SUPREME COURT
OF THE UNITED STATES

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          IN THE SUPREME COURT OF THE UNITED STATES

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THE OHIO ADJUTANT GENERAL'S          )

DEPARTMENT, ET AL.,                  )

          Petitioners,               )

               v.                    ) No. 21-1454

FEDERAL LABOR RELATIONS AUTHORITY, )

ET AL.,                              )

          Respondents.               )

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Pages:   1 through 108

Place:   Washington, D.C.

Date:    January 9, 2023
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12   Washington, D.C.

13   Monday, January 9, 2023

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15   The above-entitled matter came on for

16   oral argument before the Supreme Court of the

17   United States at 11:13 a.m.

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1   APPEARANCES:

2   BENJAMIN M. FLOWERS, Solicitor General, Columbus,

3   Ohio; on behalf of the Petitioners.

4   NICOLE F. REAVES, Assistant to the Solicitor

5   General, Department of Justice, Washington, D.C.;

6   on behalf of the Federal Respondent.

7   ANDRES M. GRAJALES, ESQUIRE, Washington, D.C.; on

8   behalf of the Union Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (11:13 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument next in Case 21-1454, the Ohio

5   Adjutant General's Department versus the

6   Federal Labor Relations Authority.

7   Mr. Flowers.

8   ORAL ARGUMENT OF BENJAMIN M. FLOWERS

9   ON BEHALF OF THE PETITIONERS

10   MR. FLOWERS: Thank you, Mr. Chief

11   Justice, and may it please the Court:

12   The Sixth Circuit and the Federal

13   Labor Relations Authority held that adjutants

14   general and state guards, when they employ

15   technicians, are federal agencies to which the

16   Authority may issue orders.

17   That is wrong. The Reform Act defines

18   agencies to include executive departments,

19   government corporations, and independent

20   establishments. Adjutants general and state

21   guards are none of these things. They're

22   neither among nor part of the 15 Cabinet-level

23   agencies that qualify as executive departments.

24   They're not government corporations because

25   they're not corporations. And they're not

1   independent establishments because they're not

2   part of the executive branch.

3   The Authority concedes all of that,

4   but it claims it can regulate adjutants general

5   and state guards anyway because they represent

6   or act on behalf of the Defense Department,

7   which is a Reform Act agency, when they employ

8   technicians.

9   But the Reform Act says the Authority

10   can issue orders to agencies. It gives it no

11   power to issue orders to non-agencies simply

12   because they serve as the representatives or

13   agents or designees of an agency.

14   Indeed, a serious sign of the problem

15   with the Authority's position is that even now,

16   40 years after the Reform Act was enacted, no

17   one can quite give a consensus justification

18   for the Authority -- for the power the

19   Authority wields. The Authority's arguments

20   have continued to evolve while the union and

21   amici advance novel arguments of their own.

22   If Congress had really given the

23   Authority this power, if it had really wanted a

24   federal independent agency with jurisdiction

25   over federal labor relations to issue orders to

1   state guards, it would not have made the grant

2   of that power so hard to find.

3   Ultimately, here, there's no reason to

4   resist the statute's plain meaning.

5   Dual-status technicians are employees of the

6   Defense Department, and they should enforce

7   their labor rights through and against that

8   department.

9   I welcome your questions.

10   JUSTICE THOMAS: Mr. Flowers, who

11   hires these technicians?

12   MR. FLOWERS: They are hired by the

13   Adjutant General. They become employees of the

14   Defense Department under 32 U.S.C. 709.

15   JUSTICE THOMAS: So under what

16   authority does the Adjutant General hire the

17   technicians?

18   MR. FLOWERS: Federal law empowers us

19   to hire technicians that are then --

20   JUSTICE THOMAS: So it's done through

21   delegation?

22   MR. FLOWERS: Yes.

23   JUSTICE THOMAS: So they are federal

24   employees?

25   MR. FLOWERS: They are federal

1 employees, and let me try -- explain why,

2 because of that, it makes the most practical

3 sense to route these disputes through the

4 Defense Department. So --

5   JUSTICE THOMAS: But isn't the

6 complaint the -- you have the -- the style of

7 the -- at least in the petition, it says that

8 before the Federal Labor Relations Authority,

9 U.S. Department of Defense, Ohio National Guard

10 is -- is the style.

11   MR. FLOWERS: That is how the case was

12 captioned, but it was at least treated as a

13 suit against the state guard, not as against

14 the Department of Defense.

15   JUSTICE THOMAS: But I thought the

16 Adjutant General was an -- was an intervenor

17 respondent.

18   MR. FLOWERS: The Adjutant General

19 intervened to defend the interests of the state

20 National Guard, which was the initial party.

21   JUSTICE THOMAS: So this would make --

22 your argument would make much more sense if we

23 were talking about the state highway patrol.

24 Could you explain on exactly when a technician

25 is a federal employee and for what purposes and

1   when a technician is a state employee?

2   MR. FLOWERS: So they are always a

3   federal employee under 32 U.S.C. 709(e). And

4   we're not disputing that they have collective

5   bargaining rights or that we are using these

6   federal employees. The question here is

7   whether we are ourselves a federal agency

8   because they can issue an order to us only if

9   we are, in fact, an agency. That's what the

10   statute says.

11   And we are not a federal agency, even

12   if we are an agent or a designee of the federal

13   government, because being someone's agent does

14   not turn you into the principal. It just means

15   you're acting on behalf of the principal.

16   I do want to, if I can, briefly

17   address --

18   JUSTICE KAGAN: Could -- could I just

19   --

20   MR. FLOWERS: Sure.

21   JUSTICE KAGAN: -- a -- point of

22   clarification? You -- you just said something

23   that also appears in your briefs that I was

24   confused by.

25   MR. FLOWERS: Sure.

1   JUSTICE KAGAN: You -- you said that

2   you're not disputing that these employees have

3   collective bargaining rights. What does that

4   mean to you? Because the idea of collective

5   bargaining rights is that there's somebody else

6   on the other side that has to sit down and

7   collectively bargain with you.

8   So are -- are you saying that, in

9   fact, there is an obligation on the -- on -- on

10   -- on the part of the state guard to sit down

11   at a collective bargaining table?

12   MR. FLOWERS: It should be their

13   employer, which is the Department of Defense,

14   who could ask us to serve as the

15   representative, might be bound by what we enter

16   into, but it would be forced through and

17   against them.

18   Let me explain how that makes sense.

19   If you step back and you ask who's best

20   positioned to handle all this, the Authority in

21   the first instance or the Department, the

22   Department on the front end is the only entity

23   that can bring all the interests to the table.

24   So, when they're negotiating or trying to

25   amicably work out a dispute, they, unlike the

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 1    Authority, are subject to presidential control,

 2    and so they can ensure that the President's

 3    commander-in-chief powers aren't frustrated.

 4    They have immense influence over the guards and

 5    the adjutants general.

 6              But most important of all, the

 7    technicians are Defense Department employees.

 8    The Defense Department signs their checks.  The

 9    Defense Department withholds their dues.  The

10    Defense Department issues myriad regulations

11    that govern the sort of conduct technicians can

12    engage in.  That's all stuff with respect to

13    which they may wish to collectively bargain but

14    the Defense Department's in charge of.

15              JUSTICE KAVANAUGH:  But the --

16              MR. FLOWERS:  On the back end -- I'm

17    sorry.  When -- yeah.

18              JUSTICE KAVANAUGH:  Keep going.  I'm

19    sorry.

20              MR. FLOWERS:  I was just going to say,

21    on the back end, when the Authority actually

22    issues the order, generally speaking, it's not

23    possible to -- or I should say, in some cases,

24    it won't be possible to redress their injuries

25    without the Department's cooperation.  In this
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1   very case, we were ordered to restore the union

2   to dues withholding status.

3   JUSTICE KAVANAUGH: I think you said

4   that the Department should be involved rather

5   than the -- but hasn't Congress, in essence,

6   resolved this by saying that the Secretary

7   shall designate the adjutant general referred

8   to -- to employ and administer the technicians?

9   In other words, that's Congress

10   speaking to resolve the issue and say they're

11   the ones who are going to act on behalf of the

12   Department. We are federal -- they're federal

13   employees, you acknowledge, in a federal

14   agency, you acknowledge, and --

15   MR. FLOWERS: The Defense Department

16   is, yes.

17   JUSTICE KAVANAUGH: -- and the

18   Department of Air Force --

19   JUSTICE KAGAN: Which has collective

20   bargaining rights --

21   MR. FLOWERS: Sure.

22   JUSTICE KAGAN: -- you acknowledge?

23   JUSTICE KAVANAUGH: And they have

24   collective bargaining rights. And you said DOD

25   should be handling this, but Congress has

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 1      spoken to this and said DOD handles this

 2      through this process which is set out in

 3      statute and which, by the way, has been used

 4      since 19 -- from 1971 to 2016 uninterrupted

 5      without any -- any objection, I guess, by -- by

 6      Ohio.

 7              MR. FLOWERS:  So -- so let me take

 8      that in a few steps.  The Defense Department

 9      has certainly said that we employ them, though

10      they're also employed by the Department of

11      Defense at the same time.  If the idea is that

12      we're acting on behalf of the Defense

13      Department, that would mean that we

14      collectively bargain on behalf of the Defense

15      Department, and the Defense Department should

16      be standing here rather than the Ohio Adjutant

17      General, that that's who their dispute should

18      be against.  And, again, on the back --

19              JUSTICE JACKSON:  But you hire and

20      fire and supervise them.  I mean, I -- I guess

21      what -- what concerns me a little bit is the

22      suggestion that, you know, while there might be

23      practical reasons why the statute could have

24      DOD be the operable agent here, it's not up to

25      us, right?  We're not just in the first
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 1   instance making policy determinations about how

 2   this thing should be structured.

