allow "ambiguous legislative history to muddy clear statutory language." *Milner* v. *Dep't of the Navy*, 562 U.S. 562, 572 (2011); *see also Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). Respondent assumes (at 11-12) without textual support that the authors of these reports were using the terms "military pension" and "inactive military service" in a technical sense that excludes dual-status technicians.

Even if Respondent is right about the what the reports' authors thought, however, this language only serves as a foil to the language Congress ultimately enacted. The uniformed-services exception does not turn on "active" or "inactive duty status," nor did Congress apply it to only "military pensions." This Court applies the language Congress enacted, even if that language yields results in particular cases that its drafters did not contemplate. *See Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1631 (2018) ("[L]egislative history is not the law. It is the business of Congress to

sum up its own debates in legislation, and once it enacts a statute, [this Court does] not inquire what the legislature meant; [it asks] only what the statute means." (internal quotation marks omitted)). "The people"—including veterans like Babcock—"are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1749 (2020).

Besides, it is far from obvious that Congress did *not* deliberately choose broader language than the authors of these reports employed. After all, Congress concluded that applying the [windfall elimination provision] to payments based on "inactive duty" was "arbitrary and inequitable," H.R. Rep. No. 103-506, at 67, even though payments for inactive duty were *not* subject to Social Security taxes during the relevant period, *see* 26 U.S.C. §§ 3101(a), 3121(b)(6)(A), (m)(1) (1970); *see also* Pet. App. 3a. That judgment reflects a desire to honor such service regardless of whether it results in a "windfall." Having reached that conclusion, it makes perfect sense for Congress to have reached the same judgment about the service of dual-status technicians. *See* H.R. Rep. No. 95-451, at 97-98 (1977) ("The technicians perform military work in the same place, with the same training, and in the same way as active duty military personnel. The technician job and its military counterpart responsibility are one in the same.").

2. Respondent's references to legislative history are even less persuasive than usual given that this statute involves veterans' benefits: In this context, even if the Court finds the text ambiguous, the "long standing" "solicitude of Congress for veterans," *United*

States v. *Oregon*, 366 U.S. 643, 647 (1961), would lead this Court to resolve any ambiguity in Babcock's favor, *see Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011); Veterans' Br. 18-21.[2]

Respondent disagrees. Recognizing that dual-status technicians are "veterans," Respondent claims that they should not receive the benefits of the canon for any "pension payments resulting from work performed in the civil service." Resp. Br. 46. That characterization of dual-status technicians' service gives short shrift to the contributions dual-status technicians make to our Nation's military readiness during their nominally "civilian" work, *see* Veterans' Br. 6-12—contributions that executive officials have not hesitated to recognize as military when the government's own resources were on the line, *see id.* at 10-11. Nor would applying the pro-veteran canon in this case create "inequitable results," Resp. Br. 46: There is nothing inequitable about recognizing the uniquely military contributions of dual-status technicians without applying a similar benefit to ordinary civil-service members who merely happen to be Guard members.

II. IT IS IRRELEVANT THAT DUAL-STATUS TECHNICIANS ARE CLASSIFIED AS "CIVILIAN" EMPLOYEES.

Respondent faults Babcock for failing to "appropriately account for the civilian nature of a dual-status technician's employment." Resp. Br. 20. This

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[2] Respondent wisely does not claim that, if the Court finds an ambiguity, its interpretation is owed any deference, *see* Opening Br. 38-40, or that the narrow-construction canon applies here, *see id.* at 30 (addressing canon discussed at Pet. App. 12a).

objection is misconceived: Congress did not make the uniformed-services exception contingent on "civilian" or "military" status. The relevant statutory definitions never use the terms "military," "civil," or "civilian"—even though Congress knows how to do this, too, when it wants to. *See, e.g.*, 32 U.S.C. § 709(f)(4), (j)(1) (making certain grievance procedures contingent on "military pay status"). Instead, Congress pegged the exception to "service as a member of a uniformed service," cross-referencing a definition that encompasses more than traditionally "military" positions. That choice renders Respondent's focus on the "civilian" aspects of dual-status technicians beside the point.

1. Respondent's attempt (at 23) to make the "civilian" status of dual-status technicians relevant involves a bit of statutory sleight of hand. The argument goes like this: Title 5 makes entitlement to CSRS payments contingent on certain "civilian service," including "employment" as a dual-status technician "under section 709 of title 32." 5 U.S.C. § 8332(b). And, for purposes of Title 5, the "civil service" is different from "uniformed service[]." *Id.* § 2101. Thus, Respondent contends, "uniformed service" cannot trigger a CSRS payment. Resp. Br. 23.

