No. 20-

IN THE
Supreme Court of the United States

DAVID BABCOCK,
Petitioner,

v.

COMMISSIONER OF SOCIAL SECURITY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

The question presented, which has divided five Courts of Appeals, is:

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

PARTIES TO THE PROCEEDING

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

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

RELATED PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit:

Babcock v. *Commissioner*, No. 19-1687 (6th Cir. May 11, 2020) (reported at 959 F.3d 210)

U.S. District Court for the Western District of Michigan:

Babcock v. *Commissioner*, No. 1:18-cv-255 (W.D. Mich. May 22, 2019) (unreported) (order adopting report and recommendation)

Babcock v. *Commissioner*, No. 1:18-cv-255 (W.D. Mich. Dec. 4, 2018) (unreported) (report and recommendation)

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David Babcock respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

INTRODUCTION

For over three decades, David Babcock worked as a full-time dual-status military technician, functioning in every way like his active-duty peers. As a condition of his employment, he maintained membership in the National Guard. He served as a pilot and also as an instructor, training others in how to fly military craft. And he observed military protocol, wore a uniform showing his rank, and was deployed on active duty to Iraq with his National Guard unit.

Yet when Babcock retired, the Social Security Administration (SSA) declined to view those thirty-plus years as uniformed service. When calculating social security benefits, the SSA applies a modified formula, the Windfall Elimination Provision (WEP). When a person receives retirement payments from a job at which he did *not* pay into Social Security—as is typical for public sector employees who pay into a separate pension system—the provision reduces his Social Security benefits to account for those other payments. *See* 42 U.S.C. § 415(a)(7)(A). The WEP does *not* require that reduction, however, if the person is receiving "a payment based wholly on service as a member of a uniformed service * * * ." 42 U.S.C. § 415(a)(7)(A)(III). When serving as a dual-status technician, Babcock paid into the Civil Service Retirement System (CSRS) rather than Social Security. The SSA concluded that the WEP applied to Babcock, reasoning that his CSRS pension payment was not "based *wholly* on service as a member of a uniformed service," though his eligibility for that pension turned wholly on his time as a dual-status technician, because dual-status technicians are classified as civilian employees of the armed services.

The federal courts of appeals are intractably split on whether the text of the Social Security Act can bear the SSA's counterintuitive interpretation. The Eighth Circuit has held that the exception unambiguously applies to dual-status technicians' civil-service pension payments. The Ninth and Eleventh Circuits both found the text unclear and deferred to the SSA's view. And the Sixth Circuit below, along

with the Tenth Circuit, both hold that the text clearly favors the SSA. If Babcock lived in Minnesota, he would receive the benefit of the WEP exception, but because he lives in Michigan, he does not.

This Court should grant review to resolve the split and end this arbitrary treatment of our veterans. Since Congress created the dual-status technician role in 1968, tens of thousands of people have served in the military's reserve components each year. When it comes time to retire, those dual-status technicians who live outside of the Eighth Circuit receive lower Social Security benefits than their counterparts in neighboring states. Those veterans are deprived a benefit Congress plainly meant to confer because the statute's text is clear that all dual-status military technicians fall within the WEP exception for those who served our Nation in the uniformed services. The Court should grant the petition and reverse.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 959 F.3d 210. Pet. App. 1a-16a. The Magistrate Judge's report and recommendation to affirm the SSA's decision is unreported, *id.* at 23a-31a, and the District Court's order adopting the report and recommendation and affirming the SSA's decision is unreported, *id.* at 17a-22a.

JURISDICTION

The Sixth Circuit entered judgment on May 11, 2020. Pet. App. 1a-16a. On March 19, 2020, the Court issued an order that extended the time for filing a petition for a writ of certiorari to 150 days

from the date of the lower court's denial of a timely petition for rehearing, thus to and including October 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Social Security Act and the principal statutes governing National Guard technicians are reproduced in the appendix to this petition. Pet. App. 54a-70a.

