

No. 13-281

In the Supreme Court of the United States

THERESA DACHNIWSKYJ, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Myron Dachniwskyj made a valid election to provide survivor annuity benefits to his wife, Roksoliana Dachniwskyj, under 5 U.S.C. 8339(j).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a) is reported at 713 F.3d 99. The court of appeals' order denying rehearing (Pet. App. 1a-2a) is unreported. The final decision of the Merit Systems Protection Board (Board) (Pet. App. 13a-17a) is noted at 116 M.S.P.R. 354 (Table), and the Board's final order is unreported. The initial decision of the Board (Pet. App. 18a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2013. The petition for rehearing was denied on June 3, 2013. The petition for a writ of certiorari was filed on August 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns whether retired federal employee Myron Dachniwskyj properly elected a survivor annuity benefit for his second wife, respondent Roksoliana Dachniwskyj, before his death in August 2009. The court of appeals agreed with the Office of Personnel Management (OPM) that his election was valid, and it therefore reversed the order of the Merit Systems Protection Board (Board) awarding the benefit to his first wife, petitioner Theresa Dachniwskyj.¹

1. Federal law entitles certain federal employees to receive monthly annuity payments upon retirement from federal service. See Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.* An annuitant has the option of providing a survivor annuity that will benefit a current or former spouse, in the event he predeceases the spouse. 5 U.S.C. 8339(j). To exercise this option, the annuitant must agree to receive reduced monthly annuity payments during his own lifetime. 5 U.S.C. 8339(j)(1) and (2).

An annuitant's divorce automatically terminates a prior election to provide survivor benefits to his spouse. 5 U.S.C. 8339(j)(5)(A)(ii). To reinstate those benefits for a former spouse following a divorce, an annuitant must inform OPM—within two years of the divorce—that he wishes to do so. 5 U.S.C. 8339(j)(3); 5 C.F.R. 831.631(b)(5)(i). If the annuitant enters a new marriage after the divorce, he may elect a survivor annuity for his new spouse by so informing OPM within two years of the remarriage. 5 U.S.C. 8339(j)(5)(C)(i).

¹ For ease of reference, Myron and Roksoliana Dachniwskyj will be referred to here as “Mr.” and “Mrs.” Dachniwskyj, respectively, and Theresa Dachniwskyj will be referred to as “petitioner.”

Federal law requires OPM to send annuitants annual notifications of their rights and obligations with respect to the election of survivor annuities for current or former spouses. Act of July 10, 1978 (1978 Act), Pub. L. No. 95-317, § 3, 92 Stat. 382, as amended by Reorganization Plan No. 2 of 1978, § 102, 92 Stat. 3783 (5 U.S.C. 8339 note). The Federal Circuit has held that there is an “implied exception” to the deadlines for making elections under Section 8339(j) in circumstances where OPM fails to provide adequate notice of those deadlines. *Brush v. OPM*, 982 F.2d 1554, 1560 (1992). In such cases, if there is sufficient evidence of the annuitant’s intent, OPM either must allow the annuitant to make the election outside Section 8339(j)’s deadlines or, if the annuitant has died, must “grant the survivor benefits as if the deceased had made a timely election.” *Simpson v. OPM*, 347 F.3d 1361, 1366-1367 (Fed. Cir. 2003) (quoting *Brush*, 982 F.2d at 1560).

2. Mr. Dachniwskyj was a federal employee who retired from federal service in 1989. Pet. App. 4a. At that time, he was still married to petitioner, and he elected to provide her with spousal survivor benefits in the event that he predeceased her. *Ibid.* As a result of this election, he received a reduced monthly annuity payment, in accordance with 5 U.S.C. 8339(j)(2). Pet. App. 4a, 6a. In January 1998, petitioner and Mr. Dachniwskyj divorced. Pet. App. 4a. Shortly thereafter, Mr. Dachniwskyj married Mrs. Dachniwskyj. *Ibid.*

Following the divorce and remarriage, OPM continued sending Mr. Dachniwskyj the required annual notices regarding his survivor annuity benefits. Pet. App. 4a. These notices were deficient, however, inso-

far as they failed to mention that his divorce had automatically terminated his prior election of a survivor annuity. *Id.* at 9a-10a; *Simpson*, 347 F.3d at 1364-1365. Moreover, despite the termination, the government continued to send Mr. Dachniwskyj the same reduced monthly annuity payment that he had been receiving before the divorce. Pet. App. 6a.

