No. 24-1774

United States Court of Appeals for the Federal Circuit

DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,
v.
RONALD L. MOULTON, MERIT SYSTEMS PROTECTION BOARD,
Respondents.

Petition for Review of Final Order of the
Merit Systems Protection Board in No. DE-0841-18-0053-I-1

RESPONSE BRIEF OF RESPONDENT RONALD L. MOULTON

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October 2, 2024

CERTIFICATE OF INTEREST

Counsel for Ronald L. Moulton certifies the following:

1. The full name of every party represented by me is:

   Ronald L. Moulton

2. The names of the real parties in interest represented by me are:

   None other than Ronald L. Moulton.

3. All parent corporations and any publicly held companies that own 10% or more of stock in the parties represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me before the originating court or that are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   N/A

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal is:

   N/A

6. Organizational Victims and Bankruptcy Cases: Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees) are not applicable because this is not a criminal or bankruptcy case. See Fed. Cir. R. 47.4(a)(6).

   N/A

DATED: October 2, 2024

By: */s/ J. Kain Day*
J. Kain Day

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STATEMENT OF RELATED CASES

The Director of the Office of Personnel Management (OPM) previously filed a petition for judicial review of the Merit Systems Protection Board (Board) decision at issue in this appeal. That petition was docketed as Case No. 24-109, and after the Court granted judicial review, the appeal was transferred to the Court's regular docket and docketed under Case No. 24-1774. Mr. Moulton is not aware of any other appeal in or from this administrative proceeding.

Mr. Moulton is also not aware of any case pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

OPM petitions for judicial review of a final judgment of the Merit Systems Protection Board, entered on November 28, 2023. Appx1-14. OPM filed its petition in a timely fashion, and the Court exercised its discretion to grant review based on that petition. *See OPM v. Moulton*, No. 24-109, 2024 WL 1953955 (Fed. Cir. May 3, 2024).

STATEMENT OF THE ISSUE

Whether 5 U.S.C. §§ 8421(c) and 8467(a), together, require an express court order for OPM to apportion a former employee's retirement annuity supplement between that employee and his former spouse.

INTRODUCTION

In 2010, Ronald L. Moulton retired from his 25-year-long career as an air traffic controller with the Federal Aviation Administration. His decades-long service entitled him to retirement benefits under the Federal Employees Retirement System (FERS), a retirement system administered by the Office of Personnel Management. That system has three core retirement benefits: a basic annuity (a government pension), the Thrift Savings Plan (the federal government's version of 401(k) savings), and Social Security. Together, these benefits provide retirement income for former federal employees.

When Mr. Moulton retired, he was eligible to receive most of his FERS benefits immediately, but he was too young to begin drawing Social Security benefits, which are available only to retirees who are age 62 or older. For federal retirees in Mr. Moulton's position, Congress provided an additional FERS benefit: the annuity supplement. The annuity supplement bridges the gap, providing early retirees with an approximation of their Social Security benefits until they reach age 62.

Although FERS benefits are generally provided to the retiree who worked in public service, Congress also recognized that a federal employee might agree to allocate some portion of her benefits to a former spouse. Mr. Moulton, for example, agreed to share some of his FERS benefits with his ex-wife, Jill Moulton. The

couple's divorce decree expressly allocated Ms. Moulton a share of Mr. Moulton's basic annuity, Appx67, but it did not address the annuity supplement, *see* Appx14. This appeal must decide whether the divorce decree nonetheless requires division of Mr. Moulton's annuity supplement.

The plain statutory text answers that question. Two statutes—Section 8421(c) and Section 8467 in Title 5—establish a straightforward rule. First, Section 8467(a) creates an express-order requirement: no FERS payment can be split unless "expressly provided for in the terms of" a divorce decree. 5 U.S.C. § 8467(a). Then, Section 8421(c) clarifies that rule applies equally to the annuity supplement: the annuity supplement "shall, for purposes of section 8467, be treated in the same way" as the basic annuity. *Id.* § 8421(c). Rephrased, the annuity supplement is subject to the same *rules* as the basic annuity, i.e., the rules set forth in Section 8467, but it is not apportioned as *part* of the basic annuity.

The other traditional tools of statutory interpretation confirm the plain meaning of Section 8421(c). When Congress wants to incorporate procedural provisions, as it did in Section 8421(c), it often does so with "treated . . . as" or "in the same way" phrasing, and elsewhere, Congress made it clear that the basic annuity and annuity supplement are distinct payments. Moreover, no canon of interpretation or policy preference undermines the plain text of Section 8421(c). In fact, this interpretation of Section 8421(c) comports with clear congressional intent.

For thirty years, OPM adhered to the plain meaning of Section 8421(c). It "considered the Annuity Supplement to be a Social Security-type benefit," which was presumptively "not allocable as between former spouses." *See* Appx182. Only a "state court order [that] expressly addressed the Annuity Supplement" could result in division. *See* Appx182.

But OPM changed course in 2016—six years *after* Mr. Moulton began receiving retirement benefits. And it did so without providing notice. Appx182. As OPM's own Officer of the Inspector General recognized, "retirees and the former spouses learned of OPM's decision only when their annuity amounts changed—many years after the parties had divorced, after a state court had ordered a former spouse's marital share, and after OPM had accepted the state court order for processing." Appx182. Now, OPM contends that Section 8421(c) makes the basic annuity and annuity supplement "part of the same retirement payment." OPM Br. 11. So those payments must be "subject to the same allocation." OPM Br. 9. That change in policy had, and will continue to have, significant negative impacts on retirees who came to rely on OPM's policy and the plain language of the statute—like Mr. Moulton.

The Board rejected OPM's attempt to rewrite the plain statutory language, Appx1-14, and this Court should do the same.