 3   And as Judge -- Justice Kavanaugh just

 4   pointed out, we have a statute that gives these

 5   people, the dual-service technicians,

 6   collective bargaining rights that in the

 7   collective bargaining world, as Justice Kagan

 8   points out, it means the right to sit across

 9   the table from the people who hire and fire you

10   and bargain over the terms and conditions of

11   your employment.

12   So I -- I guess your task in my view

13   is to establish why it is that Congress would

14   have intended to carve you out in this

15   situation.

16   MR. FLOWERS: So let me first back up

17   for a second and explain -- it -- it's

18   important to emphasize the law we're

19   interpreting here, the Reform Act, is not about

20   National Guards and technicians. It's a

21   generally applicable law for the federal

22   government. And the word --

23   JUSTICE JACKSON: Well, the law we're

24   interpreting is the FL -- or FSLMRS, right?

25   MR. FLOWERS: That's the Reform Act.

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 1              JUSTICE JACKSON:  Okay.

 2              MR. FLOWERS:  They're the same thing,

 3    so --

 4              JUSTICE JACKSON:  All right.  Sorry.

 5              MR. FLOWERS:  Those statutes are

 6    generally applicable.  They apply to the whole

 7    federal government.  And the word in question

 8    is "agency."  So the federal -- the -- the --

 9    the Authority has jurisdiction over us only if

10    we are an agency.  And if -- to be an --

11              JUSTICE JACKSON:  But DOD is an

12    agency, correct?

13              MR. FLOWERS:  DOD is an agency --

14              JUSTICE JACKSON:  All right.

15              MR. FLOWERS:  -- so it can issue

16    orders through the Department of Defense.

17              JUSTICE JACKSON:  And DOD, per the

18    statute that Justice Kavanaugh points out, has

19    delegated to your entities the authority to

20    hire, fire, and act in that capacity over this

21    group of people who have federal collective

22    bargaining rights, correct?

23              MR. FLOWERS:  Congress has given us

24    that power, though the Defense Department, we

25    shouldn't minimize, has immense control over
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1   that.

2   JUSTICE JACKSON: Understood. But why

3   isn't that answering the question?

4   JUSTICE KAGAN: It -- it's not even a

5   DOD choice. I mean, it's a -- it's an

6   obligation on DOD to authorize you to be the

7   supervisor of these employees. This is not a

8   choice on DOD's part. DOD had to give this

9   authority to you.

10   MR. FLOWERS: That's certainly true,

11   but it doesn't mean that we are the Department

12   of Defense. It means we're acting on their

13   behalf. So the Department of Defense may well

14   be bound by the contracts we enter into. We

15   don't take issue with that.

16   The Authority can issue orders to --

17   to the Department of Defense and, in fact, it

18   needs to for some of these things to bear out.

19   In the --

20   JUSTICE BARRETT: So this is a

21   technicality then, kind of, you know, to

22   Justice Kagan's point. You're just saying, you

23   know, they sued the wrong person, it should be

24   DOD here, and you -- you concede that DOD could

25   order you to go to the collective bargaining

 1   table or order you to comply with an order

 2   issued by the Authority?

 3   MR. FLOWERS: I don't think they could

 4   order us to. They could wield their influence

 5   over us to strongly --

 6   JUSTICE BARRETT: Why can't they order

 7   you to if -- if you're their agent or

 8   representative?

 9   MR. FLOWERS: So -- so they could take

10   away the technicians, they could reduce our

11   funding, but they couldn't, for example,

12   replace the adjutant general. They couldn't

13   strip -- they -- they -- they couldn't create a

14   new state National Guard. Those --

15   JUSTICE BARRETT: So you're not really

16   their agent or representative in the way that

17   we might otherwise understand principal agency

18   relationships?

19   MR. FLOWERS: It's not set up by a

20   contract with those sorts of relationships.

21   The Department of Defense is also an agency

22   with limited power granted by Congress, and

23   they have to act using the power they have,

24   which is influence rather than control.

25   And the reason that matters if we're

 1   getting, why is it not a technicality, first,

 2   the federal government would be handling these

 3   things rather than us and they're better

 4   positioned to do so. So I -- I don't know if I

 5   mentioned this, but the -- for --

 6   JUSTICE SOTOMAYOR: Oh, I'm sorry,

 7   you're saying you want to change the law so

 8   that you don't collectively bargain, DOD

 9   collectively bargains?

10   MR. FLOWERS: Well, DOD may be able to

11   through regulation say, if you want the

12   technicians, you have to collectively bargain

13   with them for us. But what they can't do is

14   change the meaning of "agency" for the Reform

15   Act, the generally applicable statute, to make

16   a state entity into a federal agency.

17   JUSTICE SOTOMAYOR: So what do we do

18   with the savings clause? The savings clause

19   says that they don't want to save anything that

20   happened under the executive orders -- it says

21   you can't change -- we're not changing any

22   policies, regulations, or practices or

23   decisions that were issued under those

24   executive orders. And one of those decisions

25   very explicitly was the Thompson Field decision

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 1    involving the Minnesota -- Mississippi National

 2    Guard.

 3              And, there, the Court said -- not the

 4    Court -- the -- the agency said very clearly

 5    rejected these very same arguments you're

 6    making and said you can go into the

 7    administrative process with the National Guard

 8    and they're bound by those decisions.

 9              MR. FLOWERS:  So two answers.

10              JUSTICE SOTOMAYOR:  So how do -- how

11    doesn't the savings clause just defeat all your

12    arguments?

13              MR. FLOWERS:  Because it doesn't do

14    the work they would like it to do.  What it

15    says -- it -- it -- what that statute did and

16    what courts have recognized for decades is it

17    kept the slate from being wiped clean while the

18    Authority and the courts interpreted the Reform

19    Act.  So, if something that those regulations

20    --

21              JUSTICE SOTOMAYOR:  No, that was

22    interpreting what agency and what was a

23    component of DOD was --

24              MR. FLOWERS:  I disagree.

25              JUSTICE SOTOMAYOR:  -- and you're
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 1 saying that -- I -- I don't see how you could

 2 read it otherwise -- that you are acting as

 3 a -- as an agent of DOD, and so you are a

 4 component of DOD. That's what one of the amici

 5 argues --

 6   MR. FLOWERS: Well --

 7   JUSTICE SOTOMAYOR: -- and I want to

 8 find out from the Solicitor General's Office

 9 why they don't think that argument is

10 compelling.

11   MR. FLOWERS: So I -- I don't think

12 that argument works. Being an agent does not

13 make one a component of the principal. It

14 makes them an agent of the principal. Usually,

15 it is a non-component that serves as the agent

16 in all sorts of other contexts.

17   But back to 7135, what it says is that

18 those regulations, decisions, et cetera,

19 continue to apply unless they're superseded by

20 the Reform Act itself, which, here, this is

21 because we --

22   JUSTICE SOTOMAYOR: But the Reform Act

23 had the same definition of -- of an agency and

24 executive department as it did then, so it

25 wasn't changing anything.

1   MR. FLOWERS: That no -- that none of

2   those decisions ever interpreted. But, beyond

3   that, or a decision issued under the Reform

4   Act, which could be a decision from the

5   Authority or the courts.

6   So the courts are not bound to

7   continue to adhere to those regulations. If

8   you look at INS v. FLRA, that's 855 F.2d 1454,

9   it's a Ninth Circuit case from three decades

10   ago recognizing that. So 7135 does not do the

11   work they would like it to do.

12   Ultimately, what they -- I understand

13   this is a strange arrangement, but what they

14   have to show is that the state entity is a

15   federal agency for purposes of the Reform --

16   JUSTICE JACKSON: But why do they have

17   to show that? I mean, do you -- do you concede

18   that our task is to ascertain the will of

19   Congress with respect to what entities it

20   intended to be covered by the Reform Act?

21   MR. FLOWERS: No, I would not concede

22   that. I would say the task is to determine

23   what the word "agency" means in the Reform Act.

24   JUSTICE JACKSON: Only insofar as

25   Congress used that term, and so we're trying to

1   figure out what Congress meant when it said

2   "agencies" in the context of this.

3   MR. FLOWERS: I think we're not asking

4   about their subjective intents. We're asking

5   about the objective meaning --

6   JUSTICE JACKSON: No, I'm asking

7   objective. I'm saying surely -- surely you're

8   not saying that we can just decide whatever we

9   want about this policy without reference to

10   what Congress intended.

