No. 20-480

In the Supreme Court of the United States

DAVID BRYON BABCOCK, PETITIONER

v.

ANDREW M. SAUL, COMMISSIONER OF SOCIAL SECURITY

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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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. The petition for a writ of certiorari was filed on October 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. Under the Social Security Act, 42 U.S.C. 301 *et seq.*, employment that results in income that is subject to Social Security taxes and to the payment of benefits is known as "covered employment." See 42 U.S.C. 415(a)(1)(A). The retirement benefits that the Social Security Administration (SSA) provides to an individual are based on a percentage of his pre-retirement income that was earned as part of covered employment. See *ibid.* Wages from "noncovered" employment are not subject to Social Security taxes 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 that retirement benefits must 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, the formula resulted in a benefits windfall for workers who split their careers between covered and noncovered employment and thus had low covered earnings for purposes of calculating Social Security benefits. 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 such systems received an annuity that typically was more generous than comparable pensions for covered

employment, 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). But, until 1984, the Social Security Act failed to take into account such annuities for individuals who did not remain in noncovered employment for their entire careers. Instead, when an individual split his career between covered and noncovered employment, that individual would receive both an annuity (based on noncovered employment) *and* a heavily weighted Social Security retirement benefit (based on low lifetime covered earnings). That combination often resulted in a total retirement income that would "greatly exceed that of a worker with similar earnings all under [S]ocial [S]ecurity." *Ibid.*

2. To correct that unintended advantage, Congress in 1983 enacted the windfall elimination provision, which modified 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)(III).

This case concerns an exception to the windfall elimination provision known as the uniformed services exception. That exception, which Congress adopted in 1994, 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." 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)). 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)(F). In this context, a "reserve component" does not include the Army National Guard. See *ibid.*; cf. 10 U.S.C. 101(c)(2) and (3) (separately defining "Army National Guard" and "Army National Guard of the United States").

Before Congress enacted the uniformed services exception, inactive military service performed after 1956 but before 1988 was treated differently from both (1) active military duty performed during and after the same time period, and (2) inactive military service performed after that period. While inactive service between 1956 and 1988 triggered application of the windfall elimination provision as originally enacted, active duty 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 after 1987 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, 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. Rep. No. 670, 103d Cong., 2d Sess. 125 (1994).

The House Committee Reports that accompanied Congress' adoption of the uniformed services exception indicate that the purpose of the exception was to correct this 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." H.R. Rep. No. 506, 103d Cong., 2d Sess.

48 (1994); see *id.* at 67 (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"). 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. 56,511, 56,512 (Nov. 9, 1995); see SSA, *Program Operations Manual System (POMS) RS00605.383 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. This case involves the question of how the federal civilian position of "military technician (dual status)," 32 U.S.C. 709, should be treated for the purposes of the uniformed services exception. Federal law defines a dual status military technician as "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). A dual status technician is an employee 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). Dual status technicians "organiz[e], administer[], instruct[], or train[] * * * the National Guard" and maintain and repair supplies issued to the

Guard or the armed forces. 32 U.S.C. 709(a)(1); see 32 U.S.C. 709(a)(2). Such technicians are required to obtain and maintain National Guard membership, hold the appropriate military rank for their position, and wear their military uniform while working as a technician. 32 U.S.C. 709(b). To maintain the National Guard membership that is a prerequisite for their civilian position, 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).

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 performing drills, training, or active duty military service as part of his National Guard membership. As federal civil servants, dual status technicians receive civil service wages and retirement benefits for their work in that role; such wages and benefits are available only to other members of the federal civil service. See 5 U.S.C. 2105, 5105, 5332, 5342, 8332(b)(6), 8401(30). Like other civil service employees, dual status technicians can join a union (with certain conditions of employment covered by a collective bargaining agreement), earn compensatory time off for working additional hours, and receive workers' compensation pursuant to the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, for on-the-job injuries. See 32 U.S.C. 709(h); Nat'l Guard Bureau, U.S. Dep't of Defense, Chief Nat'l Guard Bureau Instruction 1400.25, Vol. 800, *National Guard Technician Injury Compensation Program* (Aug. 9, 2018), https://go.usa.gov/xA95b. In addition, an individual 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. 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 Defense, Chief Nat'l Guard Bureau Instruction 1400.25, Vol. 630, *National Guard Technician Absence and Leave Program* (Aug. 6, 2018), https://go.usa.gov/xG57X.