The problem with this argument is that Title 42 employs a definition of "uniformed service" that is different from, and broader than, the definition in Title 5: Title 42 counts the service of members of the National Guard of the United States, but Title 5 does not. *Compare* 42 U.S.C. § 410(m); 38 U.S.C. § 101(27), *with* 5 U.S.C. § 2101. Because of this delta, two things are simultaneously true: Dual-status technicians are performing "civilian service" (for purposes of entitlement to a CSRS payment under Title 5) *and* that service

also qualifies as "uniformed service" (for Title 42). Indeed, Congress's decision to specify that dual-status technician service counts as "civilian" for purposes of triggering the CSRS suggests Congress recognized the potential for confusion. *See* 5 U.S.C. § 8332(b)(6).

2. The definition of "uniformed services" that Congress chose in Title 42 includes officials, like dual-status technicians, that have both military and civilian characteristics—namely, officers in the Public Health Service Corps and the National Oceanic and Atmospheric Administration Corps. *See* Opening Br. 38. Respondent now resists (at 40-42) the notion that these Corps are "civilian," but shortly after Congress enacted the uniformed-services exception that is exactly how the government viewed them. *See* U.S. Gov't Accountability Off., GAO/GGD-97-10, *Federal Personnel: Issues on the Need for NOAA's Commissioned Corps* 2 (Oct. 1996) ("Like the PHS Corps, the NOAA Corps carries out civilian, rather than military, functions.").[3]

Respondent points out (at 41) that, unlike dual-status technicians, members of the PHS and NOAA Corps "receive pay and retirement benefits that track the pay and retirement benefits received by members of the armed forces." By this, Respondent apparently means that the PHS and NOAA Corps receive payment authorized by Title 37, rather than Title 5. *See* Resp. Br. 41 (citing 37 U.S.C. §§ 101(3), 204(a)(1)). But the structure of Title 37 only strengthens *Babcock*'s interpretation of the uniformed-services

[3] Respondent points out (at 41) that the military ultimately reports to civilian leadership. But what separates the two Corps from the military is that they are housed within *agencies* that are fully civilian.

exception. Like Title 5, Title 37 defines "uniformed services" to *exclude* "reserve component[s]" like the National Guard. *See* 37 U.S.C. § 101(3), (24). This contrast confirms that, by employing a definition of "uniformed service" in Title 42 that reaches "reserve components," Congress made a deliberate choice to include individuals who are *not* considered members of "uniformed services" for purposes of Titles 5 and 37, and therefore do not necessarily receive "military" pay.

Altogether, these provisions confirm that "uniformed service" in Title 42 is not synonymous with "military" service, nor is "uniformed service" incompatible with "civilian" employment. For that reason, Respondent's emphasis on all the supposedly "civilian" aspects of dual-status technicians' employment is beside the point. *See* Resp. Br. 4-7, 36-38.

Moreover, dual-status technicians are also subject to numerous restrictions on their "civilian" employment that are *in*applicable to the general civil service. Congress considers them a "separate" category of civilian employee, 10 U.S.C. § 10216(a)(2), and they are "outside the competitive service," 32 U.S.C. § 709(e). They are unable to seek redress from the Merit Systems Protection Board or federal courts for certain adverse employment actions. *See id.* § 709(f)-(g); *infra* pp. 19-20. The D.C. Circuit has held that their ability to engage in collective bargaining is likewise restricted in connection with congressionally imposed military requirements. *Ass'n of Civilian Technicians* v. *Fed. Labor Rels. Auth.*, 250 F.3d 778, 783-784 (D.C. Cir. 2001); *Am. Fed. of Gov't Emps. AFL-CIO, Local 2953*, 730 F.2d at 1547. Dual-status technicians are not entitled to overtime pay for working extra hours, instead

receiving compensatory time off. 32 U.S.C. § 709(h); *but see* Pet. App. 43a (noting that supervisors instead often asked Babcock to treat overtime technician work as "military training time"). And they are subject to military protocol, including appearance requirements, even during the nominally "civilian" workweek. *See* 32 U.S.C. § 709(b)(4); Veterans' Br. 14-15. Babcock is a case in point: When he was serving as a technician, "[t]here was no difference between [him] and someone on active duty or on post." Pet. App. 38a.

Congress's choice not to make the definition of "uniformed service" in Title 42 dependent on "military" or "civilian" status means that that it is unnecessary to determine which of those statuses predominates dual-status technicians' service.