11   MR. FLOWERS: As long as congressional

12   intent is interpreted with respect to the

13   statute, the statute define --

14   JUSTICE JACKSON: All right. Let

15   me -- let me give you the statute.

16   MR. FLOWERS: Sure.

17   JUSTICE JACKSON: The statute uses

18   "agency."

19   MR. FLOWERS: Mm-hmm.

20   JUSTICE JACKSON: And that does

21   reference or refer to the generic term of

22   "agency" in, you know, the listed enumerated

23   departments.

24   But I guess what I don't understand is

25   why we have to automatically believe that when

1   Congress included "agency" in the Reform Act,

2   they were necessarily only incorporating those

3   listed entities, as opposed to talking about an

4   agency insofar as it employs, hires, fires, and

5   supervises federal employees.

6   So it uses the term "agency" and I get

7   that. And we have another section that says

8   these are the agencies. DOD is on that list.

9   MR. FLOWERS: Mm-hmm.

10   JUSTICE JACKSON: And to the extent

11   that any of those agencies are entities that

12   are hiring, firing, and employing federal

13   employees, we think that that's really what

14   Congress was caring about for the Reform Act

15   purpose, for the collective bargaining purpose.

16   So I guess my question is, why

17   wouldn't any entity that is under the purview

18   of a listed agency that hires, fires, and

19   employs, it functions like the agency for the

20   purpose of employment, be covered by the Act?

21   And, alternatively, why would Congress intend

22   to carve you out when you are functioning in

23   that world?

24   MR. FLOWERS: So I'll take them in

25   reverse order. Why would they want to function

1   as a -- carve us out, I think, is because it

2   does make more practical sense to route these

3   things through the Defense department.

4   JUSTICE JACKSON: But they don't say

5   that.

6   MR. FLOWERS: But what they --

7   JUSTICE JACKSON: Wouldn't we expect

8   to see that in the statute? They've excluded

9   other things specifically as agencies. So, if

10   you're right and that was their intent, we

11   would see the words "but not Adjutant General

12   or it's," you know, "National Guard" in this

13   statute, especially in light of the history

14   that Justice Sotomayor points out.

15   MR. FLOWERS: No. So I think they --

16   an agency has to justify its power. They have

17   to point to the statutory clause that gives

18   them power. Otherwise, they don't have any.

19   So the presumption starts they don't have it

20   until they identify it.

21   JUSTICE JACKSON: Right.

22   MR. FLOWERS: They point to the --

23   JUSTICE JACKSON: And the agency is

24   DOD, and everybody agrees they have this power

25   over -- over you all in the sense that you are

 1   organizing and hiring and firing.

 2   MR. FLOWERS: And there is no other

 3   context that we have found in which the FLRA

 4   interprets entities that act as the agent or

 5   designee for any of those departments to be

 6   agencies themselves.

 7   If they hire a private contractor and

 8   task them with doing something that they

 9   otherwise would have exclusive power to do,

10   they don't count. This Court in Maryland v.

11   United States held that state militias are not

12   --

13   JUSTICE JACKSON: Well, we're not

14   looking for agencies in general. We don't care

15   if you're an agency for other purposes. The

16   only thing it seems as though the statute cares

17   about is whether there's an entity that is

18   hiring, firing, and supervising these employees

19   because the statute is about their collective

20   bargaining rights.

21   MR. FLOWERS: Well, respectfully, I

22   don't know how we get to that interpretation.

23   The -- the definitions we point to are for

24   purposes of Title V. The Reform Act is in

25   Title V. And we don't come within any of those

1   definitions. And that's why you see the amici

2   and the Authority insisting that there must be

3   some way to get there. It must be justified

4   somehow, but no can settle on --

5   JUSTICE JACKSON: That it's not

6   agency?

7   JUSTICE KAGAN: Well, we try to make

8   sense of statutes as a whole.

9   MR. FLOWERS: Mm-hmm.

10   JUSTICE KAGAN: And this statute gives

11   collective bargaining rights to these

12   employees, and you acknowledge that.

13   And this statute also says that with

14   respect to these employees, and this is a kind

15   of sui generis situation, the federal

16   government is not acting as their employer.

17   Instead, the federal government per the statute

18   has the individual state guards acting super --

19   acting as their employer, supervising them,

20   hiring, firing them, and so forth.

21   So then the question becomes, so who's

22   supposed to be sitting across the collective

23   bargaining table with them? Because we know

24   that there's supposed to be a collective

25   bargaining table, and we know that somebody has

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 1    to be sitting on the other end, and we know
 2    that it -- that this statute doesn't really
 3    make sense for DOD to be sitting on the other
 4    end because -- because Congress has told DOD
 5    you can't be the employer.  You have to make
 6    the state guard the employer.
 7              So you put that all together, it
 8    should be the state guard that's sitting across
 9    the table per what Congress said.
10              MR. FLOWERS:  So let me -- let me try
11    to push back on that.  It does make more sense
12    for the Defense Department to be there.  For
13    one thing, they control many issues --
14              JUSTICE KAGAN:  I'm not talking
15    about -- it's does not make sense.  It's like,
16    you know, Congress has told you who it wants to
17    be sitting across the collective bargaining
18    table, and the way Congress has said that is
19    Congress has said to DOD:  You have to give
20    over your supervisory and employment authority
21    to the state guards.
22              MR. FLOWERS:  I think that -- I think
23    the premise is wrong.  They do -- we -- we
24    manage their day-to-day activities, yes, but
25    the Department of Defense issues regulations
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 1    that control most aspects of their work, even

 2    the hours.  So the Department of Defense is in

 3    charge of many of the things they do.

 4              I don't want to sit down before I say

 5    this:  The Department of Defense is the one

 6    that withholds the dues.  So, for example,

 7    here, we were ordered to withhold dues.  We

 8    cannot do that.  We don't --

 9              JUSTICE KAGAN:  But what you're

10    basically saying to us, your position when you

11    get right down to it, is the suit was against

12    the wrong people because -- because everybody

13    has always understood who the collective

14    bargaining agent is in the wrong way, and from

15    now on, collective bargaining as to these

16    employees has to be done on a nationwide basis

17    by the Department of Defense, as opposed to

18    state by state by the individual guards and

19    adjutants general.

20              MR. FLOWERS:  I -- I don't believe

21    that's --

22              JUSTICE KAGAN:  That's the -- isn't

23    that?

24              MR. FLOWERS:  No.

25              JUSTICE KAGAN:  You -- you -- you --
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1   you said yourself you need a collective

2   bargaining partner. You're saying that partner

3   needs to be DOD. So DOD does that on a

4   nationwide basis, as opposed to the state

5   guards doing it state by state --

6   MR. FLOWERS: So it's --

7   JUSTICE KAGAN: -- as it's been done

8   for decades.

9   MR. FLOWERS: Respectfully, it's the

10   last part I disagree with. Even if the Defense

11   Department is the -- the relevant entity, the

12   FLRA can still certify regional units to do the

13   negotiation on a region-by-region basis.

14   And -- and, I -- again, they control

15   many of the aspects over which disputes might

16   arise and which they may well wish to

17   collectively bargain. So it does make more

18   sense that they -- they collectively bargain

19   with the entities that the law says are their

20   employers.

21   JUSTICE JACKSON: But that has --

22   CHIEF JUSTICE ROBERTS: It does seem

23   to me odd -- and I understand that this is --

24   the state National Guards are unusual entities

25   in that they have, you know, status under the

 1   state authority and, of course, under some

 2   circumstances, under -- under federal, but how

 3   does it actually work?

 4   In other words, do you recognize that

 5   you're bound by the results of the collective

 6   bargaining between the -- that -- that the dual

 7   technicians are permitted to engage in, right?

 8   And you -- I mean, who negotiates that? It's

 9   the -- you want it to be the Department of

10   Defense, right?

11   MR. FLOWERS: And I think they would

12   involve all the relevant actors. But, yes,

13   ultimately.

14   CHIEF JUSTICE ROBERTS: Yeah. But

15   they're not the ones that do the supervising or

16   day-to-day management of the dual technicians'

17   responsibilities, right?

18   MR. FLOWERS: They do set regulations

19   that basically control the way we can supervise

20   them on a day-to-day basis. So we do it, but

21   subject to myriad regulations that govern all

22   sorts of aspects of their work, including their

23   hours, I should -- I should note.

24   CHIEF JUSTICE ROBERTS: Well, but it

25   -- it does seem odd to have one entity doing

 1   the negotiation and another entity doing the

 2   supervision.

 3   MR. FLOWERS: But, respectfully, I

 4   think it -- it -- it's not as odd as reading

 5   "agency," the word "agency," in a generally

 6   applicable federal law that's about the federal

 7   government to include entities that exist

 8   solely as a matter of state law.

 9   JUSTICE KAVANAUGH: But it --

10   MR. FLOWERS: The states --

11   CHIEF JUSTICE ROBERTS: No, I

12   understand --

13   JUSTICE KAVANAUGH: Keep going.

14   CHIEF JUSTICE ROBERTS: I was just

15   going to say I understand your -- your -- your

16   legal argument, but I'm trying to see whether

17   or not it makes sense may have a lot to do

18   about how it operates on the ground.

