NO. 24-1774

BRIEF FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD

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 A DECISION OF THE
MERIT SYSTEMS PROTECTION BOARD IN NO. DE-0841-18-0053-I-1

Respectfully submitted,

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DATE: October 2, 2024

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel for the Respondent, Merit Systems Protection Board (MSPB or Board), states that she is unaware of any other appeals stemming from this action that were previously before this Court or any other appellate court under the same or similar title. Counsel is unaware of any other case pending before this or any other court that will directly affect or be directly affected by this Court's decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal pursuant to 5 U.S.C. § 7703(d) and 28 U.S.C. § 1295(a)(9).

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STATEMENT OF THE ISSUE

Whether MSPB correctly concluded that the Office of Personnel Management (OPM) is authorized by statute to pay some or all of an annuitant's Federal Employees' Retirement System (FERS) annuity supplement under 5 U.S.C. § 8421(c) to a former spouse under 5 U.S.C. § 8467 only when division of the annuity supplement itself is "expressly provided for" in a court order.

STATEMENT OF THE CASE[1]

I. Nature of the Case

In a November 28, 2023 Opinion and Order, the Board affirmed as modified the initial decision, which reversed OPM's December 12, 2017 reconsideration decision apportioning a share of Respondent Ronald Moulton's FERS annuity supplement to his former spouse, Jill Moulton (née Kuryvial),[2] pursuant to a court order that awarded her a portion of his "gross monthly annuity." *Moulton v. Office of Pers. Mgmt., et al.*, MSPB Docket No. DE-0841-18-0053-I-1 (Op. & Order, Nov. 28, 2023; Initial Dec., Apr. 16, 2018); Appx1-49.[3] The Board found that OPM erred by apportioning the annuity supplement because the plain language of 5 U.S.C. § 8421(c) permits an annuity supplement to be apportioned under 5 U.S.C. § 8467 only when

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[1] Respondent does not disagree with Petitioner's Statement of the Case and Statement of the Facts except to the extent those portions of Petitioner's brief state that OPM's original division of Respondent Ronald Moulton's annuity was incorrect because it did not include the annuity supplement in the amount payable to his former spouse. *See* Fed. Cir. R. 28(b). However, Respondent MSPB believes that additional information and background is necessary and thus has not omitted these sections from this Response Brief. *See id.*

[2] This response brief refers to Mr. Moulton's former spouse as Jill Moulton for consistency with OPM's opening brief. We note, however, that OPM's retirement decisions, as well as the administrative judge, referred to her as Jill Kuryvial.

[3] "Appx" refers to the pages of the Joint Appendix.

apportionment of the annuity supplement itself is "expressly provided for" in a court order, which the court order at issue did not do. Appx7-14.

The Petitioner, the Director of OPM, now seeks review of the Board's final decision to the extent it held that section 8421(c) requires OPM to apportion FERS annuity supplements to another person only when "expressly provided for" in a divorce decree or similar court order. *See Office of Pers. Mgmt. v. Moulton, et al.*, 2024 WL 1953955, No. 24-109 (Fed. Cir. May 4, 2024); Petitioner's Corrected Brief ("Pet. Br."), ECF No. 13. The Board's determination the domestic relations court order apportioning Mr. Moulton's basic annuity did not expressly provide for apportionment of his annuity supplement is not challenged or within the scope of OPM's 7703(d) petition. *See id.*

II. Statutory Background

Under FERS, retirees are entitled to a "basic annuity," 5 U.S.C. § 8412, computed based on the retiree's length of service and average salary as set forth in 5 U.S.C. § 8415. Some employees, including Air Traffic Controllers and Law Enforcement Officers, who are subject to mandatory separation and must retire before becoming eligible for social security benefits at age 62, are also entitled to an "annuity supplement" until they reach age 62. 5 U.S.C. §§ 8403, 8421, 8425; 42 U.S.C. § 402(a). An annuity supplement is

approximately "equal to the old-age insurance benefit which would be payable . . . under title II of the Social Security Act." 5 U.S.C. § 8421(a)(3)(B), (b).

When, as here, a state divorce decree or similar court order affects the apportionment of an annuitant's FERS annuity payments, additional provisions apply. Specifically, 5 U.S.C. § 8467 describes when and how a FERS payment that would normally be made to an annuitant may be paid to another person pursuant to a court order related to a divorce proceeding or a garnishment for the enforcement of a judgment against the annuitant for child abuse. As relevant here, section 8467(a)(1) provides, in relevant part, that "[p]ayments under [chapter 84] which would otherwise be made to an . . . annuitant . . . based on service of that individual shall be paid (in whole or in part) by [OPM] to another person if and to the extent expressly provided for in the terms of" a divorce decree or similar court order. 5 U.S.C. § 8467(a)(1). Section 8421(c) clarifies that a FERS annuity supplement: "shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415 [Computation of basic annuity]." 5 U.S.C. § 8421(c).

III. Statement of Facts and Disposition Below

A. Factual Background

The Respondent, Ronald Moulton, retired from his Federal position as an Air Traffic Controller (ATC) in May 2010 at 47 years old with over 25 years of creditable service as an ATC. Appx74-75, Appx163, Appx167. OPM granted his application for immediate retirement under FERS and determined that he was entitled to a monthly basic annuity under 5 U.S.C. § 8415(e) and a FERS annuity supplement under 5 U.S.C. § 8421(b)(2). Appx74, Appx80, Appx109, Appx167. In June 2010, OPM informed Mr. Moulton's that he was entitled to gross basic annuity a was entitled to a basic annuity in the gross amount of $4,236 per month and a FERS annuity supplement in the amount of $1,087 per month. Appx80, Appx156-157.

In December 2010, OPM notified Mr. Moulton and Ms. Moulton that Ms. Moulton would receive a share of his "gross annuity benefit" pursuant to a July 12, 2004 Colorado state court decree of dissolution of marriage and a domestic relations court order awarding her a pro rata share of his "gross monthly annuity" under FERS, including "any benefit the Employee earns based on special ATC service. Appx94-97, Appx119-120. Specifically, OPM determined that she was entitled to 30.92% of Mr. Moulton's basic annuity, which, at that time, amounted to $1,365.12 per month (i.e., 30.92% of Mr.

