

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DAVID BRYON BABCOCK,)
)
 Petitioner,)
)
 v.) No. 20-480
)
 KILOLO KIJAKAZI, ACTING)
)
 COMMISSIONER OF SOCIAL SECURITY,)
)
 Respondent.)

Pages: 1 through 61
Place: Washington, D.C.
Date: October 13, 2021

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DAVID BRYON BABCOCK,)

Petitioner,)

v.) No. 20-480

KILOLO KIJAKAZI, ACTING)

COMMISSIONER OF SOCIAL SECURITY,)

Respondent.)

- - - - -

Washington, D.C.

Wednesday, October 13, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:36 a.m.

APPEARANCES:

NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

NICOLE REAVES, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:36 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-480, Babcock versus Kijakazi.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to begin with the statutory text. Section 415(a)(7)(A) is found at petition appendix page 69a, and it excludes from the windfall elimination provision "a payment based wholly on service as a member of a uniformed service as defined in section 410(m)."

David Babcock, who served as a dual-status technician in the National Guard for 33 years, qualifies. Indeed, 32 U.S.C. 709 requires technicians like him to literally "wear the uniform of the armed services, be a member of the National Guard, and hold the military grade specified by the Secretary."

And Babcock did. He wore the U.S. Army uniform day in, day out, teaching people

1 how to fly Black Hawk helicopters and the like.
2 Babcock engaged in service. He was a
3 dual-status tech. He's undoubtedly a member of
4 a uniformed service. Indeed, the Section 410(m)
5 expressly says National Guard folks qualify.

6 The government says Babcock was a
7 civilian. Even if this were true, it would be
8 irrelevant. The key statute, 415, doesn't use a
9 civil-versus-military dividing line. It simply
10 asks was the service uniformed.

11 The government attempts to say that
12 Babcock's service was not as wholly a member of
13 the uniformed service. But the best reading of
14 the statute, even before one gets to the
15 veterans canon, rejects that.

16 There is no status language in 415.
17 The government would convert the word "as" into
18 a status test trying to discern what hat someone
19 was wearing at a given point in time. Congress
20 certainly could have made such a choice, and,
21 indeed, it has in many other statutes, but it
22 did nothing like that here.

23 So we have three basic arguments.
24 One, the statute doesn't look to civilian
25 status. It looks to uniformed service. Second,

1 even if civilian status mattered, this would
2 meet it. Dual-status tech service is
3 irreducibly military. And, third, if there's
4 any ambiguity, the veterans canon would suggest
5 reading it in favor of Mr. Babcock.

6 JUSTICE THOMAS: Counsel, if -- just a
7 simple factual question. If he -- if Petitioner
8 was receiving his -- was exclusively uniformed
9 service, then why is he receiving a civilian
10 pension and a military pension?

11 MR. KATYAL: Yeah, that's just the way
12 the statute works. And I -- Justice Thomas,
13 it's very much like something that's common
14 ground between both the government and us, which
15 is that inactive service members who didn't pay
16 into the system would receive both, that that's
17 what Congress certainly had in mind in the
18 uniformed service exception.

19 JUSTICE THOMAS: That's not exactly --
20 part of it's civilian and part of it is
21 military. If your argument is right, it would
22 seem that it would be all military. That makes
23 sense if you're talking about NOAA or you're
24 talking about the Coast Guard. It's all -- it
25 -- it -- it's -- it's consistent with what

1 you're saying, that the service was uniformed
2 service, as opposed to part civilian, since he's
3 wearing more than one hat. It's dual -- it is a
4 dual position, so part civilian, part military.

5 And I don't understand how you can
6 have that and now argue that it's all military.

7 MR. KATYAL: Well, we're -- we're
8 saying, Your Honor, that it is -- it's all
9 uniformed service. That's the language of
10 410(m). And so it does certainly have some
11 civilian overtones. Civilian versus uniformed
12 service are not mutually exclusive categories.

13 JUSTICE THOMAS: Is -- is there any
14 other -- is there any other service where that's
15 the case?

16 MR. KATYAL: Well, we do think --

17 JUSTICE THOMAS: Other than this?

18 MR. KATYAL: Well, NOAA and the Public
19 Health Service are both civil --

20 JUSTICE THOMAS: But they're
21 designated by statute, though --

22 MR. KATYAL: Correct.

23 JUSTICE THOMAS: -- right?

24 MR. KATYAL: Correct. And just --

25 JUSTICE THOMAS: And -- and your --

1 and -- and -- and Petitioner is not?

2 MR. KATYAL: No, Justice Thomas, it is
3 designated by statute just as much. So the
4 National Guard is enumerated in -- Congress
5 specified in the uniformed service exception
6 certain services that were defined as uniformed,
7 and that's 410(m).

8 And when you look at 410(m) and the
9 cross-reference, it says that NOAA and Public
10 Health Services are certainly included, but so
11 too is the National Guard of the United States.

12 Now, Justice Thomas, you're absolutely
13 right, there is no other category besides
14 dual-status technicians that fall within our
15 argument about 410(m).

16 JUSTICE THOMAS: But Petitioner is not
17 acting as a National Guard -- as a member of the
18 National Guard of the United States all the
19 time.

20 MR. KATYAL: So our argument is that
21 he is all the time and that -- and that Congress
22 in 410(m) didn't draw any distinction.

23 Now, absolutely, Justice Thomas, my
24 friend on the other side has made that argument
25 before this Court for the first time, that

1 there's some distinction between the National
2 Guard of the United States and the National
3 Guard in general. And as I was saying to you in
4 my -- my first answer to you, the problem with
5 that is that it would ultimately -- first of
6 all, that's not the way the government
7 administers the statute. At page 24 of their
8 brief, they admit that it covers inactive duty
9 folks.

10 And if this is the National Guard of
11 the United States and that's the only thing
12 swept up in the uniformed service exception, the
13 problem with that is then Congress didn't reach
14 the one category that was common ground that we
15 both agree was covered by the uniformed service
16 exception. That's why I think this
17 late-breaking theory by the Solicitor General 27
18 years after the statute has passed I don't think
19 really works.

20 It also doesn't work because the
21 statutes say that once you're a member of the
22 National Guard, you're automatically
23 concurrently enlisted in the National Guard of
24 the United States. And, here, that's really
25 true. As I was saying, Babcock is required, as

1 with all dual-status technicians, to wear the
2 uniform, a United States uniform. So he wears
3 the United States Army -- it's emblazoned on his
4 uniform --

5 CHIEF JUSTICE ROBERTS: Well, counsel,
6 I don't think --

7 MR. KATYAL: -- when he goes to work
8 every day.

9 CHIEF JUSTICE ROBERTS: -- I don't
10 think the fact that -- I don't think, when they
11 say "the uniformed service," they -- they mean
12 does he wear a uniform or not. I mean, I
13 appreciate he -- he wears the uniform because of
14 his National Guard service.

15 But he gets two checks, right, two
16 checks a month or however often? One is for his
17 National Guard service, the -- I don't know
18 whether it's a weekend a month or however much
19 it is, and then another check for his 9-to-5
20 civilian job. The former is based wholly on his
21 uniformed service, working in -- in the
22 uniformed service. But the other is based
23 wholly on his civilian job.