19   MR. FLOWERS: And -- and it -- I think

20   it does make sense because the Department of

21   Defense, once they're there, can, A, bring that

22   military expertise to bear. So, frankly, in

23   terms of why we care about this, why it's not a

24   mere practicality, we have much greater trust

25   in the Department of Defense to work these

 1   disputes out before they even become disputes,

 2   without compromising our military interests,

 3   far more than an independent federal -- federal

 4   agency that's concerned with labor law. But

 5   they -- and they have the tools to do all that

 6   because they have immense control over the

 7   technicians, they have immense influence over

 8   us, and, unlike the Authority, they're

 9   subordinate to the President. So --

10   JUSTICE KAVANAUGH: But you hire --

11   you hire the technicians, correct?

12   MR. FLOWERS: We do.

13   JUSTICE KAVANAUGH: Right. And you

14   do, I think you said, day-to-day supervision of

15   them, correct?

16   MR. FLOWERS: That's true.

17   JUSTICE KAVANAUGH: And the oddity of

18   -- of the case is that you're not a federal

19   officer, yet federal law requires you to do

20   that, and you do it.

21   MR. FLOWERS: And I think that's

22   dispositive. Yes.

23   JUSTICE KAVANAUGH: And you're not

24   challenging the constitutionality of that, just

25   -- correct?

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1           MR. FLOWERS:  Well, we -- we -- no,
2    not --
3           JUSTICE KAVANAUGH:  Of that specific
4    --
5           MR. FLOWERS:  Yes.  Yes, that's right.
6           JUSTICE KAVANAUGH:  -- role?
7           MR. FLOWERS:  But -- but I think that
8    --
9           JUSTICE KAVANAUGH:  But the -- then,
10   to go back to the point about the word
11   "agency," you agree that DOD, as well as the
12   Department of Air Force and Army, are agencies,
13   correct?
14          MR. FLOWERS:  Correct.
15          JUSTICE KAVANAUGH:  Okay.  And then
16   the statute says in this unusual context DOD is
17   acting through the state guard to, as you just
18   said, hire, supervise the people, and that's
19   the natural -- if we have to make sense of
20   this, that's the natural person then who would
21   be sitting across from you at the collective
22   bargaining table in the first --
23          MR. FLOWERS:  That -- that might have
24   been a better way to write the statute, but I
25   see no way to get from the fact that we're
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 1   their agent to the -- to the conclusion that we

 2   are the Department of Defense. That's not

 3   usually how I prove --

 4   JUSTICE KAVANAUGH: Acting on behalf

 5   of the Department of Defense as assigned by

 6   Congress.

 7   MR. FLOWERS: Which -- which would

 8   mean that they are bound by the agreement, not

 9   us.

10   JUSTICE KAVANAUGH: Right. And then

11   one other kind of different angle on the -- on

12   the history of this, this -- am I -- correct me

13   if I'm wrong, and this is -- ultimately, you're

14   going to say the text controls, and I agree,

15   but I just still want to know the history,

16   which was, in the '70s, this was an -- an

17   issue, and state guards were objecting to their

18   role on this and tried to get a carve-out in

19   Congress, and that was -- came up in the

20   context of the military union and the separate

21   legislation, and it was in the Senate bill but

22   failed in the House bill and it never made it.

23   The carve-out that would have changed the

24   statute and solved your concern never made it.

25   MR. FLOWERS: Well, that -- that

 1   solution would have been to a slightly

 2   different problem, which is they wouldn't have

 3   bargaining rights at all.

 4   JUSTICE KAVANAUGH: Mm-hmm.

 5   MR. FLOWERS: So we'd -- we're --

 6   again, we're not disputing that they have

 7   rights.

 8   JUSTICE KAVANAUGH: Right. But that

 9   would have solved your problem.

10   MR. FLOWERS: I -- I -- it would --

11   yes, if we -- if they didn't have rights at

12   all, then they could not go to the Authority to

13   enforce those rights.

14   JUSTICE KAVANAUGH: Right.

15   MR. FLOWERS: That's true. But,

16   ultimately --

17   JUSTICE KAVANAUGH: I -- I agree the

18   text controls, but that history illuminates

19   this is not some isolated thing that was

20   inadvertent, I don't think --

21   MR. FLOWERS: No. I -- no, I --

22   JUSTICE KAVANAUGH: -- or at least

23   that Congress didn't pay attention to at some

24   point.

25   MR. FLOWERS: -- I fully grant that,

 1   but when we're talking about an agency's

 2   exercise of power, they've got to ground it in

 3   the text, as you recognized, and I think, here,

 4   we're talking about penumbras, not the text.

 5   JUSTICE SOTOMAYOR: So what instead

 6   you're arguing now is it's a pyrrhic victory,

 7   because they kept collective bargaining rights,

 8   they could have it against DO -- the Department

 9   of the Army, but they can't enforce it against

10   anybody.

11   MR. FLOWERS: Not -- not pyrrhic in

12   any way. They can enforce it against the

13   Department of Defense.

14   JUSTICE SOTOMAYOR: Well, but you're

15   telling me the Department of Defense can't sue

16   you for it. That's how you answered Justice

17   Barrett.

18   MR. FLOWERS: They cannot sue us.

19   JUSTICE SOTOMAYOR: They can just use

20   other pressures, but they can't have any

21   enforceable right against you in court?

22   MR. FLOWERS: Right. So, of course,

23   my first answer is we're stuck with the law

24   Congress passed, whether or not it makes sense,

25   but I think that does make sense --

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 1           JUSTICE SOTOMAYOR:  Oh, I agree with
 2    you.
 3           MR. FLOWERS:  -- but the --
 4           JUSTICE SOTOMAYOR:  We're stuck -- you
 5    and we are stuck.
 6           MR. FLOWERS:  Yeah.  Yeah.
 7           (Laughter.)
 8           MR. FLOWERS:  But the -- the --
 9           JUSTICE SOTOMAYOR:  And so I go back
10    to my original question for however they --
11    else they view the word "agency" or
12    "department" anywhere else in any other part of
13    the law, at least with respect to this issue,
14    they had the Mississippi decision?
15           MR. FLOWERS:  So the Mississippi --
16           JUSTICE SOTOMAYOR:  And that decision,
17    basically, the Thompson decision, basically
18    said you negotiate the collective bargaining
19    unit, you're acting on behalf of the Department
20    when you do it, the terms are approved by the
21    Department, so the Department has said to you
22    these are -- terms are okay, and if you breach
23    the agreement, then you have to suffer the
24    decision of the agency in charge of deciding
25    whether there was a breach or not.  That's as
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1   simple as I see this case.

2   MR. FLOWERS: Sure, but then 7135

3   says, if that ruling is superseded by the Act,

4   which this is because it defines --

5   JUSTICE SOTOMAYOR: But the Act didn't

6   change the definitions.

7   MR. FLOWERS: It does -- it doesn't --

8   it didn't change the definitions, but that

9   decision didn't consider the definitions I --

10   JUSTICE SOTOMAYOR: So -- and it -- so

11   it didn't change the interpretation of those

12   definitions.

13   MR. FLOWERS: That I disagree with.

14   The relevant definitions predate that order.

15   The order never considered the definitions.

16   And, in any event, whatever that Assistant

17   Secretary of Labor thought he was doing, the

18   statute here plainly says "agency." And even

19   --

20   JUSTICE SOTOMAYOR: So, if we --

21   MR. FLOWERS: -- even the government

22   doesn't argue they're bringing --

23   JUSTICE SOTOMAYOR: -- and -- and

24   you're willing to say there's no legal remedy?

25   MR. FLOWERS: So I --

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1          JUSTICE SOTOMAYOR:  Political pressure
2    remedy, but there's no legal remedy for rights
3    that were clearly granted by Congress and
4    intended by Congress?
5          MR. FLOWERS:  I'd -- I would -- I
6    really dispute that there's no legal remedy
7    because a remedy against the Department is
8    going to be effective.  They have immense
9    influence over us.
10          JUSTICE JACKSON:  Yes, but it's going
11    to be different.  I mean --
12          MR. FLOWERS:  But it --
13          JUSTICE JACKSON:  -- I -- I -- you --
14    I -- I appreciate -- I appreciate that you keep
15    coming back to the textual it says "agency,"
16    but I -- I would posit that the real question
17    is, what did Congress intend when it used
18    "agency" in the statute in that way?
19          MR. FLOWERS:  Well, we know what they
20    intend --
21          JUSTICE JACKSON:  And to follow your
22    line of reasoning, we would have to believe
23    that Congress intended for dual-status service
24    workers in this nature to have a different,
25    weaker form of collective bargaining rights
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1   because, unlike other federal civilian

2   employees who could sue the people who -- or,

3   excuse me, who could bargain with the people

4   who supervise them, they couldn't directly.

5   They would have to go through -- I understand

6   it's possible to -- to figure out a way for

7   them to enforce their rights, but why would

8   Congress -- given all this history, the

9   background of the statute, the fact that they

10   considered it, why would they have wanted

11   dual-service status workers to have a different

12   kind of collective bargaining right than other

13   similarly situated employees?

14   MR. FLOWERS: Absolutely. Is it okay

15   if I answer?