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; see *id.* at 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. Petitioner paid Social Security taxes on his wages for all active-duty service and for inactive-duty training and drills after 1987. *Ibid.*; see 42 U.S.C. 410(*l*)(1).

From 1975 until 2009, petitioner was employed on a full-time basis as a National Guard dual status technician; the final position that he held was that of Aircraft Flight Instructor at grade 13, step 10, on the General Schedule (GS) civil service pay scale. Pet. App. 2a-3a. As a dual status technician, petitioner received civil ser-

vice pay and participated in the Civil Service Retirement System (CSRS). *Ibid.* Petitioner did not pay Social Security taxes on his civil service pay because, when he entered the federal civil service in 1975, the term "employment" for purposes of Social Security Act coverage excluded work performed by federal civilian employees who participated in a federal retirement system, 42 U.S.C. 410(a)(6)(A) (1970), and because he maintained continuous civil service employment from 1975 to 2009, that exclusion continued to apply to him, see 42 U.S.C. 410(a)(5)(B)(i); 20 C.F.R. 404.1018(a)(1)(i). Since retiring from both his positions in 2009, petitioner has received retirement pay from two distinct sources: military retirement pay from the Defense Finance Accounting Service (DFAS) (for his National Guard service) and monthly CSRS retirement pension payments from the Office of Personnel Management (OPM) (for his work as a dual status technician). Pet. App. 3a.

After retiring from his National Guard and civil service positions, petitioner was employed in the private sector for a number of years; his private-sector wages were subject to Social Security taxes. 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, because of petitioner's CSRS pension, applied the windfall elimination provision and found that petitioner was entitled to reduced Social Security benefits. *Id.* at 4a. Petitioner sought reconsideration from the agency, 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 uniform services exception. A magistrate judge recommended that the district court uphold the agency's determination. Pet. App. 23a-31a. The district court did so, finding the Eleventh Circuit's analysis of the issue in *Martin* v. *Social Security Administration, Commissioner*, 903 F.3d 1154 (2018) (per curiam), more persuasive than the Eighth Circuit's earlier decision in *Petersen* v. *Astrue*, 633 F.3d 633 (2011). Pet. App. 17a-22a.

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

The court of appeals held that "by its plain text, the uniformed-services exception is cabined to payments that are based exclusively on employment in the capacity or role of a uniformed-services member" and that petitioner's CSRS pension "[wa]s not such a payment." Pet. App. 11a. The court reasoned that petitioner could participate in the CSRS only because he was a "[f]ederal civilian employee[]" who was "assigned to a civilian position." *Ibid.* (quoting 10 U.S.C. 10216(a)(1)(C)). Because "the word 'wholly' plainly means 'to the full or entire extent' or 'to the exclusion of other things,'" the court 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 10a-12a (citations omitted).

The court of appeals also found that "[t]he broader statutory context" supported its reading. Pet. App. 12a. The court reasoned that "[t]he uniformed-services exception should be construed narrowly with respect to a CSRS pension * * * because 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 this 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, and wear a military uniform. 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)). Because "a CSRS pension must be based at least partly on some employment 'in

the civilian service of the Government,'" the court reiterated that petitioner's "CSRS pension is not a payment based exclusively on employment in the capacity or role of a uniformed-services member." *Id.* at 14a (quoting 5 U.S.C. 8332(b)). The court also noted that, unlike covered positions held by members of the military, petitioner's position as a dual status technician was subject to the same GS pay scale as other federal civilian employees, and, as a federal civilian employee hired before 1984, petitioner did not have Social Security taxes deducted from his GS-based civilian pay. Pet. App. 14a.[1]

ARGUMENT

Petitioner contends (Pet. 17-23) that the court of appeals erred in holding that his federal civil service pension based on his work as a dual status technician does not qualify as "a payment based wholly on service as a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III), and thus does not fall within the uniformed services exception to the windfall elimination provision. The court's decision is correct and consistent with the unanimous recent decisions of the Third, Ninth, Tenth, and Eleventh Circuits. See *Newton* v. *Commissioner Soc. Sec.*, No. 19-1961, 2020 WL 7549898

[1] The court of appeals rejected as inapposite cases involving the *Feres* doctrine, see *Feres* v. *United States*, 340 U.S. 135 (1950). The court explained that "the *Feres* doctrine is about whether military personnel can sue their colleagues or the government for injuries resulting from military service." Pet. App. 15a. The fact that "the work of a dual-status technician is 'irreducibly military' for the purposes of suing other military personnel or the government," the court reasoned, "does not resolve whether the role is wholly service as a member of the uniformed service for purposes of calculating Social Security retirement benefits," a question "which focuses critically on the types and sources of a claimant's earnings." *Ibid.*