24 Now the one is subject -- subject to
25 the exemption from the windfall exception if

1 that's -- if that's right. But the other isn't
2 because it's certainly not based wholly on his
3 service in the National Guard. It's based on
4 his civilian service.

5 MR. KATYAL: So, Mr. Chief Justice, we
6 do think that the other is one that falls
7 squarely within the uniformed service exception;
8 that is, you're absolutely right, the statute
9 doesn't ask are you literally wearing a uniform
10 at any time. It asks, are you a member of a
11 service that is a uniformed service?

12 And then the statute tells us exactly
13 what is a uniformed service in Title 42, and it
14 includes the National Guard, in contrast to, as
15 Justice Thomas was asking about, Title 5, which,
16 for purposes of other things, like bookkeeping,
17 calls them civilian.

18 So I don't think the fact that they
19 are civilian answers the fundamental question,
20 which is, is Babcock serving as a member of a
21 uniformed service at the time?

22 Now my friend on the other side says,
23 well, that's a different hat because that is the
24 hat National Guard, the state National Guard.
25 But, as I say, if that's the test, then it would

1 mean inactive duty folks who stand very much
2 like Mr. Babcock don't get the -- they wouldn't
3 be able to be eligible for the uniformed service
4 exception either because they are the same --
5 they fall in the same exact category. They're
6 people who didn't pay into the system before
7 1988. Congress undoubtedly said for those
8 folks, absolutely, they should get it.

9 And the reason for this, and it sounds
10 a little arcane, but I think the reason why this
11 all exists is people like Babcock or others
12 joined the -- joined federal employment with a
13 certain set of expectations, and one of those
14 expectations was they would get a windfall if
15 they fell within this.

16 Congress later changed that in 1983
17 and adopted a broad windfall elimination
18 provision, one that sweeps very large, 1.9
19 million people are encompassed by that. But, in
20 1994, they said: Well, if you're serving in
21 uniform, if your service is wholly there, then
22 you should get an exemption, the uniformed
23 service exemption.

24 And so that's what it's about. And so
25 it's certainly about inactive service folks who

1 didn't pay into the system but see their
2 paycheck slashed decades after they started
3 their employment. They don't really remember
4 whether they paid into the system or not.
5 Congress said we want to get rid of that.

6 And as our reply brief at page 14
7 says, once Congress decided to get into that
8 question, then it stands to reason that folks
9 like dual-status technicians like Mr. Babcock
10 are just like those inactive service folks.
11 They're people who didn't pay into the system
12 but see their paycheck slashed decades later,
13 and these are people who are truly, through and
14 through, military to the extent that that was
15 even the test in terms of the way they performed
16 their --

17 CHIEF JUSTICE ROBERTS: Well, I -- I
18 don't see how you can say through and through
19 military when their job title is dual-status.

20 MR. KATYAL: Well --

21 CHIEF JUSTICE ROBERTS: I mean, what
22 are the two statuses --

23 MR. KATYAL: Well --

24 CHIEF JUSTICE ROBERTS: -- stati?

25 MR. KATYAL: -- it's -- it's military

1 and civilian to be sure.

2 CHIEF JUSTICE ROBERTS: Yeah, sure.

3 MR. KATYAL: But --

4 CHIEF JUSTICE ROBERTS: So the --
5 their pension payments are not based wholly on
6 the military service. They get a pension based
7 on their military service, and that works the
8 way you want the whole thing to work in terms of
9 accepting the application of the windfall
10 exception. But I don't see -- or I think you --
11 well, how -- how does the other part of it --
12 not the -- not the whole thing. I understand
13 you want to look at the whole thing and say the
14 whole thing is based on --

15 MR. KATYAL: So --

16 CHIEF JUSTICE ROBERTS: -- military
17 service.

18 MR. KATYAL: -- so two things.

19 CHIEF JUSTICE ROBERTS: It seems to me
20 the whole system separates out the two to the
21 extent that they call the position dual.

22 MR. KATYAL: So two things, Mr. Chief
23 Justice. First, the title is not just
24 dual-status tech. It's -- it's -- and you can
25 see it at U.S. -- at 32 U.S.C. 709(b), which is

1 petition appendix page 64a, and it's military
2 technician dual-status.

3 And then, at 10 U.S.C. 10216, it calls
4 them military technicians and military 24
5 whopping times. So I think Congress has said,
6 to the extent that you even looked at this
7 military/civil line, I think they're calling
8 them more military if anything.

9 Now the second point is we don't think
10 that the words of the statute have some sort of
11 purity test that you've got to be all military
12 all the time. You know, the --

13 CHIEF JUSTICE ROBERTS: Well, you
14 don't have to be all military all the time, but
15 maybe you do when they say the payment has to be
16 based wholly on service as a member of a
17 uniformed service.

18 MR. KATYAL: I agree that's one way to
19 read it. I just don't think it's the best way.
20 And so, you know, let me walk you through the
21 way that we understand "wholly," which is it's a
22 very severe test, as our reply brief at page 10
23 says. What it says is that if there's even a
24 drop of money that comes -- that not from
25 uniformed service, then you don't get the

1 exception the way -- the uniformed service
2 exception.

3 So Congress in 1983 passed a broad
4 provision, the windfall elimination provision,
5 which says "if any part or whole of the money
6 comes from non-covered service, then you're in
7 the windfall elimination provision." That's
8 what they said. That's a sweeping broad
9 provision that affects 1.9 million Americans
10 each year.

11 And then Congress said, we're going to
12 enact a narrow exception only for those who are
13 wholly in uniformed service, people who have
14 basically spent their career doing that.

15 And so the word "wholly" has a lot of
16 meaning. It's integral to our -- to our reading
17 of the statute because, without it, it means
18 that you can have just a little bit of money
19 from uniformed service and then you're entirely
20 out of this broad windfall elimination
21 provision.

22 So it's not the case that we're not
23 giving "wholly" work. We're giving it a lot of
24 work. Indeed, it's integral to the way we read
25 the statute.

1 To my friend's reading and, Mr. Chief
2 Justice, I think your reading, suggests that
3 "wholly" would modify the word "service," not
4 "payment." And I think that's not what Congress
5 had in mind. Congress certainly has in other
6 statutes focused on the status or something like
7 that, but it hasn't here.

8 And that's why our brief
9 linguistically walks you through that at page
10 29, saying "wholly" would have to be two words
11 down in the statute in order for this to apply.
12 And so we think it's a -- not to -- we do think
13 it's the best reading of the statute to really
14 -- to understand this. I think the government
15 itself at page 22 of their brief admits that
16 "wholly" modifies the word "payment," not
17 "service."

18 And so, when you read the statute, you
19 simply ask whether or not the service is as a
20 member of a uniformed service. And, here, when
21 someone like Mr. Babcock or dual-status
22 technicians are performing their duties, they're
23 literally having to wear the uniform, having to
24 be a military rank, having to comply with all
25 sorts of fitness requirements that --

1 JUSTICE BARRETT: Mr. Katyal --

2 MR. KATYAL: -- us civilians don't --

3 JUSTICE BARRETT: -- what if a private
4 employer said, I'm very patriotic, I really like
5 employing members of the National Guard and all
6 of these same requirements that you're
7 articulating, said I want you to wear your
8 uniform to work, I want you to maintain a
9 certain rank, I want you to maintain a certain
10 fitness level, but Mr. Babcock is doing the same
11 job that he's doing, you know, teaching pilot
12 flight school, but he's doing it for a private
13 employer.