STATEMENT OF THE CASE

I. Statutory Background

In 1978, Congress "comprehensively overhauled the civil service system." *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 773 (1985). It replaced an outdated patchwork of statutes with the uniform processes set out in the Civil Service Reform Act (CSRA) of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified, as amended, in scattered sections in title 5). Among other things, that statute updated the "Civil Service Retirement System" or "CSRS," which provides federal employees with a source of retirement income. Eligible employees receive an annuity, *see* 5 U.S.C. § 8333, which is calculated using a complex formula subject to various adjustments, *e.g.*, *id.* §§ 8339 (computation), 8340 (cost-of-living adjustment).[1]

As modified in 1978, the CSRS annuity replaced certain Social Security benefits. Social Security benefits were created in response to "the crisis of the Great Depression," *Smith v. Berryhill*, 587 U.S. 471, 474 (2019), and those benefits include both an "insurance program" and a "welfare program." *Bowen v. Galbreath*, 485 U.S. 74, 75 (1988). The insurance program, codified at 42 U.S.C. ch. 7, subch. II, "provides old-age, survivor, and disability benefits to insured individuals irrespective of financial need." *Bowen*, 485 U.S. at 75. Those individuals pay into

[1] Although, as explained below, the CSRS has been replaced with the Federal Employees' Retirement System, the CSRS continues to govern retirement benefits for certain employees.

the system during their working lives and are entitled to draw from the system during retirement. *See* 42 U.S.C. § 402(a). But CSRS employees—a significant portion of the national workforce at the time—were excluded from that insurance program. *See* 42 U.S.C. § 410(a)(5)(B)(ii).

In 1986, Congress again revamped the retirement system for federal employees. *See* Federal Employees' Retirement System (FERS) Act, Pub. L. No. 99-335, 100 Stat. 514 (1986) (codified in chapter 84 of title 5). This time, Congress crafted a new system for retirement benefits that incorporated, rather than excluded, the Social Security system. Those benefits are the subject of this appeal.

A. Benefits Available to FERS Employees

FERS is a three-part plan that includes a basic annuity, the Thrift Savings Plan, and Social Security. Together, these benefits provide retirement income for former federal employees.

The core FERS retirement benefit is the basic annuity. *See* 5 U.S.C. ch. 84 subch. II (Basic Annuity subchapter). Every federal employee with at least five years of creditable service is entitled to an annuity. *See id.* §§ 8410 (eligibility), 8411 (creditable service). The basic annuity is computed using a statutory formula, *see* 5 U.S.C. § 8415, and generally, it is paid to the retiree on a monthly basis for the rest of her life, *id.* §§ 8463 (monthly payments), 8464(b) (termination).

The next major part of the FERS system is the Thrift Savings Plan. 5 U.S.C. ch. 84, subch. III (Thrift Savings Plan). The Thrift Savings Plan is a retirement savings and investment plan for federal government employees—somewhat similar to private 401(k) plans. *See id.* Covered employees make contributions to the Thrift Savings Fund, and generally, those contributions are treated as tax-deferred contributions to a trust. *See* 5 U.S.C. §§ 8432 (contributions), 8440 (tax treatment). The employee is entitled to benefits upon separation from the government, *see id.* § 8433(a), or the employee can roll the benefits into an eligible retirement plan, *id.* § 8433(b)(2).

The final part of the FERS benefit system is Social Security. Rather than being excluded from this system, as employees were under the CSRS, federal employees are now required to pay into Social Security just like any private-sector employee. *See* 42 U.S.C. § 410 (no exclusion for FERS employees). FERS employees are, thus, taxed on every paycheck for their mandatory Social Security contribution. Once a FERS employee reaches age 62, she becomes eligible to draw from the Social Security system. *See* 42 U.S.C. § 402(a).

B. Early Retirement, Mandatory Retirement, and the Annuity Supplement

When setting up the FERS system, Congress rewarded those employees who choose to work in federal service for several decades. Generally, employees who spend at least 20 years in the federal service are entitled to retire and begin drawing

a basic annuity *before* turning age 62. *See, e.g.*, 5 U.S.C. § 8412(a), (b), (d)(1), (e). For some employees, there are specific rules providing for an immediate retirement. For example, air traffic controllers may retire "after completing 25 years of service" or "after becoming 50 years of age and completing 20 years of service." *Id.* § 8412(e)(1)-(2). Because employees with fewer years of service cannot retire and receive the basic annuity until age 62, *see id.* § 8412(c), these long-serving employees are said to be entitled to an *early* retirement.

Congress also made a policy decision that certain employees *must* retire before age 62. Typically, these employees are in jobs that might be considered more stressful or dangerous than other federal jobs. For example, any air traffic controller with more than 20 years of service *must* retire at age 56, and any air traffic controller who is older than 56 must retire upon reaching 20 years of service. *Id.* § 8425(a). A similar rule applies for law enforcement officers and firefighters. *Id.* § 8425(b).

In setting up this scheme, Congress ensured that early retirees would receive their *full* suite of FERS benefits upon retirement. Retirees are not eligible for Social Security benefits until age 62. *See* 42 U.S.C. § 402(a). Thus, a federal employee who retires early (i.e., before age 62) is entitled to draw a basic annuity and Thrift Savings Plan distributions, but not Social Security benefits—that is, she is missing one part of her three-part retirement plan.

To bridge that gap, Congress provided that employees eligible for (or required to take) an early retirement are entitled to an additional benefit: an annuity supplement. *See* 5 U.S.C. § 8421. The annuity supplement approximates the value of the Social Security benefit an employee will receive starting at age 62 based solely on her earning from federal employment. *See id.* § 8421(b). In that way, the annuity supplement ensures that a covered employee receives the same retirement income that she would have had she retired at age 62. Consistent with this aim, the annuity supplement ends once a retiree reaches age 62. *Id.* § 8421(a)(3)(B).