STATEMENT

A. Statutory Background

The Social Security Act divides a retiree's employment into covered and uncovered positions. In a covered position, a person pays Social Security taxes on the income. In an uncovered position, a person does not. Pet. App. 8a-9a. Public sector employees often hold uncovered positions and pay into a separate employer-run pension system instead of Social Security. *Id.*; *see also Program Explainers: Windfall Elimination Provision* (*WEP Explainer*), Social Security Administration (Nov. 2015), http://bit.ly/ssawindfall.

A person's Social Security payment is calculated as a percentage of pre-retirement income earned from covered employment. *See* 42 U.S.C. § 415. The formula used to calculate that benefit is progressive. Those with lower lifetime earnings receive a higher proportion of their earnings back as a benefit than those with higher lifetime earnings. Pet. App. 8a-9a.

This progressive formula favored people who had held both a covered position, with income that count-

ed toward the lifetime earnings, and an uncovered position, with income that did not count. Because the income from the uncovered position was removed from the picture, the person's lifetime earnings are lowered and the formula produces a proportionately higher benefit. At the same time, the person may receive retirement payments from their uncovered position. *See id.*

Congress enacted the Windfall Elimination Provision in 1983 to address this situation. The WEP applies to people who receive Social Security benefits based on covered work and retirement benefits from uncovered work. *See id.* at 9a (citing Pub. L. No. 98-21, § 113(a), 97 Stat. 65 (1983) (codified at 42 U.S.C. § 415)). Its formula reduces benefits to partially offset the pension or annuity payments from uncovered work. *See id.*; *see also* 42 U.S.C. § 415(a)(7)(A)-(B).

When enacted, the WEP lowered benefits for people who received military pensions based on income from service not covered by Social Security. *See* H.R. Conf. Rep. No. 103-670, at 125 (1994). Congress considered that result "inequitable." H.R. Rep. No. 103-506, at 67 (1994). And so it enacted an exemption from the WEP for these pension payments. *See* Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 308(a)-(b), 108 Stat. 1464 (codified at 42 U.S.C. §§ 402, 415).

That exemption is known as the uniformed-services exception. It exempts from the WEP any "payment based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). Through a

series of cross-references, a member of a uniformed service is defined to include a member of a reserve component of the U.S. Air Force and Army National Guards. *See id.*; *id.* § 410(m); 38 U.S.C. § 101(27)(F).

B. Factual Background

1. David Babcock served as a full-time pilot and pilot instructor in the National Guard for over three decades. Pet. App. 2a. He joined the Michigan National Guard in 1970 as an enlisted soldier. *Id*. After attending flight school and becoming a licensed pilot, he became an officer and a pilot for the U.S. Army National Guard in 1975, serving until 2009. *Id.*; *see also id.* at 17a-18a. During his service, Babcock received numerous decorations, including the Bronze Star, Army Achievement Medal, and Global War on Terrorism Expeditionary Medal. *Id.* at 50a.

Babcock's position was a "military technician (dual-status)," 10 U.S.C. § 10216, commonly called a dual-status military technician. *See* Pet. App. 2a. Congress created the dual-status technician role to make full-time National Guard technicians federal employees while they served in and supported their state National Guard. *See Larson* v. *Saul*, 967 F.3d 914, 924 (9th Cir. 2020) (discussing the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755). This role is "dual-status" because although technicians serve in the military, they are classified for certain purposes as civilian employees.

As to the military side, dual-status technicians must be "a member of the National Guard," "[h]old the military grade specified * * * for that position," and "wear the uniform appropriate for the member's

grade and component." 32 U.S.C. § 709(b)(2)-(4). If a technician "is separated from the National Guard or ceases to hold the military grade specified * * * for that position," then he "shall be promptly separated from" his "employment." 32 U.S.C. § 709(f)(1)(A)-(B). Dual-status technicians are responsible for, among other things, "organizing, administering, instructing, or training of the National Guard." 32 U.S.C. § 709(a)(1)-(2); *see also* 10 U.S.C. § 10216(a)(3)(A)-(B). They may also be called upon for "[s]upport of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense"; "[s]upport of Federal training operations"; and instructing or training "active-duty members of the armed forces," "members of foreign military forces," or Department of Defense personnel. 32 U.S.C. § 709(a)(3); *see also* 10 U.S.C. § 10216(a)(3). In short, dual-status technicians are part of an "organization organized and operated along military lines." H.R. Rep. No. 90-1823 (1968), *reprinted at* 1968 U.S.C.C.A.N. 3318, 3332.