14 MR. KATYAL: Yeah.

15 JUSTICE BARRETT: Would that be
16 service as a member --

17 MR. KATYAL: It wouldn't.

18 JUSTICE BARRETT: -- of the National
19 Guard?

20 MR. KATYAL: So -- so two things,
21 Justice Barrett. First is, of course, if a
22 private employer did anything at this point in
23 time, it's all covered employment. So --

24 JUSTICE BARRETT: Well --

25 MR. KATYAL: -- this case really --

1 JUSTICE BARRETT: -- imagine not.

2 MR. KATYAL: Right. I just want to
3 make sure that, you know, focus on it's
4 impossible for these kinds of hypotheticals to
5 arise. And then, second, we definitely don't
6 think that a private employer can somehow
7 supplement and define what is a National Guard
8 duty. Those are enumerated by statute in 709
9 and 10216.

10 JUSTICE BARRETT: But why would that
11 matter? You know, why does it matter if they're
12 two employers rather than one? Is it just the
13 fact that he works for the government?

14 MR. KATYAL: It's -- it's not two
15 employers rather than one. We're just asking --
16 when you ask what is service as a member of a
17 uniformed service, I think that can only be done
18 by someone who is a member of a uniformed
19 service.

20 Now, if the hypothetical is the
21 employer makes those people become, say,
22 National Guard members or something like that,
23 our point --

24 JUSTICE BARRETT: That is the
25 hypothetical.

1 MR. KATYAL: Yeah. Then our point
2 would be, in that circumstance, they -- they'd
3 still have -- that they'd have to be performing
4 the duties that National Guard folks do
5 enumerated by statute, not other duties. If
6 they're doing other things, they're just not --
7 they're not service -- their role -- they're
8 not -- their service is not as a member of a
9 uniformed service.

10 JUSTICE SOTOMAYOR: How about if
11 they're delivering food to the National Guard?
12 It's a private company with all of the
13 prerequisites that Justice Barrett said and
14 they're delivering mess -- food.

15 MR. KATYAL: I think you'd look to the
16 way Congress has characterized the duty, if
17 there's any clue, like, here, there is the --
18 you know, to the extent you want to focus on
19 military, something like that. And the reason
20 for that, Justice Sotomayor, is what is civilian
21 and what looks military is actually really hard.
22 Take your example of food. A culinary
23 specialist is a chief petty officer in the U.S.
24 Army. It is thoroughly a military position.
25 But it's cooking food.

1 And so I do think that the way to --
2 to deal with this -- and this only affects,
3 obviously, a narrow set of people -- is to ask,
4 what did Congress have in mind in the roles that
5 it was enumerating? Here, Congress had roles in
6 mind like the one that Mr. Babcock does,
7 teaching people how to fly military helicopters.

8 JUSTICE SOTOMAYOR: Where do you get
9 all of that from the language?

10 MR. KATYAL: We get it --

11 JUSTICE SOTOMAYOR: Tell me where you
12 -- you --

13 MR. KATYAL: We -- we get it from --

14 JUSTICE SOTOMAYOR: -- where the
15 language gives us those two requirements --

16 MR. KATYAL: It --

17 JUSTICE SOTOMAYOR: -- first, that --
18 that your job has to require you to be a -- be a
19 member, and, secondly, that it be one of these
20 specified jobs?

21 MR. KATYAL: Yeah. So I think the --
22 the language --

23 JUSTICE SOTOMAYOR: Just read the
24 language to me and tell me where.

25 MR. KATYAL: Right. So the language

1 of the statute is "service as a member of a
2 uniformed service." So we think that has three
3 components to it. One, you got to be a member,
4 you know, and, here, of course, membership in
5 the National Guard is required. Second, that
6 you got to perform the statutory duties that are
7 enumerated by the -- by the statute, as opposed
8 to Justice Barrett's hypothetical, like, adding
9 some other duties --

10 JUSTICE SOTOMAYOR: So a cook is --

11 MR. KATYAL: -- that a private
12 employer does.

13 JUSTICE SOTOMAYOR: -- a cook is -- is
14 listed. So what else?

15 MR. KATYAL: Yeah. And then -- and
16 then, lastly, you know, whether it's uniformed
17 service or not, and that's defined by the
18 statute, as I was saying to the Chief Justice,
19 in 410(f).

20 JUSTICE SOTOMAYOR: So how do you
21 exclude the -- the chef, that he's in the Army,
22 he's a officer --

23 MR. KATYAL: So I do think --

24 JUSTICE SOTOMAYOR: -- a petty
25 officer?

1 MR. KATYAL: Right. I do think, if
2 the Congress -- if Congress has defined that as
3 a kind -- as -- as -- as an enumerated duty of
4 the National Guard, then that person would
5 qualify.

6 Here, there are enumerated duties of
7 the National Guard found in 709 and 10216, and
8 as our brief explains, dual-status technicians
9 are integral to the performance of those duties.

10 You know, that's been said time and
11 again by different people, members of the
12 military, you know, civilian officers, even the
13 government's own briefs to this Court in an
14 admittedly different context, the Ferris
15 context, calls them irreducibly military.

16 JUSTICE BARRETT: Well, Mr. Katyal, is
17 training pilots to fly Black Hawk helicopters
18 one of those enumerated duties?

19 MR. KATYAL: We do think it falls
20 directly within -- within the enumerations of
21 709, which is organizing, administering,
22 instructing, or training the National Guard and
23 -- or armed services and the like. So, yes, we
24 think it does fall that way.

25 We don't think you have to get into

1 any of that here because Congress did use a
2 pretty simple test, simple language that affects
3 relatively few people. To the extent there's
4 any doubt about this, we would suggest you apply
5 the veterans canon. As Justice Alito's
6 unanimous opinion for the Court in Shinseki said
7 back in 2011, if there's any ambiguity, read it
8 in favor of veterans. And so we think that that
9 would answer it.

10 And then I think, you know, my friend
11 on the other side suggests that there's somehow
12 some sort of civilian bar in the statute, and I
13 think this is implicit in the Chief Justice's
14 question to me as well. But the relevant
15 statutory language doesn't say that. It just
16 says uniformed service.

17 JUSTICE KAGAN: Well, the way the
18 Chief Justice read the language, I think, and
19 this is the way I read the language too, is that
20 we can sort of make this simpler by saying a
21 payment based wholly on military service.

22 Do you think that that's right? Is
23 there a difference? If I say a payment based
24 wholly on military service, is that the same as
25 or different than this statutory language?

1 MR. KATYAL: I -- I think it may be
2 the same. It'll obviously depend on how you
3 read "wholly." We don't think you should read
4 "wholly" the way that they read it to
5 essentially say that there's -- "wholly" will
6 modify "service," which I think could be done in
7 a --

8 JUSTICE KAGAN: Well, "a payment based
9 wholly on military service" means that the
10 payment has to be for entirely military service.