C. Apportionment of FERS Benefits

Although FERS benefits are generally provided to the retiree who worked in public service, Congress also recognized that a federal employee might choose to allocate some portion of her benefits to a spouse or former spouse. *E.g.*, 5 U.S.C. §§ 8418 (survivor election), 8467 (court-ordered division).

A set of rules governs when a retirement payment may be divided between a retired employee and her former spouse after a divorce. *See* 5 U.S.C. § 8467(a). Section 8467 provides that a retirement payment "shall be paid (in whole or in part)" to the former spouse if "*expressly provided for* in the terms of . . . any court decree" related to the divorce. *Id.* § 8467(a)(1) (emphasis added). Rephrased, FERS establishes an express-statement rule for splitting retirement payments in this

context. And the section governing the retirement annuity supplement makes it clear that the same rule applies to any annuity supplement:

> [A retirement annuity supplement payment] shall, for purposes of section 8467, be treated *in the same way* as an amount computed under [the section governing the calculation of the basic annuity].

5 U.S.C. § 8421(c) (emphasis added).

Consistent with the statute's plain language, for almost thirty years, OPM included the retirement annuity supplement in benefits paid to a former spouse only when a "state court order *expressly* addressed the Annuity Supplement." Appx182 (emphasis added) (Office of Inspector General Review of OPM's Non-Public Decision). OPM "considered the Annuity Supplement to be a Social Security-type benefit and thus not allocable as between former spouses." Appx182; *see also* 42 U.S.C. §§ 402(b)-(c), 407 (division of Social Security benefits between divorced spouses subject to statutory formula, not divorce decree).

In 2016, OPM suddenly shifted course. For retirees who had a portion of their basic annuity payment paid to a former spouse, OPM started paying out a portion of the annuity supplement as well, even when the relevant divorce decree did not mention the supplement specifically. Appx182. Apparently, OPM reinterpreted Section 8421(c) as requiring the annuity supplement to be treated *as part-and-parcel* of the basic annuity. Accordingly, whenever the basic annuity was divided, the annuity supplement was divided as well.

In upending its longstanding interpretation of the statute, OPM did not provide any notice to retirees. Appx182. "[R]etirees and the former spouses learned of OPM's decision only when their annuity amounts changed—many years after the parties had divorced, after a state court had ordered a former spouse's marital share, and after OPM had accepted the state court order for processing." Appx182. This is despite the fact that OPM's *own* Office of the Inspector General concluded that policy change was a "new rule" that had been promulgated without the necessary procedures. Appx194-195. As that Office said, "if OPM wishes to reinterpret the meaning of Section 8421(c) . . . [it] must do so in formal rulemaking, using notice and comment procedures." Appx194-195. No such procedures were used.

What is more, OPM applied its statutory reinterpretation retroactively. Appx182. As a result, hundreds of retirees now each owe the government *thousands* of dollars, which OPM plans to extract from those retirees by reducing their monthly annuity payments. *See* Appx185 (noting that at least 595 retirees would be affected); Appx186-187 (listing example employees). Even assuming OPM was permitted to adopt its "new rule" without notice and comment rulemaking, it should not have "appl[ied] such a policy retroactively." Appx196. As OPM's Office of the Inspector General concluded, OPM has "no statutory authorization for such retroactive rulemaking." Appx196.

Ultimately, OPM's Office of the Inspector General recommended that OPM "cease implementing" its new interpretation of the statutory language, repay annuitants for amounts improperly reduced, and publicize its policy position. Appx197-201. OPM refused. Appx197-201.

II. Factual Background

Mr. Moulton was one of the retirees affected by OPM's reinterpretation. He served as an air traffic controller with the Federal Aviation Administration for decades, Appx163, having an exemplary career in the federal government. He was repeatedly promoted, Appx169, and even has "an RNAV arrival" (navigation route) "named after" him, *see* Appx217. That RNAV arrival is "still in use today and serves [thousands] of flights a year." Appx217. It represents "an honorarium," memorializing the "added value" Mr. Moulton provided in the "aviation industry." Appx217.

In 1988, while working in the federal service, Mr. Moulton married Jill Moulton (née Kuryvial). The couple divorced in 2004. Their divorce decree provided Ms. Moulton a share of Mr. Moulton's "gross monthly annuity" and "any benefit [he] earn[ed] based on [his] special [Air Traffic Controller] service." Appx120. The broader set of divorce papers also addressed Mr. Moulton's Thrift Savings Plan, Appx115-118, and included a separation agreement that was carefully

negotiated to include maintenance payments, allocate real and personal property, and address child support obligations, Appx122-140.

Six years later, at age 47, Mr. Moulton chose to take an early retirement. Appx158 (Retirement Application). As an air traffic controller with 25 years of federal service, Mr. Moulton was entitled to an immediate retirement and an annuity supplement. *See* 5 U.S.C. §§ 8412(e)(1), 8421(a). In fact, his decision to retire was conditioned on the availability of the full amount of that annuity supplement. Appx060. As Mr. Moulton explained in briefing below, Mr. Moulton "*would not* have retired when [he] did under" OPM's reinterpretation of Section 8421(c). Appx060.

Consistent with its longstanding practice, OPM applied the couple's divorce decree according to its express terms. It is undisputed that the decree expressly allocated a portion of the basic annuity to Ms. Moulton, but it did not expressly address the annuity supplement. *See* Appx14 (Board Decision); Appx36-40 (AJ's Initial Decision).[2] OPM therefore divided the basic annuity and allocated the entire annuity supplement to Mr. Moulton. Appx090-091 (showing original and revised payments).