As to the civilian side, dual-status technicians are deemed to be a "separate category" of "Federal civilian employee." 10 U.S.C. § 10216(a)(2). They are employees of "the Department of the Army or the Department of the Air Force" and "of the United States." 32 U.S.C. § 709(e). But they are "outside the competitive service," *id.*—the standard service for federal civil servants. And they are "exempt from any requirement * * * for reductions in Department of Defense civilian personnel and shall only be reduced as part of military force structure reductions." 10 U.S.C. § 10216(b)(3).

Babcock's tenure as a dual-status technician reflected these dual features. While on duty, he functioned just like active-duty personnel on post. He wore a uniform showing his rank and National Guard unit. He attended mandatory weekend National Guard drills. Pet. App. 2a-3a. He was available to support any operation or mission undertaken by his unit. And he served an active-duty deployment to Iraq between 2004 and 2005. *Id.* at 3a. Because he was classified as a civilian employee, he participated in the CSRS and, when he retired from the National Guard in 2009, received monthly CSRS payments. *Id.*[1]

Babcock did not fully retire after he left the National Guard. He worked for several years flying medical-evacuation helicopters for private hospitals. *Id.* at 3a-4a. Those earnings were covered by Social Security. *Id.* at 4a.

2. When Babcock retired fully in 2014, he applied for Social Security retirement benefits and listed his CSRS pension payments in his application. *Id.*

In granting his application, the SSA concluded that his CSRS payments triggered the WEP and applied it to reduce his benefits. *Id.* at 4a-5a. Babcock filed an administrative appeal and argued that the uniformed-services exception applied because his CSRS pension was based wholly on uniformed service in the National Guard. *Id.* at 5a. The Eighth Circuit—then the only circuit court to address the question—

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[1] Babcock received separate military retirement payments not at issue here. Pet. App. 3a-4a.

had held that dual-status technicians *were* exempted from the WEP by the uniformed-services exception. *See Petersen* v. *Astrue*, 633 F.3d 633 (8th Cir. 2011). However, the SSA applied that ruling only in the Eighth Circuit. *See* SSAR 12-X(8), 77 Fed. Reg. 51,842 (Aug. 27, 2012). The SSA thus denied Babcock's administrative appeal. Pet. App. 5a.

3. Babcock sought review of the SSA's application of the WEP to his CSRS pension. *Id.* By then, the Eleventh Circuit had disagreed with the Eighth Circuit's interpretation of the uniformed-services exception. *See Martin* v. *Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1168 (11th Cir. 2018) (per curiam) (holding that the uniformed-services exception does not apply to dual-status military technicians' CSRS payments). The Magistrate Judge recommended that the District Court adopt the Eleventh Circuit's interpretation of the uniformed-services exception. Pet. App. 23a-30a. The District Court agreed with that recommendation and affirmed the SSA's decision on Babcock's benefits application. *Id.* at 17a-22a.

The Sixth Circuit affirmed. Pet. App. 2a, 16a. After parsing dictionary definitions of *wholly* and *as*, the court concluded that the requirement that payments be "based wholly on service as a member of a uniformed service" meant that the "exception is cabined to payments that are based exclusively on employment in the capacity or role of a uniformed-services member." *Id.* at 10a-11a. The court found that Babcock's CSRS pension payments did not fall within that category because his dual-status employment was not exclusively in the capacity as a

uniformed-services member because it had elements of civilian service too. *Id* at 11a-12a. The court recognized it was joining a "circuit split" with the Eighth Circuit, *id.* at 16a, but concluded that the "plain text" of the uniformed-services exception supported its interpretation, *id.* at 13a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR, DEEP SPLIT ON THE QUESTION PRESENTED.

This case presents a simple question of statutory interpretation: Is a pension payment derived from dual-status service in the National Guard "a payment based wholly on service as a member of a uniformed service"? 42 U.S.C. § 415(a)(7)(A)(III). The Eighth Circuit has held that the answer is yes. The Sixth, Ninth, Tenth, and Eleventh Circuits have held that the answer is no. *See Larson*, 967 F.3d at 920-921. Because of this unresolved disagreement, National Guard veterans who served as dual-status technicians receive different Social Security benefits based on where they live.