11 MR. KATYAL: Exactly. So, if -- if --
12 if that's the way you read it, Justice Kagan, we
13 don't disagree. So people like Babcock, who
14 have spent their whole career in the dual-status
15 technician role and get a payment for that,
16 that's a circumstance in which they fall within
17 the exception.

18 If we contrast that to a modified Mr.
19 Babcock, someone who spent half of his time,
20 say, working at the Department of Transportation
21 in non-covered employment and half of his time
22 working as a dual-status tech, that person would
23 not be eligible for the uniformed service
24 exception.

25 JUSTICE KAGAN: So, if I understand --

1 MR. KATYAL: He falls without it.

2 JUSTICE KAGAN: -- what you're saying
3 in terms of the way you read this stat --
4 statute, the only thing at issue is, when he
5 receives his paycheck, is it entirely for
6 military service, or might it be for other
7 things as well?

8 MR. KATYAL: Is it entirely for
9 uniformed service. That's the -- that's the one
10 --

11 JUSTICE KAGAN: Oh. Now you're
12 changing it, because I asked you is it the same
13 as for military service.

14 MR. KATYAL: Oh, I'm so sorry, I meant
15 -- I didn't hear the last part then. So, yeah,
16 so we do think there's a difference between
17 uniformed service and military service. And
18 Congress gave you an express textual indication
19 of that by enumerating the Public Health Service
20 and NOAA as two examples. Those are people who
21 are not military. The government, you know,
22 dances around this in their brief, but they
23 certainly don't call them military because that
24 would be preposterous.

25 Instead, what people like NOAA and

1 Public Health Services folks are are uniformed
2 service, and that's why Congress used that
3 specific phrase. They could have used -- picked
4 up any other military test, as our brief says.
5 There are all sorts of military pay stub tests
6 throughout, including about the National Guard,
7 like 709(b) and so on, but not this one.

8 And so, here, Congress just simply
9 asked: Is the service as a member of a
10 uniformed service? And to answer that question,
11 you look to what is a uniformed service --

12 JUSTICE KAGAN: So are you saying,
13 well, we -- we concede that the payment is not
14 entirely for military service, but it's all for
15 uniformed service?

16 MR. KATYAL: We -- we don't concede
17 it. We do think, if you went there, this is
18 irreducibly military at the end of the day, but
19 -- but we don't think you have to get there.
20 That is not the language of the statute. We
21 think we meet the government's test, but we
22 don't think the government's test is right.

23 We think it's a simpler test affecting
24 a very small number of people but, obviously,
25 people to whom this amount of money is really

1 important.

2 JUSTICE BREYER: But isn't it that --
3 I mean, is there anything wrong with my reading
4 the legislative history? Is there anything
5 wrong where the statute's ambiguous?

6 MR. KATYAL: So --

7 JUSTICE BREYER: If I turn to a House
8 report, which was so common and still is, where
9 someone who works on the staff explains what
10 they mean, and that explanation is run by all
11 the senators, and either they or their staff
12 sign off on it, and, here, no one objected.

13 And what they seem to say, when I read
14 House Report 103-506, whatever it is, at 67, I
15 read it, and it seems to say that these smaller
16 group of people who are actually in military
17 reserve between 1956 or whatever the years were,
18 they're the ones we're trying to help, not
19 anybody else.

20 MR. KATYAL: So -- so, Justice Breyer,
21 we certainly don't have any problem with you
22 looking at legislative history. Some of your
23 colleagues might, but we certainly don't.

24 And -- and we think, if you look at
25 it, you draw exactly the opposite conclusion

1 because Congress did say -- you're absolutely
2 right, Congress said military pensions focused
3 on inactive service members and the like in
4 the -- excuse me -- the legislative history says
5 that, but Congress didn't use those words. They
6 used far broader words, service --

7 JUSTICE BREYER: So you're saying the
8 person who wrote the legislative history got it
9 wrong?

10 MR. KATYAL: I --

11 JUSTICE BREYER: That the person who
12 wrote that report didn't actually read the
13 statute and didn't really know what the statute
14 said?

15 MR. KATYAL: Justice Breyer, there's
16 nothing in there that excludes dual-status
17 technicians --

18 JUSTICE BREYER: It says for a small
19 --

20 MR. KATYAL: -- from the legislative
21 history.

22 JUSTICE BREYER: -- closed group of
23 people who receive military pay --

24 MR. KATYAL: Correct.

25 JUSTICE BREYER: -- based on your

1 reading.

2 MR. KATYAL: -- and we agree it is a
3 small group of people either way, whether
4 dual-status techs --

5 JUSTICE BREYER: Based at least in
6 part on non-covered military reserve duty after
7 1956 and before 1988 --

8 MR. KATYAL: Correct.

9 JUSTICE BREYER: -- which I admit I
10 don't understand --

11 MR. KATYAL: Correct.

12 JUSTICE BREYER: -- but I'll try.
13 Right.

14 MR. KATYAL: That is -- we agree that
15 that is the heart of what the statute is about.
16 Our only point is the language Congress
17 ultimately settled on doesn't have any of those
18 terms in it. And once you start reading it the
19 government's way, you're then into the problem
20 of, wait, Congress then didn't do anything. It
21 didn't cover even inactive duty folks, which is,
22 as you were saying, the paradigmatic case of
23 what they wanted to cover.

24 Questions?

25 CHIEF JUSTICE ROBERTS: Mr. Katyal,

1 when -- when Mr. Babcock was working, did he get
2 one paycheck or two?

3 MR. KATYAL: So he got -- when he was
4 working in --

5 CHIEF JUSTICE ROBERTS: Just regular
6 --

7 MR. KATYAL: -- as an -- as an active
8 --

9 CHIEF JUSTICE ROBERTS: I assume he's
10 retired now.

11 MR. KATYAL: Yeah, so he got one
12 paycheck for his National Guard service. When
13 he went into active duty for his --

14 CHIEF JUSTICE ROBERTS: No, no, no.
15 One paycheck for his National Guard service.
16 Did he get one paycheck for his 9-to-5 job and
17 one paycheck for the National Guard job?

18 MR. KATYAL: I -- I will let you -- I
19 just want to make sure of what the record says.
20 I'll get that for you on rebuttal.

21 CHIEF JUSTICE ROBERTS: But he does
22 get two separate checks for pension, right?

23 MR. KATYAL: Correct.

24 CHIEF JUSTICE ROBERTS: One for his
25 9-to-5 job and one for his National Guard job?

1 MR. KATYAL: Correct. And the way
2 that the statute works, it goes payment system
3 by payment system. So it asks whether the CSRS
4 payments are all wholly as a member of a
5 uniformed service or not. And then, if he has,
6 for example, state and local pension, that's a
7 whole separate system and a separate calculation
8 under the windfall elimination provision. You
9 don't aggregate them together.