[2] OPM has not challenged this understanding of the divorce decree and, thus, forfeits any such challenge. *See* OPM Br. 4-5.

That changed in 2016, when OPM reinterpreted Section 8421(c) to require division of both the basic annuity and the annuity supplement. Appx090-091. OPM reduced Mr. Moulton's ongoing payments by over $300 per month, and it claimed that Mr. Moulton owed the government over $24,000 for past payments that, under OPM's new interpretation should have gone to Ms. Moulton. *See* Appx090-091.[3]

Thereafter, Mr. Moulton appealed to the Board seeking to protect his full retirement benefits. *See* Appx056. He argued that the plain language of Section 8421(c) did not allow for division of the annuity supplement as part-and-parcel of the basic annuity, and that OPM effected a policy change without notice-and-comment rulemaking. During these proceedings the Director of the Office of Personnel Management intervened as a matter of right under 5 U.S.C. § 7701(d). *See* Appx5.[4]

The Board agreed with Mr. Moulton. Appx1-14. It interpreted Section 8421(c), in combination with Section 8467, to unambiguously require a court order that *expressly* addresses the retirement annuity supplement before splitting that supplement. *See* Appx14. The Board accordingly ordered "OPM to rescind its December 12, 2017 final decision, stop apportioning the annuity supplement, and

[3] OPM has since waived collection of the overpayment. OPM Br. 5 & n. 2.

[4] Ms. Moulton also intervened, but she has since passed away. After no representative appeared on behalf of her estate, the Court dismissed her from this appeal. ECF No. 11.

refund all previously apportioned annuity supplement amounts to the appellant." Appx14. Thereafter, OPM sought review in this Court.

SUMMARY OF THE ARGUMENT

All the traditional tools of statutory interpretation support the Board's interpretation. Section 8421(c) requires application of the procedures in Section 8467(a), which in turn require an express order before any annuity supplement is apportioned.

The plain text of Section 8421(c) incorporates the procedures set forth in Section 8467. Specifically, Section 8421(c) requires basic annuity payments and annuity supplement payments to be "treated in the same way" for purposes of "Section 8467." Nothing about that phrasing suggests, as OPM argues, that the basic annuity or annuity supplement are part of the same payment. Instead, those payments are just subject to the same rules set forth in Section 8467.

The statutory context confirms the plain meaning of Section 8421(c). As it did in Section 8421(c), Congress regularly uses the phrases "treated . . . as" or "in the same way" to incorporate separately stated procedures. By contrast, when Congress wanted to specify that two amounts were part of the same payment, it did so with entirely different terms. Moreover, in a neighboring provision, Congress itself treated the basic annuity and annuity supplement as distinct payments—

undermining OPM's claim that Section 8421(c) makes the annuity supplement part of the basic annuity.

OPM's reliance on interpretive canons is misplaced. The canon against surplusage provides no insight into the meaning of Section 8421(c). Under any interpretation of Section 8421(c), that provision does meaningful work in the statutory scheme. The general-specific canon is inapplicable for the same reason.

OPM's interpretation would also undermine congressional intent. Congress crafted Section 8467(a) to protect the role of state courts in adjudicating divorce decrees, yet OPM's interpretation would tie those courts' hands. A state court could *never* allocate the annuity supplement separately from the basic annuity. OPM's interpretation would also eliminate protections for a retiree's annuity supplement, which would be inconsistent with the history and purpose of that supplement.

To the extent policy considerations are relevant, they support the Board's interpretation of Section 8421(c). OPM claims that its interpretation makes "practical sense" because it provides "clarity" for state courts allocating benefits. But nothing about OPM's interpretation provides clarity. Instead, OPM's interpretation would have far-reaching negative effects for retirees. There is a real human cost to OPM's proposed interpretation.

ARGUMENT

I. Standard of Review

Statutory interpretation is a question of law, which this Court reviews *de novo*. *Rosete v. OPM*, 48 F.3d 514, 517 (Fed. Cir. 1995).

II. Section 8421(c) Allows for Division of the Annuity Supplement Only When a Court Order Expressly Provides for Such Division

The statutory text, structure, and purpose unambiguously establish that Section 8421(c) requires application of procedures outlined in Section 8467(a) to the annuity supplement. That statute does not, as OPM insists, make an annuity supplement "part of the same retirement payment" as the basic annuity. OPM Br. 10-11. Moreover, to the extent policy considerations are relevant, they support the Board's interpretation.

A. The Plain Text of Section 8421(c) Incorporates the Express-Statement Rule of Section 8467(a)

Construction "begins with the statutory text." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Here, the text of Section 8421(c) incorporates a *rule* for apportioning the annuity supplement; it does not make an annuity supplement part of the basic annuity.

In full, Section 8421(c) provides that:

> An amount under this section shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415.

This statute draws a distinction between "an amount under this section," i.e., a retirement annuity supplement, and "an amount computed under section 8415," which relates to the basic annuity. Those are two *separate* amounts, referred to using distinct terms. *Contra* OPM Br. 10-11 (arguing the amounts are part of the same payment).

Then, the statutory text defines the relationship between those two amounts: the annuity supplement amount "shall be treated in the same way as" the basic annuity amount "for purposes of Section 8467." 5 U.S.C. § 8421(c). The phrase "treated . . . as" means to "regard and handle in a certain way." *Treat*, American Heritage Dictionary (3d ed. 1992). And a "way" is "[a] manner or method of doing"—as in there are "several ways of solving this problem." *Way*, American Heritage Dictionary (3d ed. 1992). Thus, the statute's direction that the annuity supplement shall be "treated in the same way" as the basic annuity means that supplement should be handled using the same method as the basic annuity. And as is undisputed, a basic annuity is divided between spouses only if a decree "expressly provide[s]" for that division. 5 U.S.C. § 8467(a). Treating the annuity supplement in the same way means that it is divided only if a decree expressly provides for its division.