(3d Cir. Dec. 22, 2020); *Larson* v. *Saul*, 967 F.3d 914 (9th Cir. 2020), petition for cert. pending, No. 20-854 (filed Dec. 18, 2020); *Kientz* v. *Commissioner, SSA*, 954 F.3d 1277 (10th Cir. 2020); *Martin* v. *Social Sec. Admin., Comm'r*, 903 F.3d 1154 (11th Cir. 2018) (per curiam). And, contrary to petitioner's contention (Pet. 10-14), the lopsided split with the Eighth Circuit's older decision in *Petersen* v. *Astrue*, 633 F.3d 633 (2011), does not warrant this Court's review, in large part because the split is of limited and diminishing practical significance—as it only impacts dual status technicians who were hired between 1968 and 1984 and meet a number of additional criteria.

A. The Court of Appeals' Decision Is Correct

1. Petitioner receives two distinct forms of retirement pay: (1) military retirement pay from the DFAS based on his active duty and inactive duty military service in the National Guard, and (2) monthly CSRS payments from OPM based on his work as a dual status technician. There is no dispute that petitioner'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. See Pet. App. 13a.

By contrast, petitioner's CSRS pension is not "a payment based wholly on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III). As the court of appeals correctly explained, see Pet. App. 11a-15a, petitioner receives a CSRS payment because a dual status technician is classified by statute as "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). OPM issues 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. See 5 U.S.C. 8332(b)(6); cf. 5 U.S.C. 8336. Indeed, OPM cannot issue CSRS retirement "payment[s] based wholly on service as a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III), because Title 5 defines "civil service" to exclude "positions in the uniformed service," 5 U.S.C. 2101(1); see 5 U.S.C. 8332(b) (providing 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*") (emphasis added). The nature of CSRS retirement payments—and the preconditions for eligibility for those payments—thus precludes them from being "payment[s] based wholly on service as a member of a uniformed service." 42 U.S.C. 415(a)(7)(A)(III).

2. Petitioner's contrary arguments lack merit.

a. As an initial matter, petitioner is mistaken in asserting that, as a categorical matter, "[t]he National Guard is a 'uniformed service' as the statute defines that term," Pet. 17, and thus that his employment as a dual status technician was performed "*as* a member of a uniformed service," 42 U.S.C. 415(a)(7)(A)(III) (emphasis added). The statutory term "member of a uniformed service" does not encompass all civilian and military positions related to or dependent on National Guard membership—and does not include the dual status technician position that petitioner held.

Federal law defines the term "member of a uniformed service" as "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)." 42 U.S.C. 410(m). Section 101(27) of Title 38 in turn defines "reserve component[s]" to include "the Army National Guard of the United States," 38 U.S.C. 101(27)(F), but does *not* include the Army National Guard. The two terms are not coterminous. Rather, the "Army National Guard of the United States" is "*the reserve component of the Army* all of whose members are members of the Army National Guard," 10 U.S.C. 101(c)(3) (emphasis added), and therefore consists of those individuals called up to serve on federal active duty status in the Army National Guard of the United States under Title 10 (or on annual training status under Title 10).

Petitioner worked as a civilian technician employed by the Department of the Army and the United States and supporting the Michigan Army National Guard. Under the framework just discussed, his dual status technician position—which did not include his inactive training and drills or active service in the National Guard, see pp. 5-8, *supra*—was not service performed as a member of a reserve component of the uniformed services. Cf. *Kientz*, 954 F.3d at 1283 (explaining 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 thus an individual "cannot qualify for the uniformed services exception * * * simply because [he] was in * * * the National Guard [] while he held the dual status technician position").[2]

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[2] Nor was petitioner "appointed, enlisted, or inducted in" his dual status technician position within the meaning of 42 U.S.C. 410(m).

b. That petitioner "served as a member of the National Guard when he was a dual-status technician," Pet. 18, and shared some attributes with full-time service members, see Pet. 6-8, 16-17, does not transform his civilian employment into employment *as a member of* a uniformed service. As this Court explained in *Perpich* v. *Department of Defense*, 496 U.S. 334 (1990), enlisted National Guard members "must keep three hats in their closets—a civilian hat, a state militia [National Guard] hat, and an army hat—only one of which is worn at any particular time," *id.* at 348.

