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ROA Represents the Interests of its Members and Potential Members By Drafting and Filing an Amicus Brief in the Supreme Court again, but we Cannot Win them All.

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9.0—Miscellaneous

***Babcock v. Commissioner of Social Security,* 959 F.3d 210 (6th Cir. 2020), *certiorari granted* 141 S. Ct. 1463 (2021), *affirmed sub nom. Babcock v. Kijakazi,* 142 S. Ct. 641 (2022).[4]**

Bottom Line up Front

This is an important case about the treatment of military "technicians" in the four Army and Air Force Reserve Components (Army National Guard, Army Reserve, Air National Guard, and Air Force Reserve) for purposes of Social Security benefits in retirement. In 2011, one Federal appellate court held that these technicians should be treated as members of the armed forces

[1] We invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

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[3] Ms. Lukas has worked in the legislative advocacy field for more than 26 years, with the Department of Defense, the Department of Veterans Affairs, and as ROA's Director of Government Affairs. She has worked on titles 5, 10, 14, 27, 32, 37, and 38 of the United States Code. Ms. Lukas retired from the Air Force with more than 35 years of Active, National Guard, and Reserve service.

[4] This is a decision by the United States Court of Appeals for the 6th Circuit, the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee. "Certiorari granted" means the Supreme Court has agreed to hear and decide this case. The Supreme Court heard the case in the 2021-22 term and affirmed the 6th Circuit decision on a vote of 8-1.

for this purpose.[5] In this case (*Babcock*), the 6th Circuit joined with four other circuits[6] in rejecting the 8th Circuit's holding. The Supreme Court granted certiorari (discretionary review) to resolve this dispute among the circuits. By a vote of 8-1, the Supreme Court affirmed this 6th Circuit decision and endorsed the views of the 2nd Circuit, 3rd Circuit, 10th Circuit, and 11th Circuit, and overruled the 8th Circuit decision (*Petersen).*

The Reserve Organization of America (ROA) joined with other military associations in filing an amicus curiae ("friend of the court") brief in the Supreme Court urging our nation's high court to endorse the 8th Circuit view and reject the holdings in these other circuits. We have placed a link to the amicus brief at the end of this article.

While we were not successful in this case, we do not regret having made the effort. As the only military association that represents the interests of all Reserve and National Guard service members (enlisted as well as officers), including those who are eligible for membership in our organization but have not yet joined, ROA frequently files amicus briefs in the Supreme Court and other courts arguing for the interests of our members and potential members.

Q: What was the issue in this case?

A: In the Opinion of the Court, Justice Amy Conan Barrett, joined by seven of her eight colleagues, succinctly explained the issue as follows:

Retirees receive Social Security benefits according to a statutory formula based on average past earnings. 42 U. S. C. §415(a)(1)(A). The formula is progressive in that it awards lower earners a higher percentage of their earnings. (Think of it like an income tax that lets you keep more of your 1st dollar earned than your 10,000th.) But the formula originally did not count earnings from jobs exempt from Social Security taxes, so it calculated artificially low earnings for retirees who spent part of their careers in those jobs. As a result, those retirees received an artificially high percentage of their calculated earnings in Social Security benefits—plus, in many cases, payments from separate pensions to boot.

Congress responded to this "windfall" by modifying the formula to reduce benefits when a retiree receives such a separate pension payment. Social Security Amendments of 1983, §113(a), 97 Stat. 76-78, 42 U. S. C. §§415(a)(7)(A)-(B). But it exempted several categories of pension payments, including "a payment based wholly on service as a member of a uniformed

[5] *Petersen v. Astrue,* 633 F.3d 633 (8th Cir. 2011).
[6] *Linza v. Saul,* 990 F.3d 243 (2nd Cir. 2021); *Newton v. Commissioner of Social Security,* 983 F.3d 643 (3rd Cir. 2020); *Kientz v. Commissioner, Social Security Administration,* 954 F.3d 1277 (10th Cir. 2020); and *Martin v. Social Security Administration Commissioner,* 903 F.3d 1154 (11th Cir. 2018).

service." Social Security Independence and Program Improvements Act of 1994, §308(b), 108 Stat. 1522-1523, 42 U. S. C. §415(a)(7)(A)(III). The upshot is that pensions based on uniformed service do not trigger a reduction in Social Security benefits.