OPM ignores this plain text in asserting that Section 8421(c) provides that "the annuity supplement [is] considered to be part of the same retirement payment"

as the basic annuity. OPM Br. 10-11. But "treated in the same way" simply does not mean "considered part of." For example, a parent might "treat" her two children "in the same way," but that certainly does not mean that one child is "considered part of" the other.

All told, Section 8421(c) is unambiguous. Section 8421(c) requires that, "for purposes of section 8467," the annuity supplement be "treated in the same way as" the basic annuity. In ordinary parlance, that language requires application of the same *rules*—as outlined in Section 8467—to both distinct payments. It does not provide that the annuity supplement should become part of the basic annuity for purposes of Section 8467. As a result, OPM's argument fails, and the statutory interpretation effort "ends." *BedRoc*, 541 U.S. at 183.

B. The Statutory Context Confirms the Plain Meaning of Section 8421(c)

The statutory context confirms what Section 8421(c) already makes clear. As it did in Section 8421(c), Congress regularly uses the phrases "treated . . . as" and "in the same way" when incorporating separately stated procedures. Moreover, in a provision that neighbors Section 8421, Congress treated the basic annuity and annuity supplement as separate payments—thereby foreclosing OPM's interpretation.

1. Congress Consistently Used Similar Language as What Appears in Section 8421(c) When Incorporating Procedures

"In a given statute, the same term usually has the same meaning and different terms usually have different meanings." *Pulsifer v. United States*, 601 U.S. 124, 149 (2024). This is especially true for terms "with some heft and distinctiveness" that "drafters are likely to keep track of and standardize." *Id.* (provides "money remuneration" as an example of a phrase with heft).

Section 8421(c) was enacted as part of the FERS Act. Throughout that Act, and in the broader statutory scheme, Congress used the phrases "treated in the same way as" or "treated in the same manner as" when incorporating separately stated procedural requirements. By contrast, Congress used different language when it required treating a supplementary annuity payment as part of a basic annuity. This consistent usage of a complex phrase is strong evidence of its ordinary meaning.

a. Section 8442 provides a prime example. *See* FERS Act, Title I § 101. That section relates to death benefits for widows or widowers. *See* 5 U.S.C. § 8442. When a retiree dies, her spouse is often entitled to continue receiving a portion of the retiree's basic annuity under Section 8442(a). The statute also provides eligible spouses with a "supplementary annuity" under Section 8442(f), which is crafted (in most cases) to replace certain Social Security benefits. *Id.* § 8442(f)(3). In this way, the annuity under Section 8442(f) resembles the annuity supplement under Section 8421. Both are separate annuity benefits provided to replace Social Security.

Section 8442 also contains a subsection that largely mirrors the key language in Section 8421(c):

> An amount payable under [Section 8442(f)] shall be adjusted under section 8462 and shall otherwise be treated under this chapter in the same way as an amount payable under [Section 8442(a)]."

Id. § 8442(f)(6). The main difference between the statutes is that Section 8442(f) adds another procedural requirement in Section 8442(f), subjecting those payments to cost-of-living adjustment *rules* set out in Section 8462. But nothing in Section 8442(f) suggests the "supplementary annuity" is *part* of basic death benefit. Instead, this is standard incorporation-by-reference language, making the rules applicable to payments under Section 8442(a) also applicable to payments under Section 8442(f). Section 8421(c) does the same.

Section 8440 provides further support for the meaning of "in the same way." *See* FERS Act, Title I § 101. That statute relates to the Thrift Savings Plan, the federal retirement savings plan that operates like a 401(k) plan. Under that Plan, employees make contributions to a fund—called the Thrift Savings Fund—which is "treated as" a particular type of "trust." 5 U.S.C. § 8440(a)(1). Contributions or withdrawals from the fund are also "treated *in the same manner* as contributions to or distributions from such a trust." *Id.* § 8440(a)(2) (emphasis added). Nothing about this language suggests that the Fund *is* a trust or that contributions *are* contributions to a trust. Instead, Section 8440 is identifying the rules that must be

applied to the Fund and related contributions, which are the same rules applicable to the specified type of trust. Section 8440 incorporates separately provided procedures—just like Section 8421(c).

Several other provisions in Title 5 use similar language to a similar effect. *E.g.,* 5 U.S.C. §§ 8412a(g)(3) ("the phased retirement period shall be *treated as* if it had been a period of part-time employment"), 8415(k)(2) ("no part of a physicians comparability allowance shall be *treated as* basic pay for purposes of any computation under this section unless"), 8432b(b)(3) ("Contributions under this subsection . . . shall be made at the same time and *in the same manner* as would any contributions under [other statutory sections.]"), 8440e(e)(4) ("Section 8435 shall apply to a full TSP member *in the same manner* as such section is applied to an employee or Member under such section.").