In May 2002, four years after his divorce and second marriage, Mr. Dachniwskyj wrote to OPM and requested that OPM “CHANGE AND CORRECT” the designated beneficiary of his survivor annuity so as to benefit his second wife, Mrs. Dachniwskyj. C.A. App. A33; Pet. 2; Pet. App. 4a. OPM responded with two letters, dated the same day. Pet. App. 4a. The first letter denied Mr. Dachniwskyj’s request as untimely, explaining that he had not submitted the request within two years of his remarriage. *Id.* at 4a-5a. The second letter instructed Mr. Dachniwskyj to provide OPM with a certified copy of his divorce decree in order to change or eliminate the survivor election he had previously made in favor of petitioner. *Id.* at 5a.

In early 2006, Mr. Dachniwskyj responded to OPM with a new letter, again asking that OPM substitute Mrs. Dachniwskyj for petitioner on his prior election of survivor benefits. C.A. App. A36 (“Please, remove name Theresa from the system and put in name Roksoliana Dac[h]niwskyj.”) (alteration in original); Pet. App. 5a. Mr. Dachniwskyj supported this request by attaching both his divorce decree and his new marriage certificate. Pet. App. 5a. In response to OPM’s subsequent request for clarification, Mr. Dachniwskyj submitted yet another signed request again asking OPM to transfer the survivor benefits to Mrs. Dachniwskyj. *Ibid.* In April 2006, OPM approved the

request, indicating that the change was effective immediately. *Ibid.*

Mr. Dachniwskyj died in August 2009, and Mrs. Dachniwskyj applied for survivor annuity benefits soon afterwards. Pet. App. 5a. Consistent with its prior approval of Mr. Dachniwskyj's request, OPM granted her application and began paying her the benefits. *Ibid.*

Petitioner also applied to receive Mr. Dachniwskyj's survivor annuity benefits, claiming that she had been awarded those benefits in her divorce decree. Pet. App. 5a; Gov't C.A. Br. 5. In November 2009, OPM denied that request after concluding that the decree made no reference to the benefits and that there was no evidence that her ex-husband had ever elected to provide her with survivor benefits at any time following the divorce. Pet. App. 5a-6a; Gov't C.A. Br. 5. OPM also denied petitioner's subsequent request for reconsideration. Gov't C.A. Br. 5.

3. In March 2010, petitioner appealed OPM's adverse decision to the Board. Pet. App. 6a, 19a. The administrative judge overseeing the proceedings notified Mrs. Dachniwskyj of her right to intervene in the appeal to protect her rights. *Id.* at 6a.

After an initial decision in petitioner's favor, OPM and Mrs. Dachniwskyj appealed to the full Board. Pet. App. 6a, 18a-23a. The Board issued its final decision in April 2011. *Id.* at 13a-17a. The Board concluded that the annual notices that OPM had sent Mr. Dachniwskyj following his divorce were deficient in failing to advise him that the divorce had voided his prior election of a survivor annuity to benefit petitioner. *Id.* at 15a. It found that Mr. Dachniwskyj's continued receipt of a reduced annuity payment following

his divorce was evidence of his intent to provide petitioner with survivor benefits. *Ibid.* The Board concluded that the letters Mr. Dachniwskyj had sent OPM in 2002 and 2006 asking for the benefits to be provided to his new wife did not contradict this intent, because those letters mentioned “replacing” petitioner with Mrs. Dachniwskyj as the beneficiary, instead of “remov[ing]” petitioner. *Id.* at 16a. The Board thus sustained the reversal of OPM’s decision and awarded the survivor annuity to petitioner instead of to Mrs. Dachniwskyj. *Id.* at 16a-17a.

4. Mrs. Dachniwskyj appealed to the United States Court of Appeals for the Federal Circuit, and petitioner obtained permission to intervene. Pet. App. 7a n.1. The court of appeals reversed the Board’s decision and directed that Mrs. Dachniwskyj be awarded the survivor annuity benefits. *Id.* at 3a-12a.

The court of appeals agreed with the Board that the annual statutory notices that OPM had sent Mr. Dachniwskyj were insufficient to inform him that his prior election of a survivor annuity was voided by his divorce from petitioner. Pet. App. 9a-10a. Unlike the Board, however, the court further held that the notices were insufficient to inform him of his rights and obligations with respect to providing a survivor annuity for *either* petitioner *or* Mrs. Dachniwskyj. *Id.* at 10a. The court then proceeded to consider whether there was substantial evidence supporting the Board’s view that Mr. Dachniwskyj intended to provide the benefits to his former wife instead of his new wife. *Ibid.* (relying on *Brush*, 982 F.2d at 1560).