10 CHIEF JUSTICE ROBERTS: Just to be
11 clear, I'm asking when he's working, does -- at
12 the end of the month, does he have -- this is my
13 National Guard check for the time I spent
14 working as a National Guardsman, military
15 status, right? But he had this separate -- you
16 will fight the "separate" maybe -- but he also
17 had the 9-to-5 job --

18 MR. KATYAL: Oh.

19 CHIEF JUSTICE ROBERTS: -- because
20 that's what made him dual-status.

21 MR. KATYAL: Oh, yeah. No, I don't
22 think he gets a separate paycheck for that. I
23 think that's all one paycheck. It's just -- I
24 think that his military service, to the extent
25 he's on active duty or something like that, the

1 -- that is a separate paycheck. So I think
2 those are the two paychecks. I will confirm
3 this in the record --

4 CHIEF JUSTICE ROBERTS: Well, I --

5 MR. KATYAL: -- and get back to you.

6 CHIEF JUSTICE ROBERTS: -- you say to
7 the extent he's on active duty. Is it to the
8 extent he's not -- the National Guard has not
9 been called up, but he's in the National Guard
10 for specific periods, right?

11 MR. KATYAL: Correct.

12 CHIEF JUSTICE ROBERTS: Okay. So
13 you're going to let me know if he gets a -- got
14 a separate paycheck for his 9-to-5 job and a
15 separate paycheck for the time he was doing
16 National Guard work?

17 MR. KATYAL: Yeah, I -- I'm pretty
18 sure it's all the same thing because, you know,
19 literally, every time he's going to work, he's
20 wearing the uniform and performing his National
21 Guard dual-status technician duties. I don't
22 think there is any separate paycheck, but I just
23 want to double-check what's in the record.

24 CHIEF JUSTICE ROBERTS: Okay. Thank
25 you.

1 Justice Thomas?

2 JUSTICE THOMAS: Yes, counsel, just an
3 -- a question as an aside. What would have been
4 the difference in the treatment of Petitioner if
5 he had exercised the option in the 1980s to
6 switch from CSRS to FERS?

7 MR. KATYAL: Yeah. So, one, if he --
8 if he elected to be in FERS, then he would be in
9 covered employment, and then he'd be outside of
10 the windfall elimination provision because it
11 doesn't encompass at least for those
12 going-forward years non-covered employment. It
13 only applies to non-covered employment.

14 So, once you're in the language of
15 FERS in covered employment, you're outside of
16 the windfall elimination provision.

17 JUSTICE THOMAS: So he exercised an
18 option that put him in the current position that
19 he's in?

20 MR. KATYAL: Correct, and he -- you
21 know, as he says at -- this is petition appendix
22 page 44a -- when he joined the service, he
23 thought he was entitled to a certain stream of
24 benefits. They then changed it on him, and,
25 yes, he had the option to convert, but

1 conversion had all sorts of problems inherent to
2 it.

3 JUSTICE THOMAS: Yeah, but that was
4 true in the '80s for every federal employee.

5 MR. KATYAL: Correct. And what
6 Congress in 1994, Justice Thomas, said was
7 uniformed service folks are going to get a
8 benefit that other federal employees don't get.
9 We want to benefit them in a certain way because
10 they're seeing their paychecks slashed, as are,
11 of course, civilian employees, but they wanted
12 to do something -- you know, they wanted to do
13 something for uniformed service folks that was
14 different and special.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?

18 JUSTICE BREYER: No, thank you.

19 CHIEF JUSTICE ROBERTS: Justice Alito?
20 No?

21 Justice Sotomayor, anything further?

22 JUSTICE SOTOMAYOR: I -- I -- on this
23 two -- two checks, he got a check for his 9-to-5
24 job for the State National Guard, and he got a
25 separate check for his inactive duty military

1 service? When he got called up for his two
2 weeks or weekend duty for the Army National
3 Guard, he got a separate check, correct?

4 MR. KATYAL: Correct. I'm pretty
5 sure.

6 JUSTICE SOTOMAYOR: And so he's being
7 paid two pensions now, one by his 9-to-5 job and
8 he does get a military pension as well?

9 MR. KATYAL: That is correct. That is
10 what the uniformed --

11 JUSTICE SOTOMAYOR: So that's the
12 answer to Justice -- the Chief's question.

13 MR. KATYAL: I'm pretty sure it is. I
14 just want to see what's in the record,
15 absolutely, yes.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 Justice Barrett? No?

18 Thank you, counsel.

19 Ms. Reaves.

20 ORAL ARGUMENT OF NICOLE REAVES

21 ON BEHALF OF THE RESPONDENT

22 MS. REAVES: Mr. Chief Justice, and
23 may it please the Court:

24 When a dual-status technician retires,
25 he receives two separate streams of payments,

1 and the application of the uniformed services
2 exception depends on the basis for each set of
3 payments that he receives.

4 First, he receives Civil Service
5 Retirement System payments from the Office of
6 Personnel Management for the work that he
7 performs in his full-time civilian role as a
8 technician. Those payments do not trigger the
9 uniformed services exception because they are
10 based on his civilian employment.

11 A technician also receives a second
12 stream of payments which are military retirement
13 payments from the Defense Finance and Accounting
14 Service for his part-time military service, that
15 is, his inactive duty training and drills and
16 his active duty service in the National Guard.

17 Those military retirement payments do
18 trigger the uniformed service exception because
19 they are based wholly on service in a qualifying
20 National Guard capacity. And Petitioner and
21 other dual-status technicians like him, when
22 they were in the role, received two separate
23 paychecks with two separate leave and earnings
24 statements. One was a paycheck for their 9-to-5
25 technician work, and the other was the paycheck

1 for all their inactive and active duty service.

2 Congress also repeatedly categorized
3 technician service as outside -- as civilian
4 service, not uniformed service.

5 First, Congress did not include
6 dual-status technicians within the definition of
7 a member of a uniformed service that is
8 cross-referenced in the uniformed services
9 exception.

10 Second, in Section 10216 of Title 10,
11 one of the two primary provisions that governs
12 dual-status technicians, Congress describes
13 technicians as civilian four separate times.

14 And, third, in Title 5, Congress
15 defined technician employment as falling within
16 the civilian service of the government and
17 ensured that technicians would receive civilian
18 retirement payments for their civilian
19 employment.

20 I think I'd start then by discussing a
21 couple of points that my friend on the other
22 side made, and the first is whether an
23 individual knows what type of status they're in
24 at any given point in time.

25 And it's actually quite clear what

1 status a technician is at any point. During his
2 9-to-5 job, a technician is doing work in the
3 technician role, and in that role, he has a
4 variety of benefits that he doesn't have while
5 he's working in his National Guard role, and
6 that includes the fact that he can join a union.
7 He can file complaints with the EEOC and MSPB.
8 He can receive compensatory time off and
9 worker's compensation. And he's compensated
10 under the federal GS system.

11 That's different from his National
12 Guard service which he performs on weekends or
13 if he's called up to active duty.

14 Now my friend on the other side has
15 suggested that if you are -- were to accept the
16 government's position in this case, inactive
17 duty service, such as training and drills,
18 wouldn't trigger the uniformed services
19 exception. And that's wrong because of a
20 specific provision that deems such service as
21 federal for the purpose of federal funding.

22 And that provision is 10 U.S.C.
23 12602(a), which provides that for the purposes
24 of laws providing benefits for members of the
25 Army National Guard of the United States,

1 military training, duty, or other service
2 performed by a member of the Army National Guard
3 of the United States in his status as a member
4 of the Army National Guard, for which he's
5 entitled to pay from the United States, shall be
6 considered military training, duty, or other
7 service in the federal service.