Moulton's current gross basic annuity of $4,415). Appx71, Appx94-95, Appx107, Appx150-152. OPM did not apportion Mr. Moulton's FERS supplemental annuity to Ms. Moulton at that time. Appx74, Appx80, Appx152.

Nearly six years later, by letter dated August 25, 2016, OPM advised Mr. Moulton that it had adjusted the amount of his retirement benefit payable to Ms. Moulton pursuant to OPM's newly taken position[4] that the state court order and "statutory provisions" required that his FERS annuity supplement "be treated the same way" as his FERS basic annuity. Appx90-91. "Consequently," OPM stated, "the amount [Mr. Moulton] receive[d] under the FERS annuity supplement provisions must be included in the calculation of the benefit paid to [his] former spouse." Appx90. OPM stated that, because the amounts paid to Ms. Moulton for the period June 1, 2010, through June 30, 2016, did not include 30.92% of his FERS annuity supplement, Mr. Moulton received an overpayment of $24,535.30, which must be collected and provided to Ms. Moulton. Appx24-27.

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[4] As discussed below, prior to 2016, OPM did not automatically divide the annuity supplement in the same way it divided the basic annuity pursuant to a court order. Appx182, Appx192. Rather, for almost 30 years until 2016, OPM believed the annuity supplement was a Social Security-type benefit and thus presumptively non-allocable. Appx182, Appx192.

After Mr. Moulton requested reconsideration of the August 25, 2016 decision, OPM eventually issued a December 12, 2017 reconsideration decision, which affirmed its prior decision but advised that it would not collect the $24,535.30 overpayment from him until he exhausted his administrative and appeal rights.[5] Appx74-78. OPM asserted that the "clear and unambiguous language" of 5 U.S.C. § 8421(c) required it to treat a FERS annuity supplement "in the same way" as a basic annuity for purposes of 5 U.S.C. § 8467, which required OPM to divide a FERS benefit "if and to the extent expressly provided for in the terms of . . . any court decree of divorce[.]" Appx76. Thus, OPM determined that, because Mr. Moulton's basic annuity was subject to court-ordered division, to treat the annuity supplement "in the same way," it must be included in the court-ordered division of his FERS "gross monthly annuity." Appx76. OPM asserted that this determination did not involve a "policy change" but was the result of determining it had not previously computed the division of his annuity in accordance with the "clear provisions of 5 U.S.C. § 8421(c)." App.x76

[5] OPM first issued reconsideration decisions dated February 23 and October 16, 2017, but rescinded those decisions due to clerical errors. Appx70, Appx75, Appx81-89.

B. MSPB Appeal

Mr. Moulton appealed OPM's December 12, 2017 reconsideration decision to the Board.[6] Appx22. The administrative judge granted the Director of OPM's request to intervene as a matter of right under 5 U.S.C. § 7701(d). Appx23.

Before the Board, Mr. Moulton argued that OPM erred in providing Ms. Moulton a pro rata share of his annuity supplement because the domestic relations court order did not expressly provide for a division of his annuity supplement, as required by 5 U.S.C. § 8467, and OPM's decision to apportion such payments constituted a new "legislative rule" that required notice and comment rulemaking before implementation. *See* Appx4. He submitted a February 5, 2018 Management Advisory issued by OPM's Office of the Inspector General (OIG), Office of Legal & Legislative Affairs, addressing its review of OPM's "Non-Public Decision to Prospectively and Retroactively Re-Apportion Annuity Supplements." Appx4; Appx181-207. The Management Advisory noted that, for almost 30 years until July 2016, OPM

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[6] At the time OPM issued the December 12, 2017 reconsideration decision, Mr. Moulton's appeal of the prior (later rescinded) OPM decisions was already pending. Appx22. The administrative judge determined that judicial economy was best served by continuing the appeal from the December 12, 2017 reconsideration decision, rather than dismissing and refiling a new appeal. Appx22.

applied a state court-ordered marital apportionment to the basic annuity only and not to the FERS annuity supplement except when the state court order expressly addressed the FERS annuity supplement. Appx182, Appx192. OIG disagreed with OPM's assertion that it was required by law to effect the above change, because in OIG's assessment, the "language of the statute simply does not mandate the conclusion that the Basic Annuity and the Annuity Supplement should be deemed to be one and the same." Appx192-193. OIG asserted that, while OPM's approach is one possible interpretation of the statute, section 8421(c) could also be reasonably construed to mean that the annuity supplement is subject to division by a state court order in divorce proceedings "in the same way" that the basic annuity may be subject to division in those proceedings—that is, like a basic annuity, the FERS annuity supplement is subject to apportionment only by express order of the court. Appx193. OIG noted that OPM's regulations, as well as court decisions, require it to perform purely ministerial actions in carrying out a court's instructions, and that "it is not a 'ministerial' function to create a division of payment that the court order does not expressly contain." Appx193-194. Rather, OIG concluded that OPM created a new rule regarding allocation of the annuity supplement that was subject to notice and comment rulemaking and could not be given retroactive effect. Appx195-197. OIG recommended

that OPM, among other things, cease applying the state court ordered marital share to annuity supplements unless the court order expressly so provides and make whole all annuitants affected by OPM's re-interpretation of the statute. Appx198-200. Mr. Moulton argued that he and thousands of other retirees had been harmed by OPM's reinterpretation of the statute, which it carried out with "no transparency and circumvented the rule change processes." Appx174.

In response to Mr. Moulton's submission, OPM contended that the unambiguous language of 5 U.S.C. § 8421(c) required it to apportion the annuity supplement "in the same way" as the basic annuity for purposes of computing a court-ordered division of a FERS retirement benefit, i.e., if the court ordered apportionment of the basic annuity, OPM would apply the apportionment order to the annuity supplement as well, even absent an express court instruction to do so. *See* Appx4. OPM further asserted in the alternative that even if the statute was ambiguous, its interpretation was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Appx4.