3. Even if the civilian-military line somehow mattered to administration of the windfall elimination provision, that would not salvage Respondent's position. As the government has vigorously argued in multiple contexts, dual-status technicians' service falls, for all practical purposes, on the military side of that line. *See* Opening Br. 33-34; Veterans' Br. 9-11, 24-26. Most notably, when arguing that the government is immune from suit under *Feres* v. *United States*, 340 U.S. 135 (1950), the government has insisted that dual-status technicians' work—even during the "civilian" workweek—is "fundamentally military." Br. in Opp. at 17, *Neville* v. *Dhillon*, No. 19-690 (U.S. Feb. 28, 2020), 2020 WL 1313286; *see also* Veterans' Br. 24-25 (citing lower court cases adopting the government's position).

Respondent (at 44) dismisses the government's longstanding position in *Feres* cases as addressing "an entirely separate question." But this handwaving

offers no meaningful analytical distinction. The question in *Feres* cases is whether claims are "incident to [military] service." *Feres*, 340 U.S. at 146. If Respondent is correct that it matters whether dual-status technicians perform "service" in their "capacity" as Guard members, *but see supra* pp. 4-7, then it is surely relevant that the government, when it finds it convenient, considers technicians' work to be "fundamentally military." And although the government's *Feres* brief pays lip service to dual-status technicians' "civilian" classification, *see* Resp. Br. 45, it trumpets the absence of "a single case in which a court of appeals has held that a Title VII claim by a dual-status technician did not arise out of activity incident to military service," and posits that "a purely civilian claim involving a dual-status technician * * * does not necessarily exist in practicality," Br. in Opp. at 16, *Neville*, No. 19-960 (internal quotation marks omitted).

Besides, legislative and executive-branch officials have emphasized the military character of dual-status technicians' service outside the *Feres* context, too. *See* Veterans' Br. 9-12 (collecting statements). As Lieutenant General Stanley Clarke, then-Director of the Air National Guard, recently told Congress: "[I]f you stood a regular Air Force airman next to [a dual-status technician], you wouldn't be able to tell the difference between them." *Dep't of Def. Appropriations for 2015, Hearings Before the Subcomm. on Def. of the H. Comm. on Appropriations, pt. 2*, 113th Cong. 227 (2014).

III. RESPONDENT'S RULE COULD PROVE DIFFICULT TO ADMINISTER.

Respondent's rule also threatens to introduce difficult, fact-intensive distinctions into determinations

about when the windfall elimination provision applies. Respondent suggests (at 22-23) her rule could be easily administered by looking to whether a paycheck was issued under Title 5 or Title 37 of the U.S. Code. But—setting aside that Congress could easily have expressly looked to "military pay status" as it did elsewhere, 32 U.S.C. § 709(f)(4), (j)(1)—that rule does not flow from Respondent's statutory argument.

Respondent's preferred definition of "as" would capture payments based on service in the "function" of a Guard member—a mushy exercise at best. *See* Resp. Br. 22 (internal quotation marks omitted). As Respondent recognizes (at 4), Congress did not neatly divide the "functions" of a dual-status technician, assigning only "civilian" functions when technicians are receiving "civilian" pay. Instead, technicians may be assigned "additional duties," including support of military "operations or missions," even when receiving a paycheck authorized by Title 5. 10 U.S.C. § 10216(a)(3); *see also* 32 U.S.C. § 709(a)(3); Pet. App. 43a (suggesting Babcock's superiors did not rigidly distinguish between military and civilian time).

Babcock's rule avoids any need to make such functionalist distinctions. It is easy to administer, as any payment based on service as a dual-status technician qualifies, and the government has successfully applied it in the Eighth Circuit since 2012. *See* SSAR 12-X(8), 77 Fed. Reg. at 51,842.

Respondent appears motivated by fear of a slippery slope in which Guard members would be entitled to exclusion from the windfall elimination provision for any "private-sector position" that happens to be occupied by a member of the Guard. Resp. Br. 29. That is

wrong. Dual-status technicians are unique, in that as a condition of their "civilian" position, Congress requires them to maintain membership in the Guard and perform military work while in uniform. *Supra* pp. 3-4. Respondent has identified *no* similar position across the government. Recognizing that such technicians serve "as members of a uniformed service" would not have broader implications for Guard members who hold private-sector jobs—or even other positions in the government—that are untethered to service as a Guard member.

CONCLUSION

For these reasons and those in the Opening Brief, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

RONALD M. BAHRIE
JUSTIN M. BAHRIE
NICHOLAS A. KIPA
BAHRIE LAW, PLLC
6810 S. Cedar St., Ste. 2C
Lansing, MI 48911

NEAL KUMAR KATYAL
Counsel of Record
JESSICA L. ELLSWORTH
REEDY C. SWANSON
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner David Babcock

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