16   CHIEF JUSTICE ROBERTS: You may answer

17   briefly, yes.

18   MR. FLOWERS: So two -- two quick

19   answers. First, again, they have to say we're

20   the agency, and I want to emphasize even the

21   Authority does not claim that we are an agency.

22   They are not making that argument. They say

23   we're the representative of, not that we are.

24   Second, why would they want to do it?

25   I think it's important to realize that these

 1   technicians serve, even in their civilian

 2   capacities, very important military tasks. And

 3   it's perfectly reasonable for Congress to say,

 4   in that context, we want the Defense Department

 5   involved because they answer to the President

 6   and they have to make sure that whatever is

 7   being done doesn't frustrate his

 8   commander-in-chief powers.

 9   And think, in this case, the general

10   counsel wanted us to go base to base and engage

11   in basically a speaking tour where we would

12   apologize to the technicians and tell them we

13   had violated our rights.

14   JUSTICE JACKSON: But haven't you --

15   CHIEF JUSTICE ROBERTS: Thank you.

16   Thank you, counsel.

17   Justice Thomas?

18   JUSTICE THOMAS: Just briefly, could

19   -- in your delegation of authority, could it

20   explicitly authorize you to not only administer

21   but also to serve as the -- well, it would be

22   more of an imposition that -- that you are also

23   the defendant in these cases or respondent in

24   these cases?

25   MR. FLOWERS: Congress could do that,

 1   and it's actually done it in other contexts,

 2   not with respect to the Reform Act. And I do

 3   want to note that --

 4   JUSTICE THOMAS: No, no, I'm talking

 5   about the Defense Department in its delegation

 6   to you.

 7   MR. FLOWERS: So the statute delegates

 8   to us the power to hire them. I do believe the

 9   Defense Department through regulations could

10   say, if you want technicians, you have to agree

11   to collectively bargain on our behalf. I don't

12   think they could give the authority and the

13   power to issue orders to us, but they could

14   make us bargain for them.

15   And I -- I do want to briefly

16   emphasize 709(e), the designation statute, is

17   not about the Reform Act. That is a general

18   statute that says we have power over

19   technicians. So it -- that -- that's not

20   unique to the Reform Act in any way.

21   CHIEF JUSTICE ROBERTS: Justice Alito?

22   Justice Sotomayor?

23   JUSTICE SOTOMAYOR: I'm going back to

24   Justice Kagan's venerable rule, if it ain't

25   broke, don't fix it. And we know that it

 1   hasn't been broken because either under the

 2   executive orders for decades, National Guards

 3   did go through the administrative processes as

 4   the named responding party. They've been doing

 5   so in this context. But I think, most

 6   importantly, under Article I, military matters

 7   are left to the executive, and we should be

 8   doing very little to interfere in that process.

 9   And this is a major interference in

10   you saying to us we are not -- we can be

11   designated as the employer, we can have adjunct

12   generals foisted on us, we can be given

13   permission, as we have been, to bargain, but we

14   can't be forced to honor our bargains. That's

15   basically what you're saying. We can't be

16   legally forced. That's what you're saying to

17   us.

18   MR. FLOWERS: We're not -- it's not

19   that we can't be. It's that Congress hasn't

20   done it. And so, if it ain't broke, don't fix

21   it, coming back to --

22   JUSTICE SOTOMAYOR: Yeah, but Congress

23   hasn't fixed it. Congress has looked at the

24   state of affairs for I don't know how long, and

25   even when the National Guards ask Congress not

 1   to let the technicians collectively bargain,

 2   Congress rejected that request.

 3   And now you're asking us to permit

 4   labor bargains to threaten national security

 5   because there's no peaceful way to adjudicate

 6   this before an agency.

 7   MR. FLOWERS: I think the principle

 8   that Congress is in charge is absolutely right.

 9   But, here, there is no way, I think even the

10   Authority would concede, to read "agency" to

11   mean us. They have to have this round-about

12   that's good for one ride and one ride only with

13   -- when we get to adjutants general.

14   In terms of that longstanding practice

15   and if -- why is it -- is it broken or not, it

16   is broken. Anytime you have an agency --

17   JUSTICE SOTOMAYOR: It's only broken

18   because you're the first National Guard to say

19   we won't honor our commitments.

20   MR. FLOWERS: Anytime you have an

21   agency exercising authority that's that

22   Congress hasn't given it, there is a serious

23   problem. Agencies do not acquire power by

24   adverse possession. It would be highly

25   dangerous to say that as long as an agency

1   keeps violating the law, we'll let it slide.

2   If they do it once or twice, that's not okay.

3   Here, we're in the position where

4   they've been violating it repeatedly, and this

5   Court has not been shy in other cases, whether

6   it's McGirt or Janice, to correct past

7   practices that have been going on a long time

8   but that are contrary to law.

9   CHIEF JUSTICE ROBERTS: Justice Kagan?

10   JUSTICE KAGAN: It's, of course, true

11   that many, many times in the law we ascribe the

12   actions of principals to agents, and,

13   conversely, we require the same things of

14   agents that we do of principals. So that's

15   true in many contexts where we essentially say

16   we're going to treat the agent and the

17   principal as one because the agent is just

18   exercising the authority of and acting on

19   behalf of the principal.

20   And the way I see this case is, is

21   this one of those contexts? And can we

22   understand the reference to "agency" with

23   respect to this issue as also a reference to

24   the agency's agents, who in this case are you

25   and your fellow adjutant generals?

         1   And -- and -- and, there, I do -- you

         2   know, trying to make sense of an entire

         3   statute, I think about the -- the fact that

         4   there is an explicit delegation from the --

         5   from -- from D -- an explicit delegation that

         6   Congress wrote requiring DOD to give its power

         7   to you with respect to these employees, and

         8   there is also an explicit provision which you

         9   acknowledge saying that these employees have

        10   employment rights, including the right to sit

        11   down and collectively bargain with their

        12   employer.

        13   And the question is, who is that

        14   employer? And you say they have to sit down

        15   with DOD. The consequence of your position is

        16   that the employee -- is that the adjutant

        17   generals are out of the picture and DOD takes

        18   over.

        19   But I guess I'm wondering why, given

        20   that there's been this explicit delegation for

        21   you to supervise and hire and so forth these

        22   employees, why anybody would read the statute

        23   to do that rather than simply to read the

        24   statute as putting you in the shoes of DOD when

        25   it comes to this activity?

1   MR. FLOWERS: So there -- there are

2   certainly instances an -- where an agent's

3   bound by whatever order is issued to the

4   principal, but that's expressly. So, for

5   example, Rule 65 expressly says agents are

6   bound.

7   I am not aware of any area in the law

8   where agents by serving as agents become

9   principals, and that's what they would need to

10   show, the Authority has to show that to win

11   this case, because unless we are the Department

12   of Defense, they can't issue the order against

13   us.

14   They do not even argue that we're the

15   Department of Defense. And if the argument

16   here is that we become agencies by serving as

17   representatives, that is yet a new version of

18   the argument, it -- which just shows I think

19   that we're looking for some way to say it must

20   be in there somewhere when it's not naturally

21   there.

22   So then I get to, why does it make

23   sense to do it this way? I -- I do want to

24   emphasize this. Many of the things that the

25   technicians will want to bargain over are

 1   wholly within the Department of Defense's

 2   control. They withhold the dues.

 3   So the order here said we have to

 4   withhold dues. We cannot do that. We don't

 5   issue the checks. We can ask them to do it,

 6   but we can't do it ourselves. They issue

 7   regulations that control all aspects of their

 8   work. They want to bargain over that, nothing

 9   the State Guard can do.

10   And, finally, I think it's really

11   critical to emphasize the importance of the

12   President's control over the Department of

13   Defense. The general counsel of the FLRA in

14   this case, as I started to mention, wanted us

15   to go base to base and do -- and -- and get up

16   and explain that we erred, we misinterpreted

17   the Act, and apologize.

18   I think the Department of Defense

19   would have been far more likely to say:

20   Absolutely no way. That would be detrimental

21   to the chain of command. Here, thankfully, the

22   ALJ didn't impose that, but the general counsel

23   asked for it.

24   And I think that shows the -- that

25   that -- the failure to appreciate the sort of

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 1    military-specific concerns there shows why it

 2    does make practical sense to channel these

 3    things before the Defense Department.

 4                CHIEF JUSTICE ROBERTS:  Justice

 5    Gorsuch?

 6                Justice Kavanaugh?

 7                JUSTICE KAVANAUGH:  Two quick things.

 8                MR. FLOWERS:  Sure.

 9                JUSTICE KAVANAUGH:  One, the

10    collective bargaining agreement here is

11    approved by DOD, correct?

12                MR. FLOWERS:  Right.  We -- and,

13    again, we don't dispute that they could be held

14    bound by it.

15                JUSTICE KAVANAUGH:  Right.  And the

16    statute requires that these collective

17    bargaining agreements be approved by DOD, is

18    that correct?