1. The Eighth Circuit considered the question first and concluded that "the meaning and intent of" the uniformed-services exception "is clear and unambiguous" and does apply to dual-status military technicians. *Petersen*, 633 F.3d at 636. It rejected the SSA's interpretation, under which payments for work as a dual-status technician were not "based wholly on service as a member of a uniformed service" because dual-status technicians' employment had civilian aspects. *Id.* at 637 (internal quotation

marks omitted). The uniformed-services exception "only requires that the service be as a member of the uniformed service." *Id.* at 637. The text lacked any "requirement that the 'service' be only in a non-civilian or military duty capacity"; "[r]ather, the plain language of the statute makes it abundantly clear that the exception applies to all service performed as a member of a uniformed service." *Id.*

The Eighth Circuit further explained that the SSA's interpretation would "read a 'military duty' requirement into the statute" that is nowhere in its text. *Id.* The SSA offered a policy argument that applying the plain-meaning interpretation could lead to a "windfall in retirement benefits" for dual-status military technicians. *Id.* That did not move the court. The statute's text required that result, and if that was not what Congress intended, "the solution is in a change to the WEP, not in a distorted reading of the current statute." *Id.* at 637-638.

The Eighth Circuit concluded that the claimant there "m[et] the limited requirements of the" uniformed-services exception because the National Guard is a "uniformed service" and his pension was "based entirely on his service as a National Guard technician." *Id.* at 637.

2. The four other circuit courts that have addressed this question disagreed with the Eighth Circuit's interpretation. Each acknowledged the circuit split. *See Larson*, 967 F.3d at 920–921; *see also* Pet. App. 16a. But these courts have themselves split with one another in offering rationales for their conclusion that the uniformed-services exception does not apply to dual-status National Guard technicians.

The Ninth and Eleventh Circuits found the text of the uniformed-services exception to be unclear and deferred to the SSA's interpretation.

The Ninth Circuit found the uniformed-services exception to be "ambiguous" and that it "can be read differently" than "the SSA's construction." *Larson*, 967 F.3d at 924, 926. In its view, both interpretations "present a plausible interpretation of the statute," *id.* at 924, and both were subject to valid criticisms, *id.* at 922–924. The court consulted legislative history but concluded that it did "not helpfully inform [its] reading" because it was "mostly silent with respect to the pensions of dual-status technicians." *Id.* at 924.

Because the Ninth Circuit found the exception ambiguous, it deferred to the SSA's interpretation. The court acknowledged that the SSA was not entitled to *Chevron* deference because it had not adopted its interpretation in a form that carried the "force of law," like rulemaking. *Id.* at 925. (quoting *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). Even so, the court deferred under *Skidmore* because of the SSA's "technical expertise in administering the Social Security Act." *Id.* at 926. In the Ninth Circuit's view, it was enough that the SSA's "preferred interpretation of the uniformed-services provision is at least a permissible construction of the statute" for the agency's interpretation to merit dispositive deference. *Id.* (internal quotation marks omitted).

Similarly, the Eleventh Circuit acknowledged that "the plain text of the [uniformed-services exception] provision itself is not necessarily determinative." *Martin*, 903 F.3d at 1166. To resolve the meaning of

the exception, it used "the interpretive tools at [its] disposal" and "account[ed] for * * * the deference we have determined we owe the SSA's interpretation under *Skidmore*." *Id*. at 1168. It held that it is not enough that "dual status technician employment is *essentially* military" because "it is not *wholly* military in nature." *Id.* at 1166. That takes dual-status technicians outside the scope of the exception, which, in its view, does not apply where employment was not "performed wholly as a member of a uniformed service." *See id.* at 1168.

The Sixth and Tenth Circuits disagreed, and instead found that the text of the uniformed-services exception was unambiguous and did not cover CSRS pensions earned by dual-status technicians.