Put simply, chapter 84 of title 5 is littered with examples of statutes that incorporate statutory procedures. Each uses the phrase "treated . . . as" or the phrase "in the same way" as something else, always referring to a requirement for treatment under some set of rules. None provide that the statutory focus *becomes* or should be *considered part of* that something else. This consistent, uniform usage is strong support for interpreting "treated in the same way as" to incorporate the *rules* governing the division of the annuity supplement, not to transform the annuity supplement into part of the basic annuity.

b. Those examples stand in marked contrast to Congress's treatment of annuities for Central Intelligence Agency (CIA) employees. In addition to overhauling the retirement system for general federal employees, the FERS Act also addressed the retirement system for CIA employees. *See* FERS Act, Title V. As part of that effort, Congress made CIA employees subject to the FERS system, with some modifications. Among those modifications, Congress enacted a set of special rules for former spouses of CIA employees. *Id.* One such rule excepted the spouses from the usual "in the same way" language codified in Section 8421(c). Any annuity division happened automatically:

> The entitlement of a former spouse to a portion of an annuity of a retired officer or employee of the Agency under this section shall extend to any supplementary annuity payment that such officer or employee is entitled to receive under section 8421 of title 5, United States Code.

FERS Act, Title V § 304(g); *see also* 50 U.S.C. § 2154(c)(2) (codifying a similar rule). This is the exact sort of language that would accomplish what OPM misinterprets Section 8421(c) to say. Thus, "Congress knew how to" dictate an annuity apportionment, but it simply "chose not to" do so in Section 8421(c), and that is strong evidence of the meaning of that section. *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 394 (2015).

c. OPM seeks support for its interpretation in Section 8341(h)(1), noting that the statute requires dividing payments if "expressly provided" for in a divorce decree and insisting that Congress would have used similar language in Section

8421(c) if Congress had wanted that rule to apply to annuity supplements. OPM Br. 17. But that statute is simply inapposite. Section 8341 is part of the CSRS, not the FERS. The CSRS is an entirely different benefits system, which did not contain an annuity-supplement provision. Moreover, subsection (h) relates to the election of survivor benefits for a former spouse, not the division of annuity payments. Those contextual differences are critical. Section 8341(h)(1) includes the "expressly provided" phrasing because no other CSRS provision provides a rule for election of survivor benefits for former spouses. By contrast, Section 8421(c) did not need to repeat the "expressly provided" phrasing in its own text because it was sufficient to simply cross reference the rules already set out in Section 8467(a). Doing so reduced repeated text in statutory scheme—avoiding surplusage concerns.

2. Congress Treated the Basic Annuity and Annuity Supplement as Separate Payments

OPM's argument that "the basic annuity and annuity supplement are considered part of the same retirement payment" is also inconsistent with the broader statutory structure. OPM Br. 8; *see also id.* at 8 n.4, 11 n.6 (pointing to agency regulations that treat the two payments as part of a single "employee annuity"). Contrary to OPM's insistence, Congress plainly treated the basic annuity and annuity supplement as *separate* payments.

In Section 8420a, which falls within the same subchapter as Section 8421, Congress distinguished between basic-annuity and annuity-supplement payments.

Ordinarily, FERS benefits are paid on a monthly basis, 5 U.S.C. § 8463, but Section 8420a operates as an exception to that rule. Certain retirees who have "a life-threatening affliction or other critical medical condition" can elect to receive an "alternative" annuity as defined by OPM regulations. *Id.* §§ 8420a(a) (defining entitlement), 8420a(b) (requiring OPM to promulgate regulations). And Congress provided guardrails for OPM to apply in crafting its regulations. The alternative benefits must, to the extent practicable, be "actuarily equivalent to the sum of . . . the present value of the annuity" (i.e., the basic annuity) and "the present value of the annuity supplement." *Id.* § 8420a(c). If the annuity supplement were *part of* the "annuity," as OPM insists, there would be no need to list those benefits separately. By distinguishing the "annuity" from the "annuity supplement," Congress confirmed the Board's interpretation is correct.

C. OPM's Reliance on Interpretive Canons Is Misplaced

Primarily, OPM's argument relies on two canons of interpretation: the canon against surplusage and the general-specific canon. *See* OPM Br. 9-18. Neither canon supports OPM here.

1. OPM overstates the force of the canon against surplusage. *E.g.*, OPM Br. 11. Although the canon captures a "preference" for avoiding interpretations that would render text ineffective, *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004), not all repetition amounts to surplusage. "Congress may have simply intended to

remove any doubt" by including language that, although "technically unnecessary," provides clarity in the statutory scheme. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226-27 (2008) (quoting *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990)). Moreover, this canon is applicable only when one interpretation creates "substantially less" surplusage than the alternative proposal. *Fischer v. United States*, 144 S. Ct. 2176, 2189 (2024); *see also Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). Properly understood, the canon against surplusage does not help OPM because Section 8421(c) does meaningful work under the Board's interpretation.

Absent Section 8421(c), the statutory structure might confuse a reader into assuming the annuity supplement should be considered part of the basic annuity "[p]ayment" under Section 8467(a). Section 8421 falls within the "Basic Annuity" subchapter, and provisions in that subchapter generally relate to eligibility for, computation of, or adjustments to the basic annuity. *See* 5 U.S.C. ch. 84, subch. II. The phrase "annuity supplement" itself might also contribute to this confusion—leading a reader to believe this provision acts only as an adjustment to the *amount* of the basic annuity, as opposed to a distinct benefit conferred on a special class of retirees. If a reader were to fall into this trap—assuming the annuity supplement was just another part of the basic annuity—then she might conclude that an order "expressly" dividing the *basic* annuity likewise divides the annuity supplement. Put

more simply, without Section 8421(c), the statute might be read in precisely the way that OPM urges—that is, OPM's interpretation creates its own superfluity problem, and the Board's interpretation treats Section 8421(c) as doing independent work.

Indeed, just before invoking the canon against superfluity, OPM *concedes* that the statute would not be clear without Section 8421(c). OPM admits that absent Section 8421(c) there "may be some confusion as to how to treat the FERS annuity supplement for purposes of court-ordered division under 5 U.S.C. § 8467." OPM Br. 13. But that means that Section 8467, standing alone, would not clearly "require supplements to be apportioned only if required by a divorce decree" and thus that Section 8467 does *not* "already accomplish[] everything that the [B]oard attributes to section 8421(c)." OPM Br. 16.