In an April 16, 2018 initial decision, the administrative judge held that 5 U.S.C. § 8421(c) was not unambiguous, as OPM argued, but instead was subject to multiple interpretations; and that OPM's regulations, which did not

directly address annuity supplements, and unpublished internal work instructions, which were not submitted into the record before the administrative judge, were not entitled to *Chevron* deference. Appx30-36. He concluded that section 8421(c) required OPM to divide an annuity supplement between a FERS employee and Ms. Moulton only if the court order "expressly provided for" such a division, as required by 5 U.S.C. § 8467. Appx35-36. After reviewing the terms of the court order, the administrative judge determined that it did not expressly provide for the division of Mr. Moulton's annuity supplement and that OPM therefore erred in apportioning it to Ms. Moulton. Appx36-40. Accordingly, the administrative judge reversed OPM's final decision and ordered OPM to rescind the decision, stop apportioning the annuity supplement, and refund all previously apportioned annuity supplement amounts to Mr. Moulton. Appx41.

C. MSPB Petition for Review

OPM filed a timely administrative petition for review of the initial decision, arguing that the administrative judge erred in reversing its reconsideration decision. *See* Appx6. OPM reasserted that section 8421(c) unambiguously required it to apportion the annuity supplement in the same way it apportions a basic annuity pursuant to a state court order regardless of

whether the court order specifically addresses the annuity supplement; and, alternatively, that its interpretation of the statute as establishing that requirement is entitled to deference. *See* Appx6.

After the parties submitted their pleadings, the Acting Clerk of the Board issued an Order directing OPM to clarify its position regarding how it categorizes a supplemental annuity and to submit relevant documents, including specifically identified policy statements addressing its approach to apportioning supplemental annuities. *See* Appx6. OPM and the Director of OPM responded, in relevant part, that its regulations support what it claims are the "clear, unambiguous provisions of 5 U.S.C. § 8421(c)." *See* Appx6. OPM declined to submit the requested policy or guidance documentation. *See* Appx6.

In the November 28, 2023 Opinion and Order, the Board denied OPM's petition and affirmed the initial decision as modified to supplement the analysis, still reversing OPM's reconsideration decision. Appx1-14. The Board found the language of the statute was plain and unambiguous—for an annuity supplement "to be treated the same way" for purposes of section 8467 (which directs, in relevant part, that payments under chapter are paid to another person "if and to the extent expressly provided for" in the terms of a court order), it must be paid only as "expressly provided for" in the terms of

the court order. Appx7-12. The Board thus concluded that the plain language of section 8421(c) did not support OPM's interpretation. The Board additionally concluded that OPM's claims that it must treat the basic annuity and the annuity supplement as a unitary entitlement to replicate Civil Service Retirement System (CSRS) benefits was not a consideration that could outweigh the statutory text. Appx12. The Board further found that, even if the applicable statutory provisions could be viewed as ambiguous, the administrative judge correctly found that OPM's regulations and internal instructions were not entitled to deference under *Chevron*, noting that while the instructions could be entitled to some weight, OPM chose not to submit those documents into the record even after being ordered to do so, and therefore the Board could not evaluate them. Appx13. Finally, the Board agreed with the administrative judge that the specific terms of the court order in this case did not expressly provide for a division of Mr. Moulton's annuity supplement and that OPM improperly included it in its computation of the court-ordered division of his FERS annuity.

D. Judicial Petition for Review under 5 U.S.C. § 7703(d)

The Director of OPM petitioned for judicial review of Board's November 28, 2023 Opinion and Order under 5 U.S.C. § 7703(d) on the ground that the Director, in her discretion, had determined that that the Board

erred in interpreting a civil service statute, 5 U.S.C. § 8421(c), and that the error would have a substantial impact on civil service law. The Court granted the petition, giving rise to the instant matter. *Office of Pers. Mgmt. v. Moulton, et al.*, 2024 WL 1953955, No. 24-109 (Fed. Cir. May 4, 2024). In its opening brief, OPM argues that its interpretation properly gives meaning to both sections 8421 and 8467 and that the Board's interpretation is contrary to fundamental principles of statutory construction. Pet. Br. at 9-18.

SUMMARY OF ARGUMENT

The Board correctly found that the plain meaning of 5 U.S.C. §§ 8421(c) and 8467, read together, requires OPM to apportion a FERS annuity supplement to another person only "if and to the extent expressly provided for" in a state divorce decree or similar court order. In so finding, the Board carefully evaluated the words of the statute, concluding that to "treat[]" the annuity supplement "in the same way" as a basic annuity for purposes of section 8467 means that the supplement, like the basic annuity, may only be apportioned to another person when "expressly provided for" in a state court order, because that is how basic annuities are "treated." OPM does not meaningfully challenge the Board's rationale and conclusion about what the words "be treated in the same way" mean, but asserts that they actually mean "be divided in the same way" and/or that the basic annuity and

annuity supplement must be treated as a unitary entitlement for purposes of section 8467. OPM's conclusory assertion is not persuasive and, as discussed below, is not the plain reading of the statutory language.

OPM further argues that other tools of statutory construction support its interpretation of the statute and undermine the Board's interpretation. However, these "other tools" cannot override the statutory text. Moreover, the majority of the canons raised by OPM in fact weigh in favor of the Board's interpretation, which gives effect to the statute as a whole, does not render any provision superfluous, and assumes that Congress acted purposefully and intentionally. Though OPM purports to know that Congress intended OPM's current interpretation in enacting section 8421(c), it cites no legislative history or other evidence in support of its claim.

OPM appears to have abandoned the *Chevron* deference argument it made before the Board. As the Board held, OPM's interpretation would not have been entitled to deference under *Chevron*, and the Board agrees with OPM's apparent concession that it is not entitled to deference in any event in the post-*Chevron* regime. Following the Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, which overturned *Chevron*, courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the

law simply because a statute is ambiguous." 144 S. Ct. 2244, 2273 (2024). Accordingly, even if the statutory provisions were ambiguous, OPM's interpretation is not entitled to any deference, and it has not otherwise shown that its interpretation comports with the plain language of the statute.