19                MR. FLOWERS:  I think that's actually

20    some -- somewhat ambiguous.  The head of the

21    agency has to approve it, so they consider

22    themselves the head of the agency, which I

23    assume to be the Department of Sec -- of the

24    Army or Air Force, which is yet another reason

25    why I think it's --
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1   JUSTICE KAVANAUGH: But DOD in this

2   case did approve the --

3   MR. FLOWERS: It approved, yes.

4   JUSTICE KAVANAUGH: -- the relevant

5   collective bargaining agreement and there is a

6   statute. I take your point on that.

7   MR. FLOWERS: And --

8   JUSTICE KAVANAUGH: And then second

9   question was, on your point about agencies

10   can't acquire authority by adverse possession,

11   if you go back to the '70s -- I mean, I agree

12   with that point, obviously, but if you go back

13   to the '70s in the Thompson Field decision,

14   even if you think that's wrong, what do you do

15   with the unusual savings clause?

16   I know you've referenced it before,

17   but that itself is an unusual provision to say,

18   well, to the extent agencies have done

19   something, we, Congress, are preserving that

20   unless superseded by a further regulation or by

21   the President, et cetera, or by provisions of

22   this chapter?

23   In other words --

24   MR. FLOWERS: Or a decision issued

25   under this chapter, which it would include a

1   judicial decision. So, if this Court

2   interprets the Reform Act in a way that is

3   inconsistent with the regulations, the law

4   Congress passed wins. And that's what the --

5   again, I pointed to that INS v. FLRA case.

6   That's how Judge Wallace in a very thorough

7   opinion --

8   JUSTICE KAVANAUGH: Yeah, I'm not --

9   okay. That's an interesting point. I'm not

10   sure I'm fully sure of that, but I'll let it go

11   for now, okay?

12   (Laughter.)

13   CHIEF JUSTICE ROBERTS: Justice

14   Barrett?

15   JUSTICE BARRETT: On page 28 of your

16   opening brief and page 9 of your reply, you

17   point out there are other contexts in which

18   states designate officials to administer

19   federal law. You point to Medicaid. You point

20   to elections officials.

21   And I want to know if you are just

22   invoking those as examples for why it would be

23   odd to consider the Adjutant General to be an

24   -- an agent or an -- you know, a federal

25   officer or subcomponent, or are you saying that

 1   there would be implications of our decision

 2   that might pull some of these people who

 3   Congress did not intend to be included in -- in

 4   the Act? You know, are there -- are there

 5   other provisions of federal law that ruling

 6   against you might mess up? I just wasn't --

 7   MR. FLOWERS: Sure.

 8   JUSTICE BARRETT: -- really clear

 9   whether you were making an argument about this

10   could really have bad consequences or if you

11   were just saying this is an example for why the

12   government's position doesn't make sense.

13   MR. FLOWERS: It -- more why it

14   doesn't make sense. The -- it -- what we use

15   those statutes for is to show that even when

16   you're designated to fulfill a role for the

17   federal government that's completely within the

18   federal government's control and discretion,

19   you don't become the federal government itself.

20   As in those contexts, we do point to

21   the Intergovernmental Personnel Act, where the

22   federal government actually does have its

23   employees go work for tribes, local

24   governments, and so on, where, as far as we can

25   tell, they would never say the tribes become

1   entities of -- of the federal government.

2   CHIEF JUSTICE ROBERTS: Justice

3   Jackson?

4   JUSTICE JACKSON: Yeah. In response

5   to Justice Kagan, you -- you -- and, again, in

6   response to Justice Barrett, you keep saying we

7   aren't DOD. And I guess I don't understand

8   that. Why aren't you for the purpose of

9   employing -- for the purpose of this particular

10   statute? Isn't that the work of the agency

11   analysis such that the best reading of the

12   statutory terms is that you are acting as DOD

13   for the purpose of the statute and are

14   therefore covered by the laws that govern labor

15   relations in regard to these employees, given

16   your role as their employer?

17   MR. FLOWERS: I'd -- I'd refer you to

18   the last couple paragraphs of Judge Tatel's

19   majority opinion in Sealed Case, and what he

20   explains there is that the question whether

21   someone is an entity, is an agency, isn't a

22   metaphysical inquiry. It depends on statutory

23   definitions. So they have to find a statute

24   that makes us part of the Department of

25   Defense. They can't -- they -- they don't --

 1   JUSTICE JACKSON: Yeah, but what

 2   you're doing is you are -- are not taking into

 3   account the common law agency relationship.

 4   So, yes, if we didn't have any kind of

 5   relationship between you and DOD and we were

 6   just asking the question are you an agency, I

 7   agree with you.

 8   But I guess Justice Kagan's point was

 9   we have some entity that everybody agrees is an

10   agency under the statutes, and you are

11   designated by Congress, are required by

12   Congress to step into their shoes for the

13   purpose of administering this statute with

14   respect to labor relations. So, in that

15   context, why aren't you the agency for the

16   purpose of this?

17   MR. FLOWERS: So those common law

18   principles help us and not them, which is why

19   they don't cite them. Principal is bound by

20   the actions of its agent. Agent does not

21   become the principal by serving as the agent.

22   They need to show that we are part of the

23   Department of Defense. And acting as the agent

24   of the Department of Defense doesn't make you

25   the Department of Defense, just as a military

 1   contractor who works for the Department of

 2   Defense is not part of the Department of

 3   Defense.

 4   JUSTICE JACKSON: So -- so you're

 5   saying that --

 6   MR. FLOWERS: Indeed, they're --

 7   JUSTICE JACKSON: -- so you're saying

 8   that -- I -- I understood that the principal as

 9   you say is bound by the activity of the agent.

10   So, in this -- in this case, let's say you

11   agreed that you would collectively bargain on

12   behalf of DOD and you made certain concessions.

13   Are you saying that DOD would not be

14   bound by those in -- in terms of its

15   understanding of the labor relationship that

16   you created?

17   MR. FLOWERS: The Department of

18   Defense may be bound by what we do.

19   JUSTICE JACKSON: Okay.

20   MR. FLOWERS: But we -- but --

21   JUSTICE JACKSON: What you did in --

22   across the bargaining table, they would be

23   bound by it. Those employees couldn't say

24   there's some other labor thing happening. If

25   you had made representations at the collective

 1   bargaining table, you would bind DOD, is that

 2   right?

 3   MR. FLOWERS: As long as we were

 4   acting as their agent, which they say we are,

 5   yes.

 6   JUSTICE JACKSON: Okay. So why -- I'm

 7   sorry, why doesn't that make you then

 8   responsible for sitting across from these

 9   employees in the context of the collective

10   bargaining relationship as Congress understood

11   it?

12   MR. FLOWERS: Because that's -- I -- I

13   guess it might, but the question that we're

14   asking is, are we an agency? That's the only

15   question in this case. We have to be an

16   agency, or the Authority does not have the

17   ability to issue orders to us. That's

18   conceded. I don't think anyone is disputing

19   that. And we don't become an agency by being

20   the agent.

21   And, in -- indeed, every federal

22   employee is an agent of the federal government.

23   We don't say they're all agencies.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

1   Ms. Reaves.

2   ORAL ARGUMENT OF NICOLE F. REAVES

3   ON BEHALF OF THE FEDERAL RESPONDENT

4   MS. REAVES: Mr. Chief Justice, and

5   may it please the Court:

6   Petitioners are required to comply

7   with the Act and submit to the FLRA's orders in

8   cases like this one because of the role they

9   play in the federal employment system. It is

10   uncontested that dual-status technicians have

11   collective bargaining rights because they are

12   federal civilian employees who are employed by

13   parts of DOD, a covered agency. And under

14   Section 709(d) of Title 32, Petitioners employ

15   and administer technicians pursuant to a

16   designation of federal authority from DOD.

17   Other provisions confirm that role.

18   For example, Section 2105 of Title V provides

19   that an adjutant general appoints technicians

20   into the federal civil service when he hires

21   them. Adjutants general thus only hire, fire,

22   and supervise employees of DOD because they are

23   acting as if they are part of and on behalf of

24   that agency.

25   Similarly, as Petitioners seem to

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 1    concede in their reply and as multiple

 2    provisions in the Act indicate, the Act

 3    requires compliance by components and entities

 4    that are designated to act on an agency's

 5    behalf.  And that is exactly how Petitioners

 6    behave when employing technicians.  Petitioners

 7    therefore must both bargain with technicians

 8    and comply with the FLRA's orders.

 9            And if accepted, Petitioners'

10    arguments would upend 50 years of uninterrupted

11    collective bargaining between technicians and

12    state adjutants general.  In a late-breaking

13    argument, Petitioners suggest that they may be

14    required to bargain under the Act so long as

15    DOD, instead of the FLRA, enforces any order

16    issued against them.

17            But that would not negate the right

18    that the Act actually gives to technicians, a

19    right to bargain with their direct supervisors

20    subject to the FLRA's enforcement authority.

21    And it makes no sense to require DOD to

22    threaten the nuclear option of withholding

23    federal funding or recognition to state

24    national guards to enforce routine FLRA orders.

25            Because Petitioners have decided to
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1 accept the benefits that come with employing

2 technicians, they must also accept the limited

3 bargaining obligations that come along with

4 those benefits.