> This case concerns the application of the windfall elimination provision to a unique position in federal employment: the "military technician (dual status)." 10 U. S. C. §10216. As its name suggests, this rare bird has characteristics of two different statuses. On one hand, the dual-status technician is a "civilian employee" engaged in "organizing, administering, instructing," "training," or "maintenance and repair of supplies" to assist the National Guard. §10216(a)(1)(C); 32 U. S. C. §§709(a)(1)-(2). On the other, the technician "is required as a condition of that employment to maintain membership in the [National Guard]" and must wear a uniform while working. 10 U. S. C. §10216(a)(1)(B); 32 U. S. C. §§709(b)(2)-(4).
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> This dual role means that technicians perform work in two separate capacities that yield different forms of compensation. First, they work full time as technicians in a civilian capacity. For this work, they receive civil-service pay and, if hired before 1984, Civil Service Retirement System pension payments from the Office of Personnel Management. See 5 U. S. C. §§2101, 8332(b)(6); 42 U. S. C. §410(a)(6)(A) (1970 ed.); 26 U. S. C. §3121(b)(6)(A) (1970 ed.). Second, they participate as National Guard members in part-time drills, training, and (sometimes) active-duty deployment. See 32 U. S. C. §§502(a), 709(g)(2). For this work, they receive military pay and pension payments from a different arm of the Federal Government, the Defense Finance and Accounting Service. See 37 U. S. C. §§204, 206; 10 U. S. C. §1.[7]

Q: How did the Supreme Court decide that issue?

A: Justice Barrett's Opinion of the Court includes the following:

> Babcock argues that the agency and courts below erred in reducing his Social Security benefits based on his pension for technician employment. The dispute is narrow: All agree that Babcock's separate military pension for his National Guard service does not trigger the windfall elimination provision. And all agree that Civil Service Retirement System pensions generally do trigger that provision. The only question is whether Babcock's civil-service pension for technician work avoids triggering the provision's reduction in benefits because it falls within the exception for "a payment based wholly on service as a member of a uniformed service." 42 U. S. C. §415(a)(7)(A)(III). The answer depends on whether Babcock's technician work was service "as" a member of the National Guard. See §410(m) (defining "member of a uniformed service" to include a member of a "reserve component" as defined in 38 U. S. C. §101(27), which includes the Army National Guard of the United States).

[7] *Babcock,* 142 S. Ct. at 643-44.

It was not. In context, "as" is most naturally read to mean "[i]n the role, capacity, or function of." American Heritage Dictionary 106 (3d ed. 1992); see also 1 Oxford English Dictionary 674 (2d ed. 1989) ("[i]n the character, capacity, or *role* of "). And the role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard. The statute defining the technician job makes that point broadly and repeatedly: "For purposes of this section and any other provision of law," a technician "is" a "civilian employee," "assigned to a civilian position" and "authorized and accounted for as" a "civilian." 10 U.S.C. §§10216(a)(1), (a)(1)(C), (a)(2).

This statute's plain meaning "becomes even more apparent when viewed in" the broader statutory context. *FCC* v. *AT&T,* 562 U. S. 397, 407, 131 S. Ct. 1177, 179 L. Ed. 2d 132 (2011).