The treatment of dual status technicians confirms that their work in this role is not work performed as a member of the National Guard. As discussed, the categorization of dual status technicians as civil servants—and their coverage for CSRS purposes—confirms as much. See pp. 12-13, *supra*. A dual status technician is permitted to join a union, see p. 6, *supra*, while on-duty members of the National Guard cannot, see 10 U.S.C. 976 (prohibiting members of the National Guard on full-time National Guard duty, or members of Reserve components performing inactive-duty training, from joining or maintaining membership in a union). A technician can earn compensatory time off when he works additional hours and receive workers' compensation for on-the-job injuries, see p. 6, *supra*, but none of those ben-

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Petitioner was appointed to his *federal* technician position under Title 5, the same appointment authority applicable to other members of the federal civil service. See 5 U.S.C. 2105(a). By contrast, the appointment authority referenced in Section 410(m) is the appointment of officers in the *state* National Guard by the state governor, pursuant to specific authority in Titles 10 and 32. See 10 U.S.C. 12201; 32 U.S.C. 305-312; see also *Newton*, 2020 WL 7549898, at *4 & nn.28-29 (recognizing this distinction).

efits is available to a member of the National Guard performing active service or participating in inactive training or drills. And if a dual status technician is ordered to serve on active or inactive duty—whether for active deployment or training—during his civilian workweek, he must take annual leave, military leave, or leave without pay from his federal civilian position in order to do so. See p. 7, *supra*. These different rights, obligations, and benefits underscore that work performed in a dual status technician role is not service as a member of a uniformed service.[3]

c. Petitioner asserts (Pet. 19-22) that the term "wholly" in the uniformed services exception modifies the term "payment" rather than "service." Assuming that this interpretation is correct, it would not alter the outcome of the statutory analysis. As the court of appeals found, "[i]n this context, the word 'wholly' plainly means 'to the full or entire extent' or 'to the exclusion of other things.'" Pet. App. 10a (citations omitted). Dual status technicians are not entitled to CSRS retirement payments exclusively because they are National Guard members; rather, they are entitled to the CSRS payments because they were members of the civil service. See pp. 12-13, *supra*. That National Guard membership is a necessary (but not sufficient) condition of the receipt of CSRS payments in this context demonstrates

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[3] Petitioner's reliance (Pet. 18 n.2) on cases involving the *Feres* doctrine is likewise misplaced. As the court of appeals explained, Pet. App. 15a, those cases concern the ability of dual status technicians to bring suits against military personnel or the government, and do not speak to whether the retirement benefits paid to an individual for work done by a dual status technician in his civil service role are payments based wholly on service as a member of a uniformed service. See p. 11 n.1, *supra*.

that such payments are, at most, based partially—rather than wholly or exclusively—on membership in a uniformed service. Indeed, the treatment of the military pension that petitioner received for his National Guard employment—which results fully from his National Guard active duty and inactive drills and training—provides an example of payments received wholly for military service.

Petitioner speculates (Pet. 20-21) that Congress included the word "wholly" to address the situation in which a 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 suggests that in such a scenario, if a CSRS recipient can identify "which [pension] payments were *wholly* attributable to the dual-status service," then the uniformed services exception will apply to that pro-rated portion of the recipient's CSRS payments, pointing to internal agency guidance that contains instructions for applying the windfall elimination provision when part of a pension is based on covered employment and part is based on noncovered employment. Pet. 21 (citing SSA, *Program Operations Manual System (POMS) RS00605.370 WEP Guarantee* B.2. (*POMS RS00605.370*) (Apr. 17, 2003), https://go.usa.gov/xA5gm).

Nothing in that internal guidance suggests that it is intended to address dual status technicians or otherwise undermines the plain-text reading of the uniformed services exception. 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 Em-

ployees' Retirement System [FERS]" (which is the system that replaced CSRS and generally makes all federal civilian service covered service) *and* "CSRS service" —and thus proration is necessary for purposes of the windfall elimination provision guarantee, which limits the reduction to one-half of the monthly benefit attributable to non-covered employment. SSA, *Program Operations Manual System (POMS) RS00605.364 Determining Pension Applicability, Eligibility Date, and Monthly Amount* C.6. (Nov. 12, 2020), https://go.usa.gov/xA5gV (referring to *POMS RS00605.370* B.2. as containing the method by which SSA will prorate a pension in such a situation).