In the decision below, the Sixth Circuit found that the "plain text" of the uniformed-services exception resolved its meaning. Pet. App. 11a, 13a. It read the exception as "cabined to payments that are based exclusively on employment in the capacity or role of a uniformed-services member." *Id.* at 11a. Under that reading, because dual-status technicians' CSRS pension payments are based on service that is partially civilian in character, they are not "based exclusively on employment in the capacity or role of a uniformed-services member" and so do not qualify for the exception. *Id.* The court acknowledged that in other contexts the Sixth Circuit had held that dual-status service is "irreducibly military" in nature, but it considered that irrelevant because the service was nonetheless not "wholly" military in nature. *Id.* at 15a.

The Tenth Circuit's reasoning was similar. It agreed that "the plain language of the uniformed services exception" and its "context" together "resolve[d] the question" of its meaning. *Kientz* v. *Commissioner*, 954 F.3d 1277, 1281 (10th Cir. 2020). On its reading, "any pension payment that [a retiree] receives based on work outside of his exclusive capacity as a National Guard member does not qualify for the uniformed services exception." *Id.* at 1283. Because Congress labeled dual-status technicians as civilian employees, and because dual-status technicians were treated as civilians for certain employment purposes, they fell outside the exception. *Id.* at 1283–84. Like the Sixth Circuit, the court recognized that dual-status technicians' roles have "military-specific requirements." *Id.* at 1284. But because technicians have a "hybrid" role in which they wear both a "civilian hat" and an "army hat," it concluded that they do not qualify for the uniformed-services exception which requires that a "payment must be entirely or exclusively from military service." *Id.* at 1284–85.

* * *

Had Babcock filed his application for Social Security benefits in the Eighth Circuit, he would have been in exactly the same position as the applicant in *Petersen* and would not have been subject to the WEP. But because he lives in Michigan, he is subject to the Sixth Circuit's contrary rule. Applicants in the Ninth, Tenth, and Eleventh Circuits are in the same position as Babcock—subject to smaller Social Security benefits despite their years of military service, simply because of where they live.

II. THIS PETITION IS A CLEAN VEHICLE TO RESOLVE THIS IMPORTANT QUESTION OF STATUTORY INTERPRETATION.

1. This case presents a pure legal question of statutory interpretation that divides the courts of appeals. *See* Sup. Ct. R. 10. The features of a dual-status technician's employment are set out by statute. The sole question is how the uniformed-services exception to the WEP applies to dual-status technicians.

2. Resolving the answer to this question is important because the current circuit split leads to unfair, disparate treatment of those who rendered service to our nation. The SSA applies the uniformed-services exception to retired dual-status technicians "who are permanent legal residents of a State within the Eighth Circuit" but no others. SSAR 12-X(8), 77 Fed. Reg. 51,842, 51,843 (Aug. 27, 2012); *see Larson*, 967 F.3d at 920–921 & n.3 (describing SSA acquiescence ruling and implementing guidance). Accordingly, a retired dual-status military technician receiving CSRS payments in Kansas City, Missouri benefits from the uniformed-services exception and receives greater Social Security benefits, but a person who served in the same place, at the same time, at the same rank, but who now lives in Kansas City, Kansas is subject to the WEP and receives lower benefits. Such arbitrary treatment of those who dedicated their careers to serving in the National Guard—or any other uniformed service that entitles them to pension payments for work not covered by Social Security—is unacceptable. It also undermines the central purpose of the uniformed-services exception to create uniformity and to avoid

"arbitrary and inequitable" distinctions. H.R. Rep. 103-506, at 67.

This question potentially affects tens of thousands of veterans each year. Congress has consistently required that there be a minimum number of dual-status military technicians. *See, e.g.*, 10 U.S.C. § 115 note (End Strengths for Military Technicians (Dual Status)); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 413, 119 Stat. 3136 (providing for minimum of 66,035 dual-status technicians); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513(b), 110 Stat. 186 (providing for minimum of 64,838 military technicians). All technicians who receive both civil-service pension payments as a result of their dual-status work and Social Security payments for separate covered work will be affected by how the uniformed-services exception to the WEP is applied.