8 So let me unpack that a little bit.
9 What that means is that when an individual is in
10 his state status, which usually happens when
11 he's doing inactive training and drills, because
12 of this provision, he's paid by the federal
13 government as a general matter, and that does,
14 in fact, trigger the uniformed services
15 exception because that payment is payment for
16 qualifying service.

17 Now dual-status technician service is
18 different because Congress has categorized that
19 service as outside the uniformed service and the
20 payments for that service as civilian in nature.

21 JUSTICE GORSUCH: Counsel, as -- as I
22 understand your -- your colleague on the other
23 side, and I may not, but, as I understand it as
24 best I can in this area, we -- we all understand
25 that National Guardsmen serve in at least two

1 capacities, and one of them is denominated by
2 the government for purposes of its own HR
3 administration as civilian.

4 And -- and so, fine, he served as a
5 civilian when he was working as a technician.
6 That was -- that's how you classified it.

7 But just looking at the language of
8 the statute -- and I think this is the argument
9 in its simplest terms as I understand it -- was
10 -- were the payments based -- were they made
11 wholly on service in the capacity of -- as -- as
12 a member of the uniformed service, and the
13 answer he would give is yes because, while you
14 denominate it civilian for certain purposes, you
15 also said it could only be performed by someone
16 who is a member of a uniformed service.

17 So the work may be civilian for a
18 bunch of other purposes, but it can only be
19 performed by someone who is serving in the
20 capacity of a National Guardsman.

21 What's wrong with that argument?

22 MS. REAVES: I think there are a few
23 things that are wrong with that argument. One
24 is that a precondition to hold a given role
25 doesn't render service in that role and payments

1 for service in that role wholly for service in
2 the capacity of the prerequisite.

3 JUSTICE GORSUCH: Well, why -- now let
4 me stop you there. Why not? Because, if the
5 work, civilian work, whatever you -- whatever
6 words you want to put around it, can only be
7 performed, has to be wholly performed by someone
8 who is a member of the National Guard, why
9 doesn't that take care of the word "wholly" for
10 you?

11 MS. REAVES: So I think it writes out
12 the word "as" and the fact that we're in
13 agreement, I think, that "as" means in the
14 capacity of.

15 JUSTICE GORSUCH: Mm-hmm.

16 MS. REAVES: And the fact that
17 Congress --

18 JUSTICE GORSUCH: Okay. All right.
19 So, if we're moving from "wholly" now, we're
20 putting that aside, okay, so we're not arguing
21 on "wholly," we're going to "as," all right, and
22 "as" is a very important word in this case. I
23 got that.

24 "In the capacity of" is, I think, how
25 that -- you would argue it is.

1 MS. REAVES: Yes.

2 JUSTICE GORSUCH: Why isn't the
3 civilian work being performed in the capacity
4 of, by someone who has to be a National
5 Guardsman?

6 MS. REAVES: So I think "in the
7 capacity of" and "by someone that has to be" are
8 two different terms. And I -- I guess maybe an
9 analogy would be helpful here.

10 JUSTICE GORSUCH: But the work is
11 civilian work being performed as, okay, wholly
12 as a National Guardsman. Why -- why can't both
13 be true, in other words? I know it's -- it's --
14 it's a lot to hold in one's head at the same
15 time that one can be both civilian and
16 performing work as a National Guardsman, but
17 what's -- what's wrong with that?

18 MS. REAVES: So they -- they can't be
19 because Congress has said they can't be.
20 Congress has said that an individual -- that
21 there's something called National Guard service,
22 and we pay individuals military pay and give
23 them military pensions as a result of that.

24 JUSTICE GORSUCH: That's all over in
25 Title 10, though. Here we are in Title 42. And

1 what do you do just on -- in Title 42 itself?

2 MS. REAVES: So I think, in Title 42
3 itself, we looked at what is uniformed service
4 and we see that a member of a uniformed service
5 is not a technician. And we know that when
6 Congress wanted to include an individual who
7 doesn't really look normal to us who don't have
8 expertise in this area, like a member of the PHS
9 Corps or the NOAA Corps, it explicitly included
10 them within that definition of uniformed
11 service, and it didn't do that with technicians.

12 JUSTICE GORSUCH: So are we blowing
13 past "as" now and now we're on to "uniformed
14 service"?

15 MS. REAVES: We're not blowing past
16 anything. I think the best reading of the
17 statute is looking at the entire phrase and
18 giving meaning to the definition of "member of a
19 uniformed service" which doesn't include
20 technician service, giving meaning to "as" and
21 the fact that service needs to be performed in
22 that capacity, and giving meaning to "wholly"
23 and the fact that payments themselves have to be
24 entirely or completely based on qualifying
25 service. And we know that --

1 JUSTICE GORSUCH: All right. Let me
2 -- let me try it one more time and then I -- and
3 I'll promise I'll stop because I'm beating a
4 horse that's pretty dead, I think.

5 Payments based wholly on service,
6 okay, civilian service, based wholly on civilian
7 service performed in the capacity of a National
8 Guardsman. I think that's the reading, okay? I
9 -- I think that's as best I got it, and I may be
10 completely off base, Mr. Katyal will tell me,
11 but what's -- what's -- what's wrong with that?
12 Why can't we hold these two things in our head
13 at the same time?

14 MS. REAVES: I think because of the
15 definition of "uniformed service," and I don't
16 think we can just look at the Title 42
17 definition because Title 10 is one of the two
18 provisions that creates dual-status technicians
19 and it refers to their service as civilian four
20 separate times.

21 Now my friend on the other side has
22 noted that they're referred to as military
23 technicians multiple times, but that just refers
24 to whom they -- for whom they work. It doesn't
25 refer to the nature of their service. So I

1 think that we can't just read this in a bubble.

2 And when Congress enacted that --
3 this, it was enacting it against a backdrop of
4 the fact that National Guard members do have
5 different types of service and that National
6 Guard members for the most part are part-time
7 service members.

8 And I think it's helpful to compare
9 the service that a dual-status technician
10 renders with two other types of service that the
11 National Guard has. One is active guard
12 reserve, and those are individuals who hold a
13 full-time military role, and all of their pay
14 for their 9-to-5 job receives the benefits of
15 the uniformed services exception.

16 And the National Guard also employs
17 civilian employees who aren't members of the
18 National Guard, and all of these individuals may
19 perform service that seems to us to be very
20 important to the National Guard and integral to
21 its functioning, but what matters for the
22 purposes of the uniformed services exception is
23 how Congress chose to define the service.

24 And Congress chose to --

25 JUSTICE BARRETT: Well --

1 MS. REAVES: -- define this --

2 JUSTICE BARRETT: -- Ms. Reaves --

3 JUSTICE ALITO: What is the --

4 JUSTICE BARRETT: -- what about Mr.

5 Katyal's point that there is a statutory list of
6 duties performed by people like Mr. Babcock and
7 that that list can be read to include Mr.
8 Babcock's training, you know, of pilots?

9 MS. REAVES: So it's -- it's certain
10 -- so the -- the description he was referring to
11 is in 32 U.S.C. 709, which describes what
12 dual-status technicians do on a day-to-day
13 basis, and that includes organizing,
14 administering, instructing the National Guard.