5   I welcome the Court's questions.

6   JUSTICE THOMAS: As I hear Petitioner,

7 the argument is that, of course, we are

8 delegated this authority to hire the

9 technicians and to supervise them, but that

10 does not convert us into an agency for the

11 purposes of the relevant statute.

12   How do you respond to that?

13   MS. REAVES: The term "agency" in the

14 statute includes and requires compliance by

15 components and entities that are designated to

16 act on behalf of that agency, and that includes

17 subcomponents within a federal agency. And

18 that's a thing that Petitioners are most

19 analogous to in this -- in this system that

20 Section 709(d) and Section 709(e) have set

21 forward.

22   It's hard to imagine how someone can

23 fully employ federal employees from the

24 perspective of their being able to hire, fire,

25 and supervise federal employees' day-to-day --

 1   day-to-day employment activities, without

 2   holding that they are, in fact, acting as a

 3   component of an agency that's required to

 4   bargain.

 5   JUSTICE THOMAS: Well, the -- the --

 6   there's always delegations from the head of

 7   agencies to subparts, but those delegees are

 8   not converted to agencies. They may be agents

 9   for a limited purpose. They may have limited

10   authority that's delegated from the top. But

11   they're not converted to an agency. And I

12   think that's the leap that I'm having some

13   difficulty with.

14   MS. REAVES: So I think it would be

15   helpful if I could maybe go through a few sets

16   of provisions in the Federal Service Labor

17   Management Relations Act that do indicate that

18   the actual bargaining requirement often lies

19   with a component of a federal agency, which I

20   think helps bridge that gap to then seeing that

21   Petitioners aren't like that component.

22   So the first set of provisions are the

23   definition of "collective bargaining" and the

24   definition of "appropriate unit." Those are on

25   page 3a and 5a of our statutory appendix. And

 1   those indicate that bargaining is often done

 2   not on a high-level agency basis but on an

 3   agency, plant, installation, functional, or

 4   other basis.

 5   Now the second set of statutory

 6   provisions that I think is helpful are the

 7   exclusions from the definition of "agency."

 8   Those are on page 3a of the statutory appendix.

 9   And that excludes entities like the FBI and the

10   Secret Service.

11   And if we were to accept this

12   proposition that only the high-level agency is

13   required to comply with the Act and

14   collectively bargain, there would have been no

15   need for Congress to exclude the FBI and the

16   Secret Service because they aren't high-level

17   agencies. The FBI is part of DOJ. The Secret

18   Service is part of the Department of Homeland

19   Security.

20   JUSTICE KAGAN: I suppose what they

21   would say is, well, we get you as to the parts

22   of agencies, but the -- and the -- the parts of

23   agencies aren't listed either, but we just

24   assume that by saying the Department of

25   Justice, we naturally mean as well the FBI, but

1   -- but we don't usually mean Ohio, and so

2   that's the difference.

3   So what gets you to Ohio?

4   MS. REAVES: What gets us to Ohio is

5   Section 709(d) and (e) and the designation of

6   federal authority. And this isn't just a

7   partial designation. It is designation to

8   hire, fire, and control the day-to-day

9   employment obligations of dual-status

10   technicians.

11   JUSTICE GORSUCH: Well, that -- and I

12   -- that's where I want to pick up. So I'm just

13   curious about the federalism implications of

14   this case. Forget about the militia for the

15   moment, okay?

16   Under the Spending Clause today, the

17   federal government effectively employs or

18   provides the budgets for 30 to 40 percent of

19   state budgets today, and many, many, many of

20   their employees, are they now in other cases,

21   Medicare, Medicaid, the -- the examples that

22   Justice Barrett offered, are they now agents of

23   the federal government effectively? Are they

24   effectively federal agencies?

25   MS. REAVES: No, because, and that's

1   -- merely providing federal funding is not the

2   same as providing a designation of federal

3   authority to hire, fire, and supervise

4   employment.

5   JUSTICE GORSUCH: Well, let -- let --

6   let's -- let's say Congress provides those

7   similar kinds of provisions in those other

8   areas. We -- we -- we allow the states to hire

9   and fire the employees that we are funding, but

10   it has to do whatever we say. You know, you're

11   now a federal agency. I -- I know you thought

12   you were a sovereign state, but it turns out

13   you are, in fact, a federal agency.

14   MS. REAVES: So two responses to that.

15   First of all, I think the hypothetical you just

16   gave wouldn't convert them into federal

17   employees. If they were, in fact, federal

18   employees, not just federally funded, and then

19   the state was given the authority to hire,

20   fire, and supervise them in their day-to-day

21   federal roles, I think that would look a lot

22   like Petitioners here.

23   JUSTICE GORSUCH: Okay. So -- so the

24   --

25   MS. REAVES: My second response --

 1   JUSTICE GORSUCH: -- so, in other

 2   words, there is nothing in this case that's

 3   particularly unique. Congress could replicate

 4   this -- this same structure with respect to

 5   other Spending Clause programs?

 6   MS. REAVES: It could replicate it,

 7   but it is unique in that this is the only

 8   statute, 709(d) is the only one that either we

 9   or Petitioners have been able to identify where

10   a state employee supervises, hires, and fires

11   federal employees into a federal role.

12   JUSTICE GORSUCH: Now I know we don't

13   have a constitutional commandeering-type claim

14   here, but is there some concern the government

15   has about converting state militia officers

16   into federal agencies?

17   MS. REAVES: So a -- a couple of

18   responses to that. First, I --

19   JUSTICE GORSUCH: I'm sure -- I'm --

20   I'm just sure this is something you all have

21   thought about too, so I'm -- I'm curious.

22   MS. REAVES: Absolutely. So I don't

23   think this case in any way implicates militia

24   concerns because, as this Court recognized in

25   Babcock, dual-status technicians really do have

 1   three separate roles, and one of those roles is

 2   a federal -- federal military role, one is a

 3   state military role, and one is a federal civil

 4   service role. And that's the role that this

 5   case is about.

 6   And, in fact, dual-status technicians

 7   are barred by federal statute from collectively

 8   bargaining over the conditions of their state

 9   and federal military service or active-duty

10   training.

11   JUSTICE GORSUCH: And then, I'm sorry,

12   just to circle back to -- is there any limit

13   you see on -- on Congress's power to replicate

14   this scenario in other Spending Clause programs

15   at all or -- or none? I'm -- I'm --I'm -- I'm

16   just curious.

17   MS. REAVES: I don't think -- I -- I'm

18   not aware of any limit. I think, obviously,

19   this is a unique situation, and dual-status

20   technicians are, as this Court recognized in

21   Babcock, an extremely rare bird. And the --

22   JUSTICE GORSUCH: Well, I understand

23   that. But the --

24   MS. REAVES: -- role that adjutant

25   generals have is a rare --

1   JUSTICE GORSUCH: -- the government

2   doesn't see any inhibition to Congress's power

3   to turn states into federal agencies for

4   purposes of whatever, you know, whether it's

5   collective bargaining or whatever other good

6   interest it has in mind?

7   MS. REAVES: Just two responses to

8   that. First of all, I think there's an

9   important component of this, the state consent,

10   you know, Petitioners have agreed that they

11   have consented to this system. And I think, if

12   there wasn't that consent and, you know, if

13   they didn't have the ability to cease hiring

14   and firing dual-status technicians, that would

15   be a different situation.

16   But, to the extent that there was a

17   consensual role and that Congress actually

18   wanted to make a bunch of state employees

19   federal employees and create state entities to

20   be federal employers of them, I think that

21   would look a lot like this. And I don't see

22   any distinct --

23   JUSTICE GORSUCH: Beyond consent, do

24   you see any other limits?

25   MS. REAVES: No, not -- not -- not

1   that I'm aware of right now.

2   JUSTICE SOTOMAYOR: Ms. Reaves, why --

3   why are you going so far? I -- I -- I'm just

4   curious. This is a unique situation in and of

5   itself because it's a military setting. And

6   the militia, per the Constitution, is

7   intimately tied between Congress and the

8   states, correct?

9   MS. REAVES: That's correct.

10   JUSTICE SOTOMAYOR: I might have a

11   problem if -- with the anti-commandeering if we

12   forced, even under the Spending Clause, states

13   to hire particular people, utilize them, or

14   collectively bargain on their behalf. That --

15   that really is a different issue than what --

16   involved in the military setting, isn't it?

17   MS. REAVES: Well, a couple of

18   responses to that. I don't think the

19   distinguishing feature of this case is the

20   military setting. You know, the basis for

21   these provisions is not the militia clauses,

22   but it's the executive's ability to oversee

23   executive branch employees.

24   And I think, to the extent we're --

25   JUSTICE SOTOMAYOR: All right. That

 1   -- fair enough.

 2   Now the definition of "executive

 3   department" and "agency" in Section 105 is used

 4   throughout Title V. Going back to the question

 5   that Justice Barrett asked, do we need to worry

 6   if we adopt your broad definition of "agency"

 7   or "unit" or "component" that we'll be causing

 8   unforeseen issues for other provisions?