While working in a civilian capacity, technicians are not subject to the Uniform Code of Military Justice. See 10 U. S. C. §§802(a)(3)(A)(ii), 12403, 12405. They possess characteristically civilian rights to seek redress for employment discrimination and to earn workers' compensation, disability benefits, and compensatory time off for overtime work. See 32 U. S. C. §709(f))(5); 42 U. S. C. §2000e-16; 5 U. S. C. §§8101 *et seq.*, 8337(h), 8451; 32 U. S. C. §709(h). And, as particularly significant in the context of retirement benefits, technicians hired before 1984 are members of the "civil service" entitled to pensions under Title 5 of the U. S. Code, which governs the pay and benefits of civil servants. See 5 U. S. C. §2101. These provisions demonstrate that Congress consistently distinguished technician employment from National Guard service.

That distinction holds true even though Babcock also served at other times in a different capacity as a member of the National Guard. His civil-service pension payments are not based on that service, for which he received separate military pension payments that do not trigger the windfall elimination provision. Nor are we moved by Babcock's argument that the statutory requirement for technicians to maintain National Guard membership makes all of the work that they do count as Guard service. A condition of employment is not the same as the capacity in which one serves. If a private employer hired only moonlighting police officers to be security guards, one would not call that employment "service as a police officer." So too here: the fact that the Government hires only National Guardsmen to be technicians does not erase the distinction between the two jobs.

Babcock protests that the distinction is not meaningful. He argues that the word "as" may sometimes bear the looser meaning "in the likeness of " or "the same as," rather than "in the Brief 4-5. With this looser meaning of "as," the uniformed-services exception would apply to "a payment based wholly on service [in the likeness of or the same as] a member of a uniformed service." The technician job satisfies this functional test, Babcock says, because whatever its classification, the job's qualifications, duties, and dress code render it indistinguishable from National Guard service. According to Babcock, Congress' choice to designate the technician's work as "civilian" is irrelevant to the uniformed-services exception. Brief for Petitioner 3.

> We are unpersuaded. To begin with, the only reason Babcock advances for choosing his functional interpretation of "as" is that Congress used the word "capacity" (or the arguably analogous "status") in other provisions and did not do so in the uniformed-services exception. See, *e.g.*, 32 U. S. C. §101(19) ("status as a member"); 10 U. S. C. §723(a) ("employ[ment] in" a "capacity"). But these scattered provisions do not create the kind of "stark contrast" that might counsel adoption of a meaning other than the most natural one. Cf. *Astrue* v. *Ratliff*, 560 U. S. 586, 595, 130 S. Ct. 2521, 177 L. Ed. 2d 91 (2010). At most, they illustrate that Congress has employed several variations on the same theme to distinguish between service in different capacities.
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> More importantly, though, Babcock's functional test is inconsistent with the choices that Congress made in the statutory scheme. Determining whether Babcock's technician employment was service "as" a member of the National Guard does not turn on factors like whether he wore his uniform to work. It turns on how Congress classified the job—and as already discussed, Congress classified dual-status technicians as "civilian." Babcock dismisses that distinction as one drawn for purposes of "administrative bookkeeping," but bookkeeping matters when it comes to pay and benefits.
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> Babcock's civil-service pension payments fall outside the Social Security Act's uniformed-services exception because they are based on service in his civilian capacity. We therefore affirm the judgment of the Court of Appeals. It is so ordered.[8]

Q: Was there a dissent?

A: Yes. In his lone dissent, Justice Neil Gorsuch wrote:

> As the only dissenter on this narrow question of statutory interpretation, I confess trepidation. Still, I cannot help but find compelling the arguments advanced by the petitioner before us and by the Eighth Circuit in *Petersen* v. *Astrue*, 633 F. 3d 633, 637-638 (2011).
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> Dual-status military technicians hold "a unique position in federal employment." *Ante,* at 2. Not only do they sometimes serve on active duty, as the petitioner did. *Babcock* v. *Commissioner of Social Security*, 959 F. 3d 210, 212 (CA6 2020). By statute, they spend the rest of their time working for the Guard—on matters ranging from training others to administration to equipment maintenance. 10 U. S. C. § 10216(a)(1)(C); 32 U. S. C. § 709(a). At all times, they must "maintain membership" in the National Guard and wear a Guard uniform while on the job. 10 U. S.C. § 10216(a)(1)(B); 32 U. S. C. § 709(b). The authority to discharge or discipline these individuals, too, rests with the Adjutant General. §§ 709(d), (f). Given these features of their employment, I would hold that dual-status technicians "serv[e] as" members of the National Guard in all the work they perform for this country day in and day out. 42 U. S. C. § 415(a)(7)(A)(III).