For these reasons, as discussed in depth below, the Board's final decision should be affirmed.

ARGUMENT

I. Standard of Review

Under 5 U.S.C. § 7703(c), this Court must affirm the Board's decision unless it was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. *Archuleta v. Hopper*, 786 F.3d 1340, 1346 (Fed. Cir. 2015). The Court reviews the Board's legal determinations, including its interpretation of a statute, de novo. *Id.* Findings of fact are reviewed for substantial evidence. *Id.*

II. The Board correctly found that the plain language of the statute allows OPM to apportion a FERS annuity supplement to another person only when "expressly provided for" by a state divorce decree or similar court order.

In a case turning on statutory interpretation, the Court's "starting point is the language of the statute," but it will "also look to the provisions of the

whole law, and its object and policy." *Perlick v. Dep't of Veterans Affairs*, 104 F.4th 1326, 1329-30 (Fed. Cir. 2024) (quoting *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1031 (Fed. Cir. 2022)). The Court will first "try to determine congressional intent, using traditional tools of statutory construction." *Id.* (quoting *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990)). "Beyond the statute's text, [the traditional tools of statutory construction] include the statute's structure, canons of statutory construction, and legislative history." *Id.* (quoting *Timex V.I., Inc. v. U.S.*, 157 F.3d 879 (Fed. Cir. 1998)). Courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters.*, 144 S. Ct. at 2273.

Here, as a FERS retiree, Mr. Moulton was entitled to a basic annuity, 5 U.S.C. § 8412, and, as an ATC subject to mandatory separation before becoming eligible for Social Security benefits at age 62, he was also entitled to an annuity supplement until he became eligible for Social Security at age 62, 5 U.S.C. §§ 8403, 8421, 8425(a); 42 U.S.C. § 402(a). Pursuant to the Colorado Domestic Relations Court Order awarding Ms. Moulton a "prorata [sic] share of [his] gross monthly annuity under [FERS]," Appx120, OPM originally allocated a portion of Mr. Moulton's basic annuity to her, Appx94-

95. After adopting the new interpretation of the statute in 2016, however, OPM determined that 5 U.S.C. § 8421(c) required it to pay her a portion of the annuity supplement as well. Appx74-78. The Board found that this was error, holding that section 8421(c)'s requirement that an annuity supplement be "treated in the same way" as a basic annuity for the purposes of section 8467 meant that OPM could only apportion the annuity supplement when such apportionment was "expressly provided for" in the court order. Appx8-14. For the following reasons, the Board's interpretation of the statute, and thus its final decision, should be affirmed.

A. The plain language of the statute supports the Board's interpretation.

The "first and foremost 'tool' to be used is the statute's text, giving it its plain meaning." *Timex V.I., Inc.*, 157 F.3d at 882. "Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* The Board's interpretation of the statute properly centered on a careful assessment of the language of the statutory provisions themselves and gave effect to their plain meaning, while OPM's interpretation relies primarily on other factors. Appx9-11.

As set forth above, section 8421(c) provides that an annuity supplement "shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415." The Board interpreted the "for purposes of

section 8467" language of section 8421(c) as meaning "when applying section 8467." Appx9. Thus, the Board read section 8421(c) as: "an annuity supplement amount shall, when applying section 8467, be treated in the same way as a basic annuity amount." Appx9. OPM does not contend that this reading is incorrect.

The Board then examined how "an amount computed under section 8415" is "treated," to ascertain how an annuity supplement must "be treated in the same way" as a basic annuity when applying section 8467. Appx9-10. The Board observed that section 8415, which describes how to compute a FERS basic annuity, constitutes a "[p]ayment under [chapter 84] which would otherwise be made to an employee" under section 8467(a). Appx9. As such payment under chapter 84, a basic annuity subject to section 8467(a)(1) "shall be paid (in whole or in part) by [OPM] to another person *if and to the extent expressly provided for*" in the terms of a court order. Appx9-10 (emphasis added); 5 U.S.C. § 8467(a)(1). The Board concluded then that to "treat" an annuity supplement "in the same way" as a basic annuity for purposes of section 8467, the annuity supplement too must be apportioned to another person "if and to the extent expressly provided for" in a court order. Appx10.

OPM argues, however, that the only reasonable interpretation of section 8421(c) is that the annuity supplement must always be apportioned in the

same manner as the basic annuity; i.e., to "treat" an annuity supplement "in the same way" as the basic annuity means it should be divided in the same way as the basic annuity is divided, *regardless* of whether the annuity supplement is explicitly identified in the court order. Pet. Br. at 9-12. This interpretation—that "treat" means "divide"—is not supported by the statutory language.

As a verb, "treat" has several meanings, but "divide" or "apportion" are not among them. *See* TREAT, Black's Law Dictionary (12th ed. 2024). As applicable here, to treat something in a particular way means to "deal with" it in that way. *See id.* It is a "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning[ ] . . . at the time Congress enacted the statute." *Wolfe v. McDonough*, 28 F.4th 1348, 1354 (Fed. Cir. 2022) (quoting *Perrin v. U.S.*, 444 U.S. 37, 42 (1979)). Accordingly, the plain language of the statute requires that the FERS annuity supplement be *dealt with* in the same way as a basic annuity for the purposes of section 8467. And the language regarding how a basic annuity is *dealt with* under section 8467 is clear: it shall be paid (in whole or in part) to another person "if and to the extent expressly provided for" in state court order. 5 U.S.C. § 8467(a)(1) (regarding state court orders incident to divorce), (a)(2) (regarding state court

orders or similar "in the nature of garnishment for the enforcement of a judgment rendered against [the annuitant] for physically, sexually, or emotionally abusing a child").