d. Contrary to petitioner's suggestion, treating dual status technicians as falling outside the uniformed services exception would not result in "'arbitrary and inequitable' distinctions" among members of the military. Pet. 16 (citation omitted). Under the government's reading of the statutory scheme, petitioner is treated identical to any other similarly situated individual who both was a member of the National Guard and simultaneously held any federal civil service position. Assuming that such an individual had held such positions at the same time as petitioner held his positions, both petitioner and such an individual would have received civil service pay and CSRS retirement payments for their civil service employment, and both would have received military pay and DFAS retirement payments for their National Guard active duty and inactive training and drills. And, for petitioner and that individual, their DFAS retirement payments would fall within the uniformed services exception, while their CSRS retirement payments would not.

Indeed, the House Report on which petitioner relies (Pet. 15-16) indicates that the uniformed services exception was adopted to address inequitable treatment *of different types of military duty*. That report explains that the uniformed services exception was intended to eliminate "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." H.R. Rep. No. 506, 103d Cong., 2d Sess. 67 (1994) (emphasis added). As explained above, see pp. 12-13, *supra*, petitioner's CSRS pension is not (and could not be) based on his military reserve duty; it is based on his civilian employment as a dual status technician.

B. The Question Presented Does Not Warrant This Court's Review

The lopsided disagreement among the courts of appeals—with five circuits rejecting petitioner's approach and one circuit adopting it—does not warrant this Court's review, both because the split is of limited and diminishing practical significance, and because the Eighth Circuit may wish to reconsider its outlier decision in *Petersen*, *supra*.

1. The practical impact of *Petersen* is cabined and certain to diminish over time. The availability of the uniformed services exception affects only a discrete segment of dual status technicians who meet the following criteria: (1) they were hired between 1968, when Congress created the technician position, and 1984, when Congress made the pay of newly hired federal employees subject to Social Security taxation; (2) they receive a CSRS pension payment based on their noncovered wages; and (3) they qualify for Social Security

retirement benefits based on 40 quarters of covered employment in which they met the minimum earning requirement. See 42 U.S.C. 414(a)(2); 20 C.F.R. 404.110.

Technicians hired after 1983 are assessed Social Security taxes on their civilian pay and earn their federal pension payments under the entirely different FERS pension system—which is based on pay for covered employment. FERS pension payments thus do not trigger application of the windfall elimination provision. It is therefore irrelevant that Congress has continued to authorize the dual status technician role, see Pet. 16, as no new technician—or any technician who began working in his position in the past 35 years—will be impacted by the different approaches to the uniformed services exception.

In addition, the rule adopted by the Eighth Circuit in *Petersen* is further limited because it governs only administrative determinations or decisions that are made after that decision was issued. SSA has confined its application of the *Petersen* rule to determinations or decisions on benefits applications from residents of the Eighth Circuit made after the *Petersen* decision, see 77 Fed. Reg. 51,842, 51,842 (Aug. 27, 2012), and the Eighth Circuit has affirmed the dismissal of a challenge to this agency limitation, see *Mitchael* v. *Colvin*, 809 F.3d 1050 (2016).

2. Given the widespread disagreement with *Petersen* among other courts of appeals, the Eighth Circuit may wish to reconsider its outlier approach to the question presented. The question presented here is also at issue in an appeal that is awaiting decision in the Second Circuit. See *Linza* v. *Saul*, No. 19-2766 (filed Aug. 30, 2019). When certain "[a]ctivating events" occur, SSA's regulations permit it to "consult[] with the

Department of Justice" and "decide under certain conditions to relitigate" an issue that is the subject of an acquiescence ruling within that circuit. 20 C.F.R. 404.985(c)(1) and (2). One such activating event is the existence of "[s]ubsequent circuit court precedent in other circuits" that "supports [SSA's] interpretation of the Social Security Act or regulations on the issue(s) in question." 20 C.F.R. 404.985(c)(1)(iii). SSA thus retains the authority under its rules to decide to relitigate the issue decided in *Petersen*, in order to permit the Eighth Circuit to reconsider its holding in that case. Cf. 77 Fed. Reg. at 51,842.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner notes (Pet. 11-14) that the courts of appeals that have upheld the government's interpretation of the uniformed services exception have adopted slightly different rationales. That is not the type of disagreement that warrants this Court's review. See, *e.g.*, *Johnson* v. *De Grandy*, 512 U.S. 997, 1003 n.5 (1994) ("This Court 'reviews judgments, not statements in opinions.'") (citation omitted); *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (same).