15 And that is certainly what he did
16 during his 9-to-5 technician job. We aren't
17 debating that in any way. But that -- even
18 though that's important to the National Guard,
19 integral to its functioning, that was his 9-to-5
20 civilian service, and that's separate from his
21 weekend training and guard -- training and
22 reserve service.

23 So I don't think the fact that
24 Congress decided to list off their roles here
25 tells us anything about whether that service is

1 in the capacity of a member of a National Guard.

2 It's also important to note that
3 Congress also has wholly civilian employees of
4 the National Guard who aren't members of the
5 National Guard and don't have that prerequisite.
6 They can also be trainers, like Mr. Babcock was.

7 JUSTICE ALITO: What is the purpose of
8 this dual-status setup? Why -- why would it not
9 have been sufficient for these employees to be
10 simply civilian federal employees? If they want
11 to be on -- in the National Guard on the side,
12 fine, they can be in the National Guard?

13 MS. REAVES: So I can't answer that
14 question as to any individual technician because
15 there are tens of thousands of them and they do
16 have very different roles. It might be a
17 different answer for Mr. Babcock. The
18 individual who was the plaintiff in Martin, the
19 Eleventh Circuit case on this issue, was a
20 personnel clerk, so he did paperwork but still
21 had to be a National Guard member. But I can
22 tell you why we got here and maybe some of the
23 benefits of it.

24 As to the why, this is really a
25 holdover of how states had structured the system

1 before. So, in 1916, Congress authorized states
2 to hire military caretakers, who were the
3 predecessors of dual-status technicians, and
4 states developed a practice where most of these
5 individuals had to be members of the National
6 Guard.

7 JUSTICE ALITO: Well, is it -- is this
8 just a historical accident, or is there some
9 benefit to the federal government or to the
10 National Guard from having these people in a
11 dual status as opposed to a -- an overlapping
12 status as opposed to completely discrete
13 statuses?

14 MS. REAVES: So I think the benefits
15 are that it definitely helps the National Guard
16 with enrollment because these civilian jobs are
17 very attractive with all the benefits that they
18 have. And it also does help the National Guard
19 from the perspective of cohesion and unit
20 readiness. These individuals, you know, do get
21 called up with their National Guard units and do
22 inactive training and drills with them.

23 I don't think any of that really tells
24 us anything about how to answer the question
25 presented here just because, as I previously

1 discussed, what we have to look at is the status
2 itself as Congress has defined it and the
3 payment, type of payments that Congress has
4 provided for that, not whether it looks military
5 or looks essential to us.

6 I think my friend -- let's talk for a
7 moment about "wholly" and what kind of work that
8 term is doing here. We read "wholly" as an
9 adverb that modifies the adjectival phrase that
10 begins with "based on" and that phrase in turn
11 modifies "payment." I think we're all in
12 agreement on that reading, and what that means
13 is that we have to look at the nature of this
14 particular payment here.

15 And I think even if the Court were to
16 accept my friend on the other side's functional
17 approach, which says that this looks like
18 National Guard service, so we should treat these
19 payments as it for being payments that trigger
20 the uniformed services exception, that doesn't
21 work because "wholly" indicates that even if
22 you're taking that functional approach, which we
23 don't think you should, the payments are not
24 wholly based on that.

25 An individual member of the National

1 Guard who's not a technician cannot receive the
2 CSRS pay -- Civil Service Retirement System
3 payments that Petitioner received. He can't
4 hold that technician role. And I think, because
5 of that, "wholly" does do work under our
6 reading.

7 And the problem with my friend on the
8 other side's reading of "wholly" is it actually
9 is reading "wholly" as "in whole or in part."
10 Petitioner suggests that if -- if there was a
11 CSRS payment that was partially based on
12 military service and partially based on
13 non-military service, that could somehow be
14 apportioned out and only the part based on
15 military service would trigger the uniformed
16 services exception.

17 But that's actually completely against
18 the text of the uniformed services exception.
19 And if this Court were to find that dual-status
20 technician payments trigger the uniformed
21 services exception, it would be the only
22 situation in which a CSRS payment could be
23 entirely based on military service and would be
24 subject to the uniformed services exception.

25 If the Court has no further questions?

1 CHIEF JUSTICE ROBERTS: Further
2 questions? Justice Thomas?

3 JUSTICE THOMAS: I have one. I have
4 just a minor question. The -- how -- how -- how
5 big a problem is this now that CSRS no longer
6 exists?

7 MS. REAVES: I can give you a partial
8 answer as to the number of individuals that this
9 will impact. So this will only impact
10 individuals who are in the dual-status
11 technician role before 1984 and are still
12 receiving CSRS payments or are eligible to
13 receive them and are not yet receiving them.

14 And because of data-keeping
15 limitations, I only have the number of
16 dual-status technicians who retired after 2004
17 or are eligible to retire, and that's about
18 53,000 National Guard dual-status technicians.

19 This case will also impact a smaller
20 number of Air Force and Navy -- Air Force and
21 Army technicians. Those forces have dual-status
22 technicians like these. It's a much smaller
23 number because the force authorizations for
24 those have been smaller.

25 So that -- that's unfortunately all

1 that I can provide for you, but it -- it's a
2 fairly small group of individuals that this case
3 will possibly impact.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer?

7 Justice Alito, anything for you?

8 Justice Sotomayor?

9 Justice Kagan?

10 JUSTICE GORSUCH: One quick question.

11 So we agree this only impacts folks who are
12 still receiving CSRS benefits that they would
13 have been eligible for before 1984?

14 MS. REAVES: Based on service before
15 1984 --

16 JUSTICE GORSUCH: 1984, yeah.

17 MS. REAVES: -- or service that began
18 before 1984 --

19 JUSTICE GORSUCH: Right. Yeah.

20 MS. REAVES: -- and continued.

21 JUSTICE GORSUCH: All right. And
22 then, secondly, if -- if -- if no man alive can
23 figure this out, does the veterans canon have
24 any role to play here?

25 MS. REAVES: So, obviously, I disagree

1 with your premise there. I think that there are
2 a lot of textual clues in this statute and in
3 related statutes that indicate that our reading
4 is the better one, but I don't think the
5 veterans canon has any play here for a couple of
6 reasons.

7 The first is that the group of
8 individuals that this would benefit Congress has
9 defined as not being veterans, and that's
10 because technician service itself doesn't create
11 any sort of veterans preference.

12 It doesn't give someone veterans
13 benefits. It's only the National Guard service
14 that someone renders that can possibly give
15 technicians veterans preference, so I don't
16 think this would be a -- that would be an
17 appropriate place to apply the veterans canon
18 because the veterans canon is usually applied to
19 statutory schemes that themselves are intended
20 to benefit veterans.

21 JUSTICE GORSUCH: Military, not
22 uniformed service, we're back to that?

23 MS. REAVES: I don't think it's back
24 to that because I -- because I would dis- -- I
25 disagree that technician service is uniformed

1 service. Technician service isn't within the
2 definition of "uniformed service."