After reviewing the facts, the court of appeals held that the Board had “improperly discounted the evidence and actions [Mr. Dachniwskyj] took that demon-

strate his intent to provide a survivor annuity for [Mrs. Dachniwskyj], not [petitioner.]” Pet. App. 11a. The court cited Mr. Dachniwskyj’s 2002 and 2006 letters requesting that the benefits be transferred to his new wife. It emphasized that he “took multiple affirmative steps to replace his former spouse with his current spouse as beneficiary” and declared that his actions were “completely inconsistent with the intent to provide benefits for his former spouse.” *Id.* at 12a. The court ultimately concluded that OPM’s initial decision granting Mrs. Dachniwskyj the survivor benefits was correct, and it reversed the Board’s ruling that the survivor benefit instead belonged to petitioner. *Ibid.*

ARGUMENT

Petitioner asks this Court to grant certiorari to decide whether the court of appeals erroneously declined to enforce the two-year deadline set forth in 5 U.S.C. 8339(j)(5)(C)(i) for electing a survivor annuity for a new spouse. But petitioner does not identify any conflict between that decision and any decision of this Court or any other court. The decision below was a straightforward application of longstanding precedent to the facts of this particular case, and it was plainly correct. Further review is unwarranted.

1. Petitioner argues that the court of appeals erred in failing to apply the two-year statutory deadline for electing a survivor annuity for a new spouse. Pet. 5-9. Notably, she does not challenge the court’s conclusion that OPM failed to provide Mr. Dachniwskyj with adequate annual notices of his rights and obligations with respect to the survivor benefits for several years after he and petitioner divorced. Pet. App. 9a-10a (noting absence of dispute on this point). Instead,

petitioner acknowledges that such notices were deficient, but criticizes the court of appeals for allegedly “imposing a rule that an annuitant who has received statutorily inadequate notice can elect a new beneficiary *at any time* after receipt of adequate notice.” Pet. 6, 7, 9. According to petitioner, that “adequate notice” came in June 2002, when Mr. Dachniwskyj received OPM’s letter instructing him to provide evidence of his divorce. Pet. 5-6.

Petitioner is wrong to assert that the court of appeals created a new categorical rule allowing an annuitant who has received inadequate notice to elect a new beneficiary “at any time” after receipt of adequate notice. Pet. 9. In fact, the court applied longstanding circuit precedent making clear that there is an exception to Section 8339(j)(5)(C)(i)’s deadline when OPM fails to provide the annuitant with adequate annual notice of his right to elect a survivor annuity for a spouse or former spouse. Pet. App. 9a-10a (citing *Hernandez v. OPM*, 450 F.3d 1332, 1334-1335 (Fed. Cir. 2006); *Simpson v. OPM*, 347 F.3d 1361, 1366-1367 (Fed. Cir. 2003); *Brush v. OPM*, 982 F.2d 1554, 1560 (Fed. Cir. 1992)). In such circumstances, the court explained, the right approach is to consider evidence of the annuitant’s intent and, if the annuitant is deceased, to grant survivor benefits as if the deceased had made a timely election. *Ibid.*

The Federal Circuit’s longstanding treatment of Section 8339(j)’s deadlines in these types of cases is both fair and correct. It reflects a commonsense effort to reconcile the statutory deadlines with Congress’s plain desire to ensure that annuitants are equipped to make informed decisions about their annuity benefits. See 1978 Act § 3 (requiring OPM, “on

an annual basis, [to] inform each annuitant of such annuitant's rights of election under section[] 8339(j)". As the Federal Circuit explained in *Brush*, exempting annuitants from the statutory deadlines when OPM has not provided the requisite notice "is consistent with the statute and Congress' intent that annuitants be afforded the information necessary to make informed decisions regarding their retirement benefits." 982 F.2d at 1560.

Petitioner does not claim that the Federal Circuit's longstanding practice violates this Court's precedent or any decision of any other court. She does make the vague assertion that the Federal Circuit's approach somehow encroaches on authority reserved to the Board or OPM (Pet. 5, 7, 9-10), but she fails to mention that the Federal Circuit adopted its rule from Board precedents recognizing the need for exceptions from the statutory deadlines in these circumstances. See, *e.g.*, *Brush*, 982 F.2d at 1560-1561 (expressly adopting analysis of Board decisions applying same rule).

Petitioner is also wrong to claim that the decision below necessarily grants annuitants the right to make a new election "at any time" following receipt of adequate notice. Pet. 9. Although the court did not enforce the statutory deadline in this case, it did not address whether the receipt of adequate notice gives rise to a *new* deadline for making a new election. It had no need to address the proper timing of an election because, as the court recognized, Mr. Dachniwskyj's "multiple affirmative steps to replace his former spouse with his current spouse as beneficiary" began in May 2002—that is, *before* receiving OPM's

June 2002 letter that (according to petitioner) first gave him adequate notice of his rights. Pet. App. 12a.