3. There are no factual disputes that could cloud resolution of this question here. There is no dispute that Babcock served as a dual-status technician or that his CSRS pension is based entirely on his service as a dual-status technician. And even if the facts of his service as a dual-status technician were relevant, those facts show just how untenable the majority interpretation is. As a pilot and pilot instructor, including acting as a test pilot and training military pilots how to fly Black Hawk helicopters, Babcock's role was unequivocally military in nature. As he testified during the SSA administrative proceedings, there was no difference between him and active-duty personnel on post while he was serving

as a dual-status technician. Pet. App. 38a. These facts thus cleanly show the inequities of an interpretation that excludes a National Guard dual-status technician, who serves in uniform in a quintessentially military capacity, from the uniformed-services exception simply because he is also classified as a civilian for certain employment purposes.

III. THE DECISION BELOW IS WRONG.

1. "The preeminent canon of statutory interpretation requires" courts "to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.' " *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)) (alterations in *BedRoc*). Interpretation thus "begins with the statutory text, and ends there as well if the text is unambiguous." *Id*. That bedrock principle should have resolved this case in favor of Babcock.

The uniformed-services exception to the WEP applies to any "payment based wholly on service as a member of a uniformed service." 42 U.S.C. § 415(a)(7)(A)(III). The National Guard is a "uniformed service" as the statute defines that term. *See supra* pp. 5–6. Babcock's dual-status military technician service as a member of the National Guard was thus service "as a member of a uniformed service." And his CSRS pension payments were "based wholly on" that service, as there is no other basis for them but his dual-status National Guard service. *See supra* pp. 6–8. He therefore falls within the plain scope of the uniformed-services exception, and

the SSA should have exempted his CSRS payments from the WEP.

That Babcock was *also* classified as a civilian for certain employment purposes, *see supra* pp. 7–8, is irrelevant under the text of the exception. The exception is not limited to "payment[s] based wholly on service as a member of a uniformed service *who is not designated as a Federal civilian employee*" or to "*non-civilian* service as a member of a uniformed service." *Petersen* v. *Astrue*, No. 4:08CV3178, 2009 WL 995570, at *3 (D. Neb. Apr. 14, 2009), *aff'd*, 633 F.3d 633 (8th Cir. 2011). It applies to payments based on "service as a member of a uniformed service," 42 U.S.C. § 415(a)(7)(A)(III), and there can be no dispute that Babcock served as a member of the National Guard when he was a dual-status technician. That reality is made more obvious by examining non-dual-status military technicians, who are *not* required to be members of the National Guard or another uniformed service as part of their employment as a technician. *See* 10 U.S.C. § 10217; 32 U.S.C. § 709(b)-(c).[2]

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[2] Given that National Guard dual-status technicians' role is "irreducibly military in nature," courts have imposed the *Feres* doctrine which prevents military personnel from suing the government for injuries resulting from their service, on claims they raise. *See* Pet. App. 15a (collecting cases); *accord Wood* v. *United States*, 968 F.2d 738 (8th Cir. 1992). Similarly, courts have held that dual-status technicians may not bring Title VII discrimination actions where, given their role in the National Guard, their complaints are "integrally related to the military's structure." *Mier* v. *Owens*, 57 F.3d 747, 751 (9th Cir. 1995); *accord Fisher* v. *Peters*, 249 F.3d 433, 443 (6th Cir. 2001).

2. The courts that have concluded otherwise did so by rewriting the statute to move the word "wholly" and change its function in the text. Take the decision below, which interpreted the uniformed-services exception to not apply where the service at issue "is not wholly 'service as a member of a uniformed service.' " Pet. App. 15a. On that reading, because a dual-status technician's service is part civilian and part military, it is not "wholly" uniformed service and so cannot support the uniformed-services exception.