The other rules set forth within section 8467 further clarify that there is more to treating an annuity supplement in the same way as a basic annuity than simply dividing it the same way the court order divides the basic annuity. Specifically, the second part of subsection (a) directs that OPM, if served with more than one order or other legal process involving the same chapter 84 payment, will satisfy "such processes on a first-come, first-served basis, with any such process being satisfied out of such moneys as remain after the satisfaction of all such processes which have been previously served." 5 U.S.C. § 8467(a). Next, subsection (b) provides that OPM will make payments pursuant to the court order only after OPM receives notice of it and "such additional information and documentation" as it may require. 5 U.S.C. § 8467(b). Lastly, subsection (c) defines "judgment rendered for physically, sexually, or emotionally abusing a child" and "child" for purposes of section 8467. 5 U.S.C. § 8467(c). Thus, to "treat" an annuity supplement "in the same way" as a basic annuity for purposes of section 8467 would require applying all of these provisions equally to the annuity supplement.

OPM's interpretation of "treat" as "divide" does not *deal with* an annuity supplement in the same way as it deals with a basic annuity; rather, it ignores all of section 8467 except the first part of section 8467(a) and then imposes a two-step process not found in the statute—requiring OPM to see how the basic annuity is divided by the court order and then to divide the annuity supplement the same way. The Board's interpretation, by contrast, requires OPM to *deal with* the FERS annuity supplement in the same way as a basic annuity for purposes of section 8467—i.e., an annuity supplement should simply be processed under section 8467 in the same way a basic annuity would be, applying subsections (a)-(c) as applicable.

OPM further claims that, "for purposes of court orders, the basic annuity amount and the annuity supplement are considered to be part of the same retirement payment," such that, if the basic annuity is explicitly divided, the annuity supplement must be divided in the same manner. Pet. Br. at 10-11. OPM asserts that its regulations have "confirm[ed]" this unitary entitlement since 1992, noting that 5 C.F.R. § 838.103 defines an "employee annuity" as any "recurring payments under [CSRS] or FERS made to a retiree." Pet. Br. at 11 n.6. OPM reasons that, "[t]he annuity supplement is paid monthly along with the basic annuity amount, *see* 5 U.S.C. § 8421(b)(1); 5 C.F.R. § 842.502, and so, under the regulations, the annuity supplement is

necessarily a 'recurring payment' that is part of the 'employee annuity.'" Pet. Br. at 11 n.6.

However, OPM makes no attempt to explain how the statute's plain language directing OPM to "treat" an annuity supplement in the same way a basic annuity is treated could plausibly be read as creating a unitary entitlement. OPM further does not explain why—if it believed since it promulgated its regulations in 1992 that a court order apportioning an "'employee annuity' necessarily encompasses the supplement as well as the basic annuity"—it did not apply this interpretation until 2016. As the administrative judge found, neither the regulations themselves, nor the final or interim rules published in the Federal Register during OPM's rulemaking process, address or even mention the FERS annuity supplement. Appx33; *see* Orders Affecting Retirement Benefits, 57 Fed. Reg. 33570-01 (July 29, 1992); Federal Employees Retirement System—General Administration: Court Orders Affecting Retirement Benefits, 51 Fed.Reg. 47189-01 (Dec. 31, 1986). Thus, OPM's claims that its regulations "confirm" its "unitary entitlement" theory is neither credible nor persuasive.

As the Board correctly found, the plain meaning of the statute is that a FERS annuity supplement may only be apportioned to another person when "expressly provided for" by a court order. Although OPM argues that various

tools of statutory construction support its interpretation otherwise, these "other tools" cannot override the statute's unambiguous text. *Timex V.I., Inc.*, 157 F.3d at 882. Moreover, for the reasons that follow, the other tools of statutory construction relied on by OPM in fact support the Board's interpretation.

B. The Board's interpretation gives effect to every part of the statute and does not render any provision superfluous.

A statute should be construed so that effect is given to every clause and word, and so that no part will be inoperative, superfluous, void, or insignificant. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Sanho Corp. v. Kaijet Tech. Int'l Ltd., Inc.*, 108 F.4th 1376, 1382 (Fed. Cir. 2024) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

The Board correctly found that its interpretation, unlike OPM's, reads the provisions as a whole and in harmony and gives effect to the "expressly provided for" language of section 8467(a). Appx10. In its opening brief, OPM counters that its construction, not the Board's, "harmonizes and gives effect to both section 8421 and section 8476" and that the Board's interpretation improperly renders section 8421(c) superfluous. Pet. Br. at 11, 16-18. These arguments are unpersuasive.

First, the only explanation OPM provides in support of its claim that its construction harmonizes both provisions is that "[s]ection 8467 governs when

the basic annuity may be divided, and section 8421 provides that the annuity supplement should be divided in the same way." Pet. Br. at 11. However, as discussed above, this reading of the statute is not supported by the statutory text itself. Section 8421(c) does not provide that the annuity supplement is "divided" in the same way as the basic annuity; rather, it provides that the annuity supplement "be treated"—i.e., dealt with—in the same way as a basic annuity for purposes of section 8467, which in turn allows apportionment of a basic annuity only when "expressly provided for" in a court order, directs OPM to process multiple court orders concerning the same moneys on a first-come, first-served basis and that payments to another person may only be made after OPM receives notice of the court order and additional required documentation, and provides definitions for purposes of this section.

As the Board correctly found, OPM's interpretation would render the "expressly provided for" language of section 8467(a) inoperative and superfluous. Appx10. Specifically, it would require that the annuity supplement always be divided in the same manner as the basic annuity, which would nullify section 8467(a)'s mandate that payments under chapter 84 are apportioned only when "expressly provided for" by a state court order. In addition, OPM's interpretation would render the other parts of the section inoperative and superfluous as related to the annuity supplement, including:

the second part of subsection (a) (directing OPM, if it is served with more than one court order affecting the same moneys, to process them on a first-come, first-served basis), subsection (b) (providing that OPM shall only make payments under subsection (a) after receiving notice of the court order and any additional information or documentation required), and subsection (c) (providing relevant definitions for this section). As such, OPM's interpretation does not harmonize and give effect to every provision.