The parties thus agree that Congress enacted Section 8421(c) as "clear instructions to OPM" on how the annuity supplement should be treated for purposes of Section 8467(a). *See* OPM Br. 13. The parties' dispute turns on the *content* of that instruction: whether the annuity supplement should be treated under the same rule applicable to the basic annuity or as part-and-parcel of the basic annuity. *See* OPM Br. 9 (characterizing parties' dispute). The canon against surplusage has no impact on the answer to that question. Under any party's interpretation, Section 8421(c) "remove[s] any doubt" from the meaning of the statutory scheme. *Ali*, 552 U.S. at 226. Thus, that provision is not surplusage. *See id.*

Having run headlong into its own admission, OPM cannot retreat to an argument that its interpretation of Section 8421(c) results in "substantially less" surplusage than the Board's interpretation. *Cf. Fischer*, 144 S. Ct. at 2189. In either case, Section 8421(c) does precisely the same work—clarifying how the annuity supplement should be treated for purposes of Section 8467(a). Again, the crux of the partes' dispute is what Congress meant by the phrase "treated in the same way as," and under either interpretation, Section 8421(c) provides useful clarity to the statutory scheme.

2. OPM's reliance on the general-specific canon suffers from the same error. OPM Br. 11-12. OPM appears to contend that Section 8421(c) is more specific than Section 8467, such that Section 8421(c) should govern whether an annuity supplement payment is divided under a court order. *See* OPM Br. 10. But again, the parties all agree that "Section 8421(c) applies section 8467's general rule to the specific context of the annuity supplement," *id.* Nobody is arguing that Section 8421(c) does not apply in this specific context. Instead, the dispute is about what Section 8421(c) says in that situation.

D. Adopting OPM's Interpretation Would Undermine the Legislative Purposes Underlying Sections 8421 and 8467

The statutory text plainly supports the Board's interpretation, so the Court need not resort to legislative purpose or history. *See BedRoc*, 541 U.S. at 183. That said, if the Court choses to "make use" of those interpretive tools, they are "clear

evidence" confirming the plain meaning of the statutory text. *Cf. Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

1. OPM's interpretation is antithetical to the purposes underlying Section 8467(a). That provision was motivated by federalism concerns. As this Court has recognized, "OPM is neither qualified nor obligated to resolve disputes about the import of state divorce decrees." *Hayward v. OPM*, 578 F.3d 1337, 1345 (Fed. Cir. 2009) (addressing CSRS) (citation omitted). The statutory text accordingly assigns OPM a "purely ministerial" task. *See id.* It is charged with applying the "express[]" terms of a state-court order, 5 U.S.C. § 8467(a), thereby "honor[ing]" the role of state courts in adjudicating matrimonial issues. *Cf.* 5 C.F.R. § 838.101(a)(2).[5]

OPM's interpretation would cabin state courts' authority to craft divorce decrees, rather than honoring their place in the matrimonial system. OPM interprets Section 8421(c) as inextricably linking the basic annuity and the annuity supplement. If a divorce decree addresses the basic annuity, OPM argues, it also necessarily addresses the annuity supplement. Under that view, state courts are disabled from issuing any order that treats the basic annuity and annuity supplement differently. Any order purporting to do so would directly conflict with federal law and would

[5] This is consistent with the fact that federal courts lack the "power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

therefore be preempted. *See Howell v. Howell*, 581 U.S. 214, 220 (2017) (federal statute preempted state divorce decree). That cannot be what Congress intended. The federal scheme is designed to protect state authority, not to nullify the power afforded state-court judges.

2. OPM's interpretation would also be inconsistent with the purpose and history of Section 8421(c). The annuity supplement was crafted as replacement for Social Security benefits. *See* OPM Br. 12-13 (discussing history). Congress recognized that employees forced to retire before age 62 would suffer a retirement-income shortfall, given they would be too young to qualify for Social Security payments. *See* 42 U.S.C. § 402(a)(2). Thus, just like Social Security, the "purpose of" the annuity supplement is to provide for the "decent support of elderly workmen who have ceased to labor." *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 364 (1946).

To serve that purpose, Congress enacted provisions aimed at "protect[ing]" those "social security beneficiaries" from creditors' claims. *Fetterusso v. State of N.Y.*, 898 F.2d 322, 327 (2d Cir. 1990). Specifically, future Social Security payments are "not . . . transferable or assignable." 42 U.S.C. § 407(a). This restriction provides an important safeguard for retirees—ensuring they will continue to receive the benefits they are expecting. Importantly, Section 407 applies both to creditors and to former spouses. *See id.* Rather than receiving benefits pursuant to

a state-court order, eligible spouses are entitled to a statutory share. *See* 42 U.S.C. § 402(b)-(c) (providing for statutory share).

It only stands to reason that Congress would have intended similar protections for the annuity supplement. Certainly, Congress crafted a different scheme for allocating benefits. Former spouses are not entitled to a statutory share of the annuity supplement, but they may be allocated a share of that benefit pursuant to an express court order. *See* 5 U.S.C. §§ 8421(c), 8467(a). Under that system, which is consistent with the Board's interpretation and the plain statutory language, employees have a statutory protection against any division that would be against their will—just like the purpose served by 42 U.S.C. § 407(a). An *express* order is required, so they will certainly be on notice of any division.

By contrast, OPM's interpretation would remove or obscure key protections for retirees. That interpretation would require that every mention of the "basic annuity" in a divorce decree would also serve to allocate the annuity supplement. As a result, a retiree may unwittingly give up a portion of his retirement benefits—meant to compensate him in his old age. That would be inconsistent with Congress's clear intent to protect retirees.