But that reading applies the word "wholly" to *service* rather than to *payment*. That effectively moves the word "wholly" in the statutory text:

Actual text of § 415(a)(7)(A)(III)	(III) a payment based wholly on service as a member of a uniformed service
Sixth Circuit's revision	(III) a payment based ~~wholly~~ on service **wholly** as a member of a uniformed service

The Tenth Circuit's opinion gives away the game. It offered this formulation: "Put another way, any pension payment that [a retiree] receives based on work outside of his exclusive capacity as a National Guard member does not qualify for the uniformed services exception." *Kientz*, 954 F.3d at 1283. Notice

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Recognition of the essentially military nature of dual-status technicians under doctrines that disadvantage military personnel should carry over to questions of the benefits given to military personnel as well.

how "exclusive"—the court's substitute for "wholly"—has moved in that formulation to apply to "capacity," though in the statute it modifies "based." Only by that shift, which changes the statutory text, do Babcock's CSRS payments fail to qualify for the uniformed-services exception.

Rewriting a statute's text in this way violates this Court's precedents on how to interpret statutes. A court is "not at liberty to rewrite the statute" and "must give effect to the text Congress enacted." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (internal quotation marks omitted). Disregarding those basic interpretive principles, as the decision below did, is reason enough for this Court to grant review. *See Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("We cannot approve such a casual disregard of the rules of statutory interpretation.").

3. The justifications for the re-write given by the Sixth Circuit and the other courts on its side of the split are all unpersuasive.

The Ninth and Tenth Circuits criticized the interpretation put forward by dual-status retirees like Babcock as making " 'wholly' " in the uniformed-services exception mere "surplusage." *Larson*, 967 F.3d at 923; *see Kientz*, 954 F.3d at 1285. Not so. The word "wholly" does important work in the statute because it requires consideration of whether *payments* that trigger the WEP are *wholly* based on

qualifying uniformed service. A payment not "wholly" based on service in a uniformed service would not qualify for the exception. So, for instance, if a retiree spent a portion of his career as a dual-status military technician and a portion of his career as a purely civilian federal employee, and she received a CSRS pension based on both, she would not be able to assert the uniformed-services exception unless she could identify which payments were *wholly* attributable to the dual-status service. The SSA's Program Operations Manual System (POMS)—its internal guidance for processing benefits—has instructions for doing just that: prorating pension payments for application of the WEP when "part of the pension is based on covered employment" and part is based on uncovered employment. *See* POMS RS 00605.370(B)(2) WEP Guarantee, Social Security Administration (Apr. 17, 2003), *available at* https://bit.ly/34Njfpt.

The Sixth Circuit embraced the SSA's purposive argument that if the WEP were not applied, it would lead to an unfair windfall for dual-status technicians receiving CSRS pensions. *See* Pet. App. 12a-13a. But the uniformed-services exception is a carve-out from the WEP—meaning Congress intended the exception to give preferential treatment to some groups, and the question is simply whom the exception reaches. In the SSA's view, the uniformed-services exception exempts "only military retirement pay based on reserve inactive duty training." 77 Fed. Reg. at 51,843; *see Larson*, 967 F.3d at 925–926 (deferring to this SSA acquiesce-ruling interpretation). If that is what Congress intended, it could

have written that statute. But it instead settled on broader language—language that does reach dual-status technicians. *See Petersen*, 633 F.3d at 637 ("The SSA's request that this court read a 'military duty' requirement into the statute is rejected.").

Finally, the Sixth Circuit was wrong to invoke the statutory canon that "an exception to [a] general rule * * * should be construed narrowly." Pet. App. 12a (citing *Commissioner* v. *Clark*, 489 U.S. 726, 739 (1989)). That canon applies when the exception is itself "ambiguous" and where an "expansive reading" would "eviscerate th[e] legislative judgment" embodied by the general rule. *Clark*, 489 U.S. at 739. Here, the uniformed-services exception unambiguously *does* cover dual-status technicians' CSRS payments, and reading it that way leaves the WEP intact for the vast majority of purely civilian federal and state government pension payments that the WEP was enacted to address.

* * *

The text of the uniformed-services exception is clear. The decision below and those that agree with it have contorted the text to achieve what those courts believe is what the statute is meant to do. But courts may not "revise legislation" because they perceive that the "the text as written creates an apparent anomaly," nor do they have a "roving license * * * to disregard clear language" because they believe "Congress must have intended something" else. *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) (internal quotation marks omitted). That four courts of appeals have disregarded the statute's plain text in contravention of

this Court's principles of statutory interpretation is all the more reason to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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