Second, contrary to OPM's argument, the Board's interpretation of sections 8421(c) and 8467 does not render any language superfluous but rather ensures that each provision retains its distinct purpose and meaning. Section 8467(a) provides that payments under chapter 84, including both the basic annuity and the annuity supplement, may only be apportioned if "expressly provided for" in a court order. Section 8421(c), in turn, clarifies that the annuity supplement—a unique payment designed to bridge the gap until Social Security eligibility—should be treated "in the same way" as the basic annuity for purposes of section 8467.

Although OPM claims that the Board's interpretation renders section 8421(c) superfluous because section 8467(a) already directs that payments under chapter 84 be paid to another person only when "expressly provided for" by a court order, section 8421(c) serves a critical clarifying purpose

under the Board's interpretation. A FERS annuity supplement has a different nature and purpose than a basic annuity: it is intended to replicate the non-transferrable and non-assignable Social Security benefit for which the annuitant is not eligible until he turns 62. *See* 5 U.S.C. § 8421(b)(2) (providing that the FERS annuity supplement is "an amount equal to the old-age insurance benefit which would be payable to such annuitant under title II of the Social Security Act" multiplied by a fraction (total years of service divided by 40)); 42 U.S.C. § 407(a) (providing that a Social Security benefit is not transferrable or assignable); *see also* H.R. Rep. No. 99-606, at 131 (1986) ("The supplement is designed to replicate the Social Security benefit (based on Federal civilian service) available at age 62 for those employees retiring earlier. The supplement terminates once the employee attains age eligibility to receive Social Security benefits, i.e., age 62"). Without section 8421(c), there could be uncertainty about how to treat the annuity supplement, i.e., whether it could be divided pursuant to a court order, even though the Social Security benefit it replicates cannot be. By requiring that the annuity supplement be "treated in the same way" as the basic annuity, section 8421(c) ensures that the "expressly provided for" requirement applies uniformly to all chapter 84 payments, including the supplement.

In sum, the Board's interpretation gives full effect to all statutory provisions and maintains the integrity of the statutory scheme. It ensures that both section 8467 and section 8421(c) are read in harmony, with each provision serving its intended purpose without rendering any part superfluous or inoperative. It adheres to the actual language of the statute, without substituting other verbiage to achieve a preferred end. OPM's reading, by contrast, renders the "expressly provided for" language, procedural requirements, and definitions of section 8467 inoperative and superfluous with respect to the annuity supplement. It also requires reading "treat" as "divide," which is not only an entirely different word from the one Congress chose, but is not a reasonable interpretation for the reasons discussed in the previous section.

C. The Board's interpretation assumes properly that Congress acted intentionally and purposely.

Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Hyundai Steel Co. v. U.S.*, 19 F.4th 1346, 1353 (Fed. Cir. 2021) (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983)).

As the Board observed, in the FERS Act of 1986, Pub. L. No. 99-335, 100 Stat. 514, Congress enacted the provisions at issue in this appeal and

amended the Central Intelligence Agency (CIA) Retirement Act of 1964 by providing for the participation of certain CIA employees in the FERS. Appx11. In section 304(g) of the amendment, covering "Special Rules for Former Spouses," Congress provided that "[t]he 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, § 506. The legislative history confirms that section 304(g) "provides that the entitlement of a retired CIA FERS employee's former spouse to a portion of the employee's annuity extends to any annuity supplement the employee receives under section 8421 of title 5, United States Code (as added by section 101 of the conference agreement)." H.R. Rep. No. 99-606, at 157-58 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 1508, 1540-41.

The Board found the fact that Congress specifically provided that annuity supplements shall be included in the benefits payable to a former spouse of a CIA employee shows that Congress knew how to mandate automatic division of the FERS annuity supplement in the same way as the basic annuity, but intentionally and purposely chose not to do so for other FERS annuitants. Appx11-12. Instead, Congress intentionally and purposely

allowed court decrees, court orders, or court-approved property settlement agreements to expressly (and thus separately) resolve the question of how to apportion a FERS annuity supplement to another person under 5 U.S.C. § 8467 and 5 U.S.C. § 8421(c). Appx11.

As the Board correctly found, and as OPM has not disputed, Congress's decision to explicitly include language extending the annuity supplement to former spouses of CIA employees under Section 304(g) of the FERS Act, while omitting such language for other FERS employees, demonstrates that Congress knew how to create an automatic entitlement to an annuity supplement when it wanted to. Appx11; *see Hyundai Steel Co.*, 19 F.4th at 1353; *see also Kloeckner v. Solis*, 568 U.S. 41, 52 (2012) (noting that, if Congress had wanted a certain result, "it could just have said so"). The fact that Congress did not include similar language in the general FERS provisions but instead directed that the annuity supplement "be treated in the same way" as the basic annuity for purposes of section 8467 reflects that Congress intended the apportionment of the annuity supplement to be governed by the same "expressly provided for" requirement applicable to all chapter 84 payments, as well as the other procedural requirements and definitions set forth in section 8467.

OPM does not address the CIA Retirement Act amendment in its brief, but argues that 5 U.S.C. § 8341(h)(1)—which provides for apportionment of a CSRS survivor annuity to a former spouse when "expressly provided for" by a court order or election—undermines the Board's interpretation. As an initial matter, however, the provision OPM cites is not from the same statute or act as the FERS provisions at issue here and thus is not applicable to the canon for which OPM offers it. *See Hyundai Steel Co.*, 19 F.4th at 1353 (considering whether Congress includes "particular language in one section of a statute but omits it in another section of the same Act"). Rather, 5 U.S.C. § 8341(h)(1) was enacted as part of the Civil Service Retirement Act of 1920, 5 U.S.C. § 8331 *et seq.*, which created the CSRS.

The comparator FERS provision, 5 U.S.C. § 8445(a), contains substantially similar language to 5 U.S.C. § 8341(h)(1), however, providing as follows:

> a former spouse of a deceased employee, Member, or annuitant (or of a former employee or Member who dies after having separated from the service with title to a deferred annuity under section 8413 but before having established a valid claim for annuity) is entitled to [a survivor annuity], if and to the extent expressly provided for in an election under section 8417(b), or in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree.