[8] *Babcock,* 142 S. Ct. at 645-47.

> I appreciate the analogy to police officers moonlighting as private security guards. *Ante,* at 6. But to my mind dual-status technicians are more like part-time police officers employed in their outside hours by the same police department to train recruits, administer the precinct office, and repair squad cars—all on the condition that they wear their police uniforms and maintain their status as officers. I suspect most reasonable officers in that situation would consider the totality of their work to constitute "service as . . . member[s]" of the police force. So too here I expect most Guardsmen who serve as "dual-status technicians"—who come to work every day for the Guard, in a Guard uniform, and subject to Guard discipline—would consider all of their work to represent "service as . . . member[s]" of the National Guard. I would honor that reasonable understanding and would not curtail servicemembers' Social Security benefits based primarily on implications extracted from other, separate "bookkeeping" statutes. *Ante,* at 7.[9]

Q: What is the practical effect of this Supreme Court decision?

A: Going forward, dual-status technicians in the Army National Guard will receive Social Security benefits that are offset for their *civilian* pensions in the Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS). These same technicians also receive military retirement benefits under chapter 1223 of title 10 of the United States Code. There is no Social Security offset for receipt of military retirement benefits under chapter 1223.

Q: What about dual-status technicians in the Air National Guard?

A: This decision will apply in exactly the same way to dual-status technicians in the Air National Guard.

Q: What about dual-status technicians in the Army Reserve and Air Force Reserve?

A: This decision will apply in exactly the same way to dual-status technicians in the Army Reserve and Air Force Reserve.

Q: Are there dual-status technicians in the Navy Reserve, the Marine Corps Reserve, or the Coast Guard Reserve?

A: No. Those Reserve Components meet their full-time support needs in other ways and do not employ dual-status technicians.

Q: What is "full-time support"?

[9] *Babcock,* 142 S. Ct. at 647 (Gorsuch, J., dissenting).

A: A Reserve Component is made up primarily (90% or more) of part-timers who are only paid for the days when they serve or train to maintain their readiness to serve. The cost of a Guard or Reserve part-timer is only a fraction of the cost of a full-time Active Component service member, so the Reserve Components are a cost-effective way to provide for defense readiness.[10]

A Reserve Component needs a cadre of full-timers to perform essential functions like recruiting, maintenance of aircraft and other equipment, and preparing the training for the part-timers on their drill weekends and annual training tours. In the four Army and Air Force Reserve Components (the Army Reserve, the Army National Guard, the Air Force Reserve, and the Air National Guard), most of this full-time support (FTS) is provided by "technicians."

A technician has a hybrid military-civilian status. He or she is required to be a member of and to maintain membership in one of the Reserve or National Guard units that he or she supports, and the technician participates in inactive duty training (drills) and annual training in his or her military capacity, and when the unit is mobilized the technician usually goes with the unit, in the technician's military status.[11] On other workdays, the technician is considered to be a civilian employee of the Reserve Component.

If you were to visit a military installation on a weekday, you would not be able to distinguish the technicians from the full-time active-duty service members or the Reserve Component service members there for service or training. The technicians wear their military uniforms and observe military courtesies (saluting, etc.) while at work, and they perform essential functions for the Reserve Components of which they are members.