Moreover, despite criticizing the court of appeals' approach, petitioner herself recognizes that Section 8339(j)(5)(C)(i)'s deadline does not apply inflexibly to every case. After all, her own claim to Mr. Dachniwskyj's survivor benefits *itself* relies on an implied exception to the statutory deadlines in circumstances where the annuitant received inadequate notice. Mr. Dachniwskyj's election of survivor benefits in petitioner's favor automatically expired upon their divorce in 1998, see 5 U.S.C. 8339(j)(5)(A)(ii), and no one claims that Mr. Dachniwskyj made a new election reinstating her right to the survivor benefits within two years of the divorce, as required by 5 U.S.C. 8339(j)(3). Nor does petitioner claim that Mr. Dachniwskyj reinstated her rights at any point after the June 2002 letter that allegedly provided adequate notice. Inflexibly applying the statutory deadline would mean that *no one* is entitled to Mr. Dachniwskyj's survivor annuity. Petitioner never explains why she—but not Mrs. Dachniwskyj—should be allowed to take advantage of the long-established exception to Section 8339(j)'s deadlines in cases of inadequate notice.

2. Petitioner strongly implies that the two-year deadline set forth in Section 8339(j)(5)(C)(i) should have started to run in June 2002, when OPM responded to Mr. Dachniwskyj's request to transfer his benefits to Mrs. Dachniwskyj by asking him for proof of his divorce. Pet. 6, 7-9. Petitioner contends that by failing to provide such proof until January 2006, Mr. Dachniwskyj forfeited his right to transfer the survivor benefits to his wife.

Petitioner's suggestion that the two-year deadline should have run from June 2002 is unsupported by authority and unworthy of further review. The statute is clear: An election of survivor benefits for a new spouse upon an annuitant's remarriage must occur "within 2 years *after such remarriage.*" 5 U.S.C. 8339(j)(5)(C)(i) (emphasis added). Petitioner's argument that the deadline should have started to run nearly four years *after* the remarriage, in June 2002, has no basis in the statutory text.

Petitioner cites no case in which any court or the Board has ever applied Section 8339(j)(5)(C)(i)'s deadline in the manner she proposes. The closest she comes is *Allen v. OPM*, 99 M.S.P.R. 653 (2005). Pet. 7-8. There, the Board relied on the precedent discussed above to excuse an annuitant's failure to comply with the two-year statutory deadline, because OPM had provided him deficient notice concerning the election of survivor benefits following his wife's death. *Allen*, 99 M.S.P.R. at 655-659. In dicta, the Board "reserve[d] for [its] future consideration" whether OPM could "subsequently provide adequate notice of the election requirement and thereby trigger a new 2-year election period." *Id.* at 657 n.2. Crucially, however, the Board made clear that such a trigger would only even arguably apply "*if [OPM's] notice also informs the annuitant that the 2-year election period commences with its adequate notice.*" *Ibid.* (emphasis added). *Allen's* dicta provides no support to petitioner here, because neither of OPM's June 2002 letters to Mr. Dachniwskyj informed him of any new two-year deadline for making a valid election. See C.A. App. A34-A35.

Notably, petitioner could not prevail even if she were right that OPM's June 2002 letter to Mr. Dachniwskyj triggered a new two-year deadline for electing survivor benefits under Section 8339(j)(5)(C)(i). As noted above, OPM sent this letter as a response to Mr. Dachniwskyj's May 2002 request to grant such benefits to Mrs. Dachniwskyj. By the time OPM sent its letter, Mr. Dachniwskyj had *already* made clear that he wished to transfer the survivor annuity to his new wife. Mr. Dachniwskyj's election was therefore presumably valid even under petitioner's own rule.

3. Finally, petitioner repeatedly asserts that the court of appeals' decision violates the constitutional separation of powers and established doctrines of administrative law. See Pet. 5, 6-7, 9-11. Petitioner is mistaken. The court correctly explained both the basis for its jurisdiction over Board decisions, and the "limited" scope of its review. Pet. App. 8a (citing 5 U.S.C. 7703(c) and *Hernandez*, 450 F.3d at 1334). It then carefully applied these standards to the facts at hand, concluding that the Board's decision awarding the survivor benefits to petitioner was unsupported by substantial evidence. *Id.* at 12a. This determination was within the court's authority. It was also plainly correct, as the record evidence shows that Mr. Dachniwskyj clearly wanted his survivor benefits to go to Mrs. Dachniwskyj, and not to petitioner. Further review of the court's factbound conclusion is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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