5 U.S.C. § 8445(a). Although section 8445(a) contains the "expressly provided for" language, there are significant differences between how and when OPM must pay a survivor annuity to a former spouse under section 8445 and how and when OPM must apportion a FERS payment to another person under section 8467. For example, a survivor annuity may be paid only to a "former spouse of a deceased" individual pursuant to a court order incident to a divorce or an election under section 8417(b), whereas general payments under chapter 84 may be apportioned to another person pursuant to a court order incident to a divorce or a garnishment stemming from a child abuse judgment. In addition, there are other subsections governing the payment of a survivor annuity to a former spouse pursuant to an election or court order set forth in section 8445 that have no relevance to other types of payments made under chapter 84. *See* 5 U.S.C. § 8445(b)-(g).

Given the differences between the payment of a survivor annuity to a former spouse and the apportionment of other chapter 84 payments to another person pursuant to a court order, it is clear that Congress could not have simply placed in section 8445 a cross reference to section 8467 and a direction that the survivor annuity "be treated in the same way" as a basic annuity. Therefore, the fact that Congress included specific language requiring payment of the survivor annuity to a former spouse "if and to the extent

expressly provided for" in an election or court order does not undermine the Board's interpretation. If anything, it supports the Board's interpretation, reflecting Congress's intent that court orders purporting to allocate federal retirement benefits be specific.

Finally, the fact the Congress cross-referenced section 8467 in section 8421(c) instead of specifying within section 8421 that an annuity supplement must be paid to another person only as "expressly provided for" by a court order does not undermine the Board's position. Section 8467, as set forth above, contains detailed instructions about how OPM should handle general FERS payments that are subject to a court order incident to a divorce or garnishment arising from a child abuse judgment, requiring not only that the payment to another person be "expressly provided for," but also directing OPM to process multiple court orders concerning the same moneys on a first-come, first-served basis and to make payments to another person only after OPM receives notice of the court order and additional required documentation, and setting forth the definitions applicable to this section. Rather than reproducing all of this language in section 8421, Congress reasonably instructed OPM to "treat" the annuity supplement may "in the same way" as a basic annuity for purposes of section 8467.

D. The structure of the statute does not undermine the Board's interpretation.

OPM also mentions in its brief *Fed. Law Enforcement Officers Assoc. v. Ahuja*, No. 19-735, 2021 WL 4438907, at *5 (D.D.C. Sept. 28, 2021), *vacated and remanded by*, 62 F.4th 551 (D.C. Cir. 2023), in which the district court held that, because section 8421 is located within the subchapter entitled "Basic Annuity," the annuity supplement should be automatically included in any court order dividing the basic annuity. Pet. Br. at 20. But the district court's decision was vacated by the D.C. Circuit, and thus the Board properly declined to consider it. *See* Appx13-14. In any event, the Supreme Court has held that "the title of a statute . . . cannot limit the plain meaning of the text" and that, "[f]or interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

Here, the statutory text of sections 8421(c) and 8467 is clear and specific: any division of the annuity supplement, like the basic annuity, must be treated the same as a basic annuity under section 8467, including that it must be expressly provided for in a court order. And it is beyond dispute that an annuity supplement is not the same as, or part of, the basic annuity. The fact that the supplemental annuity section is within the "Basic Annuity"

subchapter does not shed light on any ambiguous word or phrase and does not undermine the Board's interpretation.

Moreover, the "Basic Annuity" subchapter contains many provisions that do not pertain only to the basic annuity but instead have broad application to any FERS retirement. For example, all of the sections governing the types of retirement and eligibility requirements under FERS (immediate, phased, deferred, and early) are located within the Basic Annuity subchapter. *See* 5 U.S.C. §§ 8412-8414. There is also a section governing "alternative forms of annuities," which authorizes OPM to prescribe regulations to allow employees with life-threatening or other critical medical conditions to elect an alternative form of annuity benefits upon retirement. 5 U.S.C. § 8420a. Additionally, the section governing mandatory separations for ATCs and law enforcement officers is within the Basic Annuity subchapter. 5 U.S.C. § 8425. As such, contrary to OPM's argument, the placement of the annuity supplement provisions in this subchapter does not mean that Congress intended the annuity supplement to be considered part of the basic annuity or to be automatically divided in the same way as a basic annuity pursuant to a court order, especially in light of the plain language providing otherwise.

E. The Board's interpretation does not elevate the general over the specific.

OPM next argues that its construction is consistent with the principle of statutory construction that the specific governs the general, which should be given particular force here, "where Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." Pet. Br. at 11-12 (citing *Biogen MA, Inc. v. Japanese Found. for Cancer Rsch.*, 785 F.3d 648, 656 (Fed. Cir. 2015) (internal quotations omitted)). Pet. Br. at 11-12. It is not clear from OPM's argument which provision it believes is more specific than the other and whether it is arguing that the Board's interpretation improperly gives effect to the more general provision. Regardless, under the Board's interpretation, both sections 8467 and 8421(c) are given full effect and read harmoniously to ensure that all payments under chapter 84, including the annuity supplement, are subject to the requirement that they are not paid to another person except as "expressly provided for" by a state court order.

F. OPM's legislative intent argument is unsupported and unpersuasive.

According to OPM, its newest interpretation of section 8421(c) is what Congress intended in enacting it. Specifically, OPM argues that Congress set up the three-part FERS retirement plan, consisting of a basic annuity, a Social

Security benefit, and Thrift Savings Plan "to be different from, but on parity with, the overall benefits provided" under CSRS. Appx12-13. OPM claims that the FERS annuity supplement, which provides a supplement approximately equal to the Social Security benefit, was Congress's answer to the structural problem that left FERS employees who had to retire before Social Security eligibility "missing one portion of the three-legged stool." Appx12-13. OPM goes on to speculate that, because "Congress recognized 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," it enacted section 8421(c) "to provide clear instructions to OPM that when a court order divides the FERS portion of the three-legged stool, OPM should not apply that division only to the FERS basic annuity. It must also apply the division to any FERS annuity supplement payable, and that it must treat these benefits as if they were one ('in the same way')." Pet. Br. at 13.