In the Army National Guard and Air National Guard, the technicians have a hybrid Federal-State status in addition to their hybrid military-civilian status. For purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA), a technician is an employee of the Adjutant General[12] of the State where the technician serves.[13] For other purposes, National Guard technicians are treated as Federal employees of the Department of the Army (for Army

[10] Lieutenant General Richard Scobee, the Chief of the Air Force Reserve, testified to Congress as follows: "The Air Force Reserve is a cost-effective, accessible, and ready force. When the nation needed rapid pandemic response, we had medical personnel on the ground in New York and New Jersey within 48 hours. We provide strategic depth for national defense while operating on only 3% of the total Department of the Air Force budget. We are committed to attracting top talent by fostering a culture of inclusion in which every Airman is valued and can thrive."

[11] Babcock was called to the colors and deployed to Iraq for a year in 2005-06.

[12] The Adjutant General is the state official who heads up the Army National Guard and Air National Guard of a specific state or territory.

[13] *See* 38 U.S.C. § 4303(4)(B). *See* Law Review 14029 (March 2014) and Law Review 15020 (March 2015) concerning the enforcement of the USERRA rights of National Guard technicians.

National Guard technicians) or the Department of the Air Force (for Air National Guard technicians).
In the Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve, dual-status technicians are not used. Most of the FTS needs are met by reservists on full-time Active Guard and Reserve (AGR) duty.

Q: What are the Reserve Components?

A: Our nation has eight Reserve Components of the armed forces. In ascending order of size, they are the Space Force Reserve (newly established and just getting organized), the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The Air National Guard and Army National Guard are hybrid Federal-State entities, while the other six Reserve Components are purely Federal. The authors of this article are retired officers of the Navy Reserve (Wright) and the Air Force Reserve (Lukas).

Now more than ever, our nation depends upon the Reserve Components for national defense readiness. The number of Reserve Component part-timers is almost equal to the number of people serving full-time in the Active Component of the armed forces, so the Reserve Components account for almost half of our nation's pool of trained personnel available in an emergency. More than one million National Guard and Reserve personnel have been called to the colors since the terrorist attacks of 9/11/2001, the "date that will live in infamy" for our time.

Q: What is an amicus brief?

An organization with members who are affected by the outcome of a court case, but are not parties to that case, can file an amicus curiae ("friend of the court" in Latin) brief, and that is what ROA did in the Supreme Court *Babcock* case. Neal K. Katyal, Esq., a former acting Solicitor General of the United States,[14] represented David Babcock on a pro bono (no fee) basis. Mr. Katyal suggested that ROA file an amicus brief to explain to the Court the critical role of the Reserve Components and the essential role of Reserve and National Guard "technicians" in providing full-time support for the Reserve Components.

ROA has previously filed amicus briefs in the Supreme Court, in the United States Court of Appeals for the 3rd Circuit, in the United States Court of Appeals for the 7th Circuit, and in the Supreme Court of New Mexico, in cases arising under USERRA. *Babcock* did not involve USERRA.

[14] The Solicitor General is the Number 3 official in the United States Department of Justice (DOJ). The Solicitor General and his or her staff represent the interests of the United States in Supreme Court cases.

It involved another Federal statute that is important to persons who serve in the Reserve Components.

Q: What is ROA?

A: The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA),[15] is a congressionally chartered military service organization that advocates for strong national defense and for the interests of service members, especially those who serve in the Reserve Components. ROA is almost 100 years old. It was founded in October 1922 at a convention held in the historic Willard Hotel in Washington, DC. General of the Armies John J. Pershing, who commanded U.S. forces in "the Great War" (as World War I was then known), invited Reserve officers who had served under him to attend the convention to discuss what they could do to establish and maintain national defense readiness. General Pershing and those he invited to the meeting recognized that calling World War I "the war to end all wars" was a dangerous conceit, and as it turned out less than a generation later our nation was dragged into an even greater conflict.

One of the reserve officers who founded ROA was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that relying on the Reserve Components, including the National Guard, is a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Q: Who is eligible to join ROA?

A: If you are now serving or have ever served in any one of our nation's eight uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active

[15] At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new "doing business as" (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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[16] You can also donate on-line on our website, www.roa.org.