3. In a similar vein, there is no dispute that the annuity supplement was intended to replace Social Security benefits. Likewise, there is no dispute that Social Security benefits are not apportioned as part of the basic annuity: those benefits are

subject to a statutory allocation only. *See* 42 U.S.C. § 402(b). It makes sense, then, that Congress would likewise separate the annuity supplement and basic annuity for purposes of apportionment.

E. To the Extent the Court Considers the Policy Implications of Its Ruling, Those Considerations Strongly Support the Board's Interpretation

OPM argues its interpretation of the statute "makes practical sense." OPM Br. 14-15. Of course, the policy decision about what makes sense is for Congress to make, not OPM. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2268 (2024) ("Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences."). But to the extent the Court takes account of such concerns, they cut decisively in favor of the Board's interpretation.

1. OPM's Policy Arguments Are Flawed

OPM argues that its interpretation makes "practical sense." OPM Br. 14-15. OPM notes that "a state marital court typically cannot know . . . whether [an] employee will qualify for the annuity supplement," and that dividing the annuity supplement in the same way as the basic annuity "account[s] for" that "uncertainty." OPM Br. 15. That is simply incorrect. Any uncertainty that exists as to *whether* an employee will be entitled to an annuity supplement is not resolved by setting a rule about *how* that annuity supplement would be divided. Indeed, there is almost always

going to be uncertainty about what an employee's federal benefits will be on retirement. *See, e.g.*, 5 U.S.C. § 8415(a) (providing for calculation of basic annuity based on "1 percent of that individual's average pay multiplied by such individual's total service"); *see also* OPM Br. 14-15. There is nothing the statutes addressing *apportionment*, like Section 8467(a) and 8421(c), could do to remedy that uncertainty. At this point, OPM's "practical sense" argument falls apart.

Instead, what the statutory scheme can do is simple: ensure that everyone is playing by the same clear rules. That is the purpose of Section 8421(c). Rather than burying the annuity supplement in the basic annuity, which could only result in further confusion, that statute requires the divorce decree to call out the annuity supplement specifically. That clarity makes practical sense. Everyone at the negotiating table knows that the annuity supplement can be divided only by an express order, and OPM need not interpret state decrees when apportioning that supplement.

2. Adopting OPM's Interpretation Would Upset Settled Expectations

To the extent the Court does conduct an inquiry into what makes "sense," that analysis strongly favors the Board's interpretation. Adopting OPM's interpretation would not only break from the plain meaning of the statutory text, but it would also upset the settled expectations of numerous retirees in extremely damaging ways.

For thirty years, OPM had a practice consistent with the Board's interpretation of Section 8421(c). No annuity supplement payment was divided, except when that division was "expressly provided for" in a state-court order. As a result, countless divorce decrees were crafted with that practice in mind.

Now, OPM advocates for precisely the opposite rule—requiring division of the annuity supplement any time the basic annuity is divided. What is more, OPM has applied that policy change retroactively. It claims that any prior payments that did not divide the annuity supplement were in "error." *See* OPM Br. 5. As a result, the benefits of affected retirees are not only reduced going forward, but those retirees are also being penalized for what OPM deems to be "overpayments" that occurred in the past.

This will have real negative impacts on retirees. Mr. Moulton is the perfect example. In 2010, Mr. Moulton retired from the federal service. Appx158 (application for retirement). Thereafter, he began receiving his annuity benefits, including his entire annuity supplement payment. *See* Appx150-151 (original calculation). Six years later, after he had come to rely on those benefits, OPM proposed stripping Mr. Moulton of nearly 20 percent of his monthly retirement income, including a significant "overpayment" penalty. *See* Appx059. Ultimately,

OPM actually reduced his income by 10 percent, staying the penalties pending appeal. Appx215.[6]

Losing up to a fifth of one's income can have life-altering consequences. It may lead to the inability to cover rent, medications, or other aspects of life necessities. Mr. Moulton is fortunate to not suffer from such pressing financial needs, but loss of 10 percent of his retirement income has no doubt impacted his life. And it is a virtual certainty that some impacted retiree is facing dire consequences. Indeed, the financial insecurity of retirees has been well documented. *E.g.*, Christian Weller, Financial Security In Retirement Comes With A High Price Tag, www.forbes.com (July 1, 2024), https://www.forbes.com/sites/christianweller/2024/07/01/financial-security-in-retirement-comes-with-a-high-price-tag/. The reality is that "[o]nly about half of retirees are financially secure." *Id.*

Separate from this financial hardship, upsetting retirees' settled expectations can have emotional impacts as well. As Mr. Moulton explained in his papers below, revisiting his divorce decrees "caused problems and opened old wounds with previously litigated and uncontested divorce decrees." Appx231. It also "upset child support agreements" crafted in light of other retirement provisions. Appx231. Divorce is, "for the majority," a "very painful process and one that most want to

[6] OPM has agreed to waive collection of the amount it claims was overpaid to Mr. Moulton, OPM Br. 5 & n.2, so he is no longer subject to penalties.

forget." Appx236. And OPM's reinterpretation of Section 8421(c) after 30 years is forcing many retirees to relive (and possibly relitigate) their divorce agreements.

This is all to say there is a real human cost to OPM's proposed interpretation. While the technical tools of statutory interpretation may well drive the Court's decision, the impact of that decision will be felt by numerous retirees throughout the country.

CONCLUSION

For the foregoing reasons, the Court should affirm.

DATED: October 2, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1), because it contains 7,886 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED: October 2, 2024

By: /s/ *J. Kain Day*
J. Kain Day

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I certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system on October 2, 2024.

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