As an initial matter, OPM has not cited to any legislative history or any other source material in support of its theory that Congress enacted section 8421(c) to instruct OPM to automatically divide the annuity supplement in the same way it divides the basic annuity pursuant to a court order "as if they were one." OPM has further not addressed why, if this were Congress's intent, it could not have achieved this aim with direct language. *See*

Kloeckner, 568 U.S. at 52 (noting that, if Congress had wanted a certain result, "it could just have said so"). Absent evidence, specific citations, or interpretative guidance supporting OPM's claim regarding Congress's intent, OPM's current belief about what Congress intended is not persuasive. *See Loper Bright Enters.*, 144 S. at 2273. Moreover, as discussed throughout this brief, OPM's interpretation of the statutory language is contrary to the plain language and other tools of statutory construction.

G. OPM's claim that its interpretation makes more practical sense and is easier to administer, even if true, cannot override the statutory text.

OPM lastly argues that its interpretation makes "practical sense" by avoiding uncertainty and the potential for confusion in the division of an annuity supplement during divorce proceedings. Pet. Br. at 14-15. Specifically, OPM contends that, because a court may not know whether an employee will eventually receive an annuity supplement, it is simpler and more practical to automatically divide the supplement in the same way as the basic annuity, regardless of whether the state court order expressly mentions the supplement. Pet. Br. at 15. OPM argues that the Board's interpretation, in contrast, "invites (and even mandates) OPM to embroil itself in interpreting court orders to assess whether they reference an annuity supplement with the requisite specificity." Pet. Br. at 15.

OPM's practical concerns, however, cannot justify an interpretation that disregards the statute's plain language. *See Burrage v. U.S.*, 571 U.S. 204, 218 (2014). The statute must be applied as written, even if "we think some other approach might accord with good policy." *Id.* (internal quotations omitted). Here, as the Board correctly found and as discussed in depth above, the plain language of the statute requires that annuity supplements be paid to another person only when "expressly provided for" by a state divorce decree or similar court order. Congress deliberately chose to require express provision for any division of retirement benefits, including annuity supplements, and OPM's argument for administrative convenience cannot override this clear statutory mandate.

Moreover, OPM's argument that the Board's interpretation would burden OPM by requiring it to interpret court orders appears to be overstated. The statutory scheme already requires OPM to interpret court orders to determine whether they contain the requisite express provision for dividing retirement benefits, including the basic annuity and the survivor annuity. And, as OPM's regulations make clear, it is OPM's responsibility to "comply with court orders, decrees, or court-approved property settlement agreements in connection with divorces, annulments of marriage, or legal separations of employees, Members, or retirees that award a portion of the former

employee's or Member's retirement benefits or a survivor annuity to a former spouse." 5 C.F.R. § 838.101(a)(1). Further, the regulations provide that, "[i]n executing court orders under this part, OPM must honor the clear instructions of the court"; that OPM "will not supply missing provisions, interpret ambiguous language, or clarify the court's intent by researching individual State laws"; and that "OPM performs purely ministerial actions in accordance with these regulations." 5 C.F.R. § 838.101(a)(2). Thus, OPM is well positioned to determine whether the court order "expressly provides for" division of the annuity supplement before carrying out its "ministerial role" to "honor the clear instructions of the court," *see* 5 C.F.R. § 838.101(a), just as it does for the basic and survivor annuities. OPM may not abrogate its role and attempt to simplify administration by presuming automatic divisions of benefits that are not expressly provided for by the state court order when doing so would be contrary to the statutory mandate.

H. OPM's interpretation of the statute is not entitled to deference.

As noted above, following the Supreme Court's recent decision in *Loper Bright* overturning *Chevron*, courts must "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters.*, 144 S. at 2273.

However, the Supreme Court allowed that "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry." *Id.*

Here, the Board correctly found that the statute is not ambiguous. Even if the Court finds ambiguity in the statute, OPM's interpretation and regulations are not entitled to deference (nor, as the Board also correctly found, would they have been under *Chevron*). *See id.* While the Executive Branch judgment may help inform the Court's inquiry, OPM's current interpretation is implausible and represents a significant (and unexplained) departure from the interpretation it operated under, and which federal employees and state courts relied upon, for approximately 30 years. Therefore, while OPM's judgment and interpretation of other statutory provisions may provide valuable guidance in other matters, they are unpersuasive here. The Court should adopt instead the Board's interpretation, which gives effect to the plain language of the law as written and Congressional intent.

CONCLUSION

For the reasons set forth above, the Board correctly concluded that section 8421(c)'s directive to "treat[]" a FERS annuity supplement "in the same way" as a basic annuity for purposes of section 8467 means, in relevant part, that the annuity supplement may only be paid to another person "if and

to the extent expressly provided for in the terms of" a divorce decree or similar court order. 5 U.S.C. §§ 8421(c), 8467(a)(1). Accordingly, the Board correctly reversed OPM's December 12, 2017 reconsideration decision because it improperly allocated a portion of Mr. Moulton's annuity supplement to Ms. Moulton without such apportionment being "expressly provided for" in the court order. Respondent respectfully requests that the Board's final decision be affirmed.

Respectfully submitted,

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DATE: October 2, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this date, service of the RESPONDENT MERIT SYSTEMS PROTECTION BOARD'S RESPONSE BRIEF was filed through CM/ECF and served electronically on all parties.

DATE: October 2, 2024

/s/ Talethia Owens-Wand
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Paralegal Specialist

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief was prepared using a proportionally spaced typeface, 14-point font, and that the textual portion of the brief, exclusive of the tables of contents and authorities, certificates of service and compliance, and statement of related cases, but including headings, footnotes, and quotations, contains 9,181 words as determined by the word counting feature of Microsoft Word, and therefore complies with Rule 32(a)(7)(B).

/s/ DeAnna Schabacker
DEANNA SCHABACKER