3 JUSTICE GORSUCH: Sorry, I didn't mean
4 to go back there. Thank you. Thank you,
5 counsel.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: You -- you -- you
9 agree, however, that there is a veterans canon
10 that would apply when statutes are ambiguous
11 generally. You'd say it doesn't apply here both
12 because it's not ambiguous and because it's not
13 really veterans as we normally think about it?

14 MS. REAVES: Yes, we are not
15 contesting the availability of the veterans
16 canon to resolve grievous ambiguity.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 Thank you, counsel.

20 Rebuttal, Mr. Katyal?

21 REBUTTAL ARGUMENT OF NEAL K. KATYAL
22 ON BEHALF OF THE PETITIONER

23 MR. KATYAL: Thank you, Mr. Chief
24 Justice. Three points.

25 First, as Justice Gorsuch was

1 indicating, we do think that the plain text
2 controls here. There are two key features of
3 our argument. First, Section 415 looks to
4 service, not status, and, in particular,
5 uniformed status -- service.

6 And, second, Congress has specifically
7 defined National Guard service as uniformed
8 service and dual-status technician service in
9 particular as part of that and has labeled it
10 military.

11 Second, Mr. Chief Justice, he got one
12 paycheck for his DST service, his dual-status
13 service. That was -- that's petition appendix
14 page 42a. That is, to be sure, a civilian
15 paycheck under Title 5.

16 Our point is civilian pay -- where
17 your paycheck comes from doesn't matter for
18 purposes of 415. 415 doesn't ask that. And,
19 indeed, as Justice Gorsuch was saying, it's not
20 mutually exclusive. You can have a civilian
21 paycheck but still be serving -- your service
22 may still be performed as a member of a
23 uniformed service.

24 There is no pay stub test. Congress
25 has used pay stub tests even with respect to the

1 National Guard, as our reply brief points out.
2 Here, they didn't do anything like that. They
3 used the words "service as a member of a
4 uniformed service." They didn't try and embrace
5 a paycheck test or anything like that.

6 CHIEF JUSTICE ROBERTS: Mr. Katyal,
7 I'm sorry to interrupt your rebuttal, but I'm
8 not -- I want to make sure I've got this right.

9 He -- did he receive one paycheck for
10 his civilian status duty and one for his
11 National Guard duty?

12 MR. KATYAL: No, one paycheck for it
13 all; that is, his job is all part of one thing.
14 So, as he shows up to work as a dual-status
15 technician, he falls within all the requirements
16 of 709, wearing the uniform, all that stuff. He
17 doesn't have some separate hat he's wearing for
18 purposes of 415. He's just -- he's getting one
19 paycheck --

20 CHIEF JUSTICE ROBERTS: Is it --

21 MR. KATYAL: -- and it is civilian.

22 CHIEF JUSTICE ROBERTS: -- is it
23 allocated separately?

24 MR. KATYAL: Only to the extent, as I
25 was saying before, he is in active duty or

1 something like that. But, otherwise, he's
2 getting one paycheck. It is a civilian
3 paycheck, but that's not the way -- that's not
4 what the test is.

5 JUSTICE BARRETT: What about weekend
6 service when he goes for training and drills?

7 MR. KATYAL: And the weekend stuff
8 also comes in the military DFAS payments as
9 well.

10 JUSTICE BARRETT: So that's the
11 separate -- like, we could say it's two separate
12 paychecks insofar as you're talking about his
13 weekend National Guard service that you might do
14 even if you were in private employment?

15 MR. KATYAL: To the --

16 JUSTICE BARRETT: And then the 9-to-5?

17 MR. KATYAL: Yeah, to the extent he
18 was doing any of that, any -- any weekends or
19 something like that, that's military and
20 separate.

21 Now my friend on the --

22 CHIEF JUSTICE ROBERTS: Wait, wait.
23 But that's military and separate. Does he get
24 paid for that?

25 MR. KATYAL: He does get paid for

1 that, just -- absolutely.

2 CHIEF JUSTICE ROBERTS: Is that
3 different than the pay he gets for his 9-to-5
4 job?

5 MR. KATYAL: It is because that's
6 Title 5 --

7 CHIEF JUSTICE ROBERTS: Are there two
8 checks?

9 MR. KATYAL: He does get two paychecks
10 for --

11 CHIEF JUSTICE ROBERTS: Okay.

12 MR. KATYAL: Not -- not for his
13 dual-status service but anything else.

14 So then my friend on the other side
15 said that there's a statute that she's just
16 pointed out, 12602, which says that -- that --
17 she says it fills the gap and allows him to
18 cover National Guard of the United States.
19 That's not an argument they've made before in 27
20 years, but I don't think that that statute
21 actually works.

22 Indeed, it's inconsistent with their
23 own view of the word "wholly" because their own
24 view of "wholly" is that Title -- because they
25 say Title 5 is responsible for these civilian

1 payments.

2 JUSTICE BREYER: Is this a -- let me
3 get back to this thing. He -- Person A, Monday,
4 Tuesday, Wednesday, works as a technician,
5 nothing really -- at the Army base but does
6 nothing that a civilian doesn't do there. Then,
7 on Thursday, he does a special National Guard
8 duty, and on Friday, they're nationalized, so he
9 has a federal thing. He gets one paycheck for
10 that week, is that right?

11 MR. KATYAL: He gets -- if he's
12 nationalized, he would get a separate military
13 pay stub in a separate military paycheck.

14 JUSTICE BREYER: Okay. So, for
15 Monday, Tuesday, Wednesday, Thursday, he gets
16 one paycheck?

17 MR. KATYAL: Correct.

18 JUSTICE BREYER: And now -- okay. How
19 do they deduct the Social Security for that? Do
20 they -- do they -- and it goes to two systems,
21 doesn't it?

22 MR. KATYAL: It does go to two
23 systems, Your Honor.

24 JUSTICE BREYER: All right. So do
25 they -- do they -- how do they do it? They

1 deduct two amounts, one for the one day of
2 Thursday and another for the --

3 MR. KATYAL: No. It's system by
4 system. And that's the way the windfall
5 elimination provision works. So you only look
6 to -- and I was saying this in my opening -- you
7 only look to, for example, the CSRS payments
8 here. There's only one stream of CSRS payments.
9 They're all wholly -- wholly uniformed services.
10 So that's why we think he falls within it.

11 Now, if there's any ambiguity in this,
12 we would suggest that the veterans canon does
13 apply. And the government doesn't argue,
14 Justice Kavanaugh, that they are not -- that
15 Mr. Babcock and other dual-status technicians
16 aren't veterans. Pointedly, the last paragraph
17 of their brief says the reverse, that they are
18 veterans. And so, if there is any ambiguity, we
19 would suggest that you read it that way.

20 And I think it would be a very
21 dangerous thing to fall on the 12602 argument
22 that my friend has just raised because it's
23 inconsistent with what they say "wholly" means.
24 And also, indeed, it very well may boomerang on
25 them because it says you're -- if you're

1 "entitled to pay" from the federal government,
2 then that counts as federal service.

3 Well, undoubtedly, Babcock is entitled
4 to pay for his federal service, for his
5 dual-status technician service Monday through
6 Wednesday. That makes him part of the uniformed
7 service exception.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 12:30 p.m., the case
11 was submitted.)

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