 9   MS. REAVES: No, you do not, and

10   that's because our argument is heavily grounded

11   on Section 709(d) and Section 709(e). And

12   those are unique provisions that there's no

13   analog to anywhere else in the U.S. Code. And

14   to the extent that --

15   JUSTICE SOTOMAYOR: So your component

16   argument seems to follow the arguments of

17   amici, American Federation of Labor and

18   Congress of Industrial Organizations, they were

19   talking about the National Guards being a unit

20   or a component of DOD.

21   And I guess the counter to that

22   argument is that Section 10105 refers to

23   federally recognized units and organizations of

24   the Army National Guard. How could the state

25   National Guards be federally recognized units

 1   or components?

 2   MS. REAVES: So we're not relying on

 3   the federal components or units argument

 4   because, as we envision this case, Petitioners

 5   are acting in a federal civilian employment

 6   role when they're employing dual-status

 7   technicians. They aren't acting in their

 8   federal military role in any way.

 9   So I don't think that the right way to

10   analyze this case is the way that those amici

11   analyze it. I think the correct way to analyze

12   it is to recognize that dual-status technicians

13   have collective bargaining rights and then ask

14   who are those rights against and what do the

15   entities in this case look like as far as the

16   Act's provisions go. And Petitioners here look

17   the most like a component or representative of

18   an agency who's exercising that agency's

19   authority in hiring, firing, and supervising

20   the day-to-day activities of federal --

21   JUSTICE ALITO: Isn't it odd --

22   MS. REAVES: -- civilian employees.

23   JUSTICE ALITO: -- to -- to say that

24   an entity is a component of the federal

25   government for some purposes but not a

 1   component of the federal government for other

 2   purposes?

 3   MS. REAVES: I don't think so, because

 4   I think that the Act itself is what provides

 5   the definition of an indication of what is a

 6   component.

 7   Those two provisions I listed in

 8   response to Justice Thomas's question, and also

 9   there's a third set of provisions, there's

10   exclusions that the President can make to

11   collective bargaining under the Act. That's in

12   Section 7103(b) of the Act. And the President

13   can remove subcomponents of agency from the --

14   agencies from the Act.

15   So I actually think that in the

16   context of the Act that's at issue here, it's

17   clear that components have to comply. And that

18   doesn't necessarily mean that's the case for,

19   you know, other provisions throughout the

20   federal code.

21   JUSTICE BARRETT: Ms. Reaves, is there

22   a distinction between -- you -- you're moving

23   back and forth between kind of sub-agency,

24   component, and representative. Is there any

25   legal distinction between a sub-agency and a

1   component and a representative?

2   I guess I would have thought that

3   representative was a stronger argument for you

4   than component or sub-agency for the reasons

5   that Justice Alito was saying.

6   MS. REAVES: So I think that there --

7   representative can be a little bit of a broader

8   meaning in some places in the Act. Sometime a

9   representative can be just an individual who

10   for the purposes of bargaining is going to the

11   table for bargaining purposes, and when we're

12   using the term "representative" here, we mean

13   that a little bit more broadly.

14   JUSTICE BARRETT: But I thought

15   designate was a big part of your argument. And

16   if you think of the Adjutant General as a

17   designee, that seems to me more like a

18   representative than a component.

19   MS. REAVES: So I think it -- I really

20   think it's both. You know, there is some --

21   some component of that could be seen as

22   representative, but to the extent that

23   adjutants general with very limited review have

24   final say on hiring and firing federal

25   employees, that really makes them look more

1   like a component, who similarly has kind of

2   large discretion to hire and fire federal

3   employees.

4   JUSTICE JACKSON: Does anything turn

5   on the distinction that Justice Barrett is

6   pointing out? I mean, I thought that your

7   argument was: Let's figure out who is

8   functioning as the employer for the purpose of

9   this statute.

10   And whether we, you know, call them,

11   you know, a component, the agency itself, a

12   representative or whatnot, nobody contests that

13   this particular entity is performing those

14   functions and those are the kinds of things

15   that are at the heart of collective bargaining.

16   And, as Justice Kagan says, someone has to be

17   across the table if the rights that are being

18   conferred have any power.

19   MS. REAVES: I think that's right,

20   Justice Jackson. And I think all of these

21   things -- the component argument, the

22   representative argument, the agency arguments

23   -- all are trying to fit together the stat --

24   these two statutory schemes and the clear right

25   that technicians have in this clear designation

 1   of federal authority.

 2   JUSTICE KAGAN: So, Ms. Reaves, as --

 3   as I understand General Flowers' argument, and

 4   I'm not sure I -- I -- I did until this

 5   argument, but he says he agrees that these

 6   employees have collective bargaining rights, he

 7   agrees that that means that somebody has to be

 8   across the table, but he says it's you that has

 9   to be across the table, the DOD, and, you know,

10   by virtue of the definitional sections.

11   And he says, you know, there's --

12   there's no requirement that you do this

13   nationwide, you can just do it for Ohio.

14   Now I'm not sure why Ohio would want

15   you to bargain for them, but, apparently, Ohio

16   does.

17   (Laughter.)

18   JUSTICE KAGAN: And I guess the

19   question is, what would that scheme look like?

20   MS. REAVES: So I do think it's

21   important to think about what that scheme would

22   look like. And, first of all, you know,

23   historically, the FLRA has certified bargaining

24   units not at the nationwide level when it comes

25   to the DOD.

 1   And that comes from the definition of

 2   "appropriate unit" in 7112(a) of the Act, which

 3   is on page 5a of the statutory appendix, that

 4   requires the agency to take into account a

 5   clear and identifiable community of interest.

 6   And, historically, that hasn't meant a

 7   nationwide bargaining unit.

 8   But setting that aside --

 9   JUSTICE KAGAN: Okay. So let's say

10   it's Ohio.

11   MS. REAVES: Yeah. So setting that

12   aside, I think we have to think about the

13   enforcement difficulties here. So what Ohio is

14   proposing is that DOD bargains with state --

15   with state National Guard unit -- state --

16   employees of state National Guard units and

17   then, when Ohio refuses to comply with that,

18   instead of the FLRA issuing them an order and

19   it being subject to contempt, as is the

20   ordinary case and has happened for the last

21   nearly 50 years, DOD has to threaten to

22   withhold federal funding or federal recognition

23   to the state National Guard and state adjutant

24   general.

25   And -- and, respectfully, to my friend

 1   on the other side, I don't think that's any way

 2   to run a railroad. That has actual

 3   implications for the relationship between state

 4   National Guards and their federal components.

 5   There could be real national security risks.

 6   And if I can play this out just one

 7   more way, I think you further have to imagine

 8   how could the FLRA try to enforce that against

 9   DOD. Could the FLRA hold DOD in contempt if it

10   doesn't threaten to withhold all of a state

11   National Guard's funding in order to enforce

12   some minor FLRA order involving a single

13   federal employee?

14   I think the system the Court should

15   stick with is the system that's worked for the

16   last 50 years.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel.

19   What entity in the federal -- I can't

20   say in the federal government, that's part of

21   the question. I mean, what -- what entity is

22   most like the Adjutant General here?

23   MS. REAVES: I think, for bargaining

24   purposes, what's most --

25   CHIEF JUSTICE ROBERTS: No, just in

 1   general. If you said this is the closest

 2   analog to the Adjutant General.

 3   MS. REAVES: It would probably be the

 4   secretary -- whosever in charge of the

 5   Department of the Air Force or the Department

 6   of the Army.

 7   CHIEF JUSTICE ROBERTS: So full-time

 8   federal employee, officer of the United States,

 9   head of an agency as defined under law?

10   MS. REAVES: Yes. That would be most

11   --

12   CHIEF JUSTICE ROBERTS: Well, that's

13   nothing at all like what they are.

14   MS. REAVES: Well, I think adjutant

15   generals are -- are very unique. They're the

16   number one military commander in their state,

17   and so -- and they primarily do act, you know,

18   when they're not called into federal

19   active-duty service or when they're not

20   supervising federal civilian employees, they do

21   primarily act in a state role. But they have

22   these other hats.

23   CHIEF JUSTICE ROBERTS: No, no, I

24   know. That's why I'm trying to find if there's

25   anything remotely like them at all.

1   MS. REAVES: I mean, I -- I think the

2   closest thing, if you're talking about the

3   federal system, is the head of federal military

4   departments. That would be the most analogous

5   thing.

6   CHIEF JUSTICE ROBERTS: But how are

7   they remotely like it? I mean, nobody would

8   say, well, let's try to figure out if you're a

9   federal officer or a federal agency. It's

10   pretty clear they are. So you've got nothing

11   that's remotely like them, I gather.

12   MS. REAVES: I -- I don't think so.

13   They are really unique. I mean, I guess

14   something that's analogous are individual

15   members of state National Guards. They also

16   have to wear three hats.

17   CHIEF JUSTICE ROBERTS: Yeah, but

18   you'd never call them an agency.

19   MS. REAVES: No, you wouldn't.

20   CHIEF JUSTICE ROBERTS: There's Agency

21   Fred. No.

22   MS. REAVES: Mm-hmm. No, you would

23   not.

24   CHIEF JUSTICE ROBERTS: Okay. Justice

25   Thomas, anything further?

 1   JUSTICE THOMAS: No.

 2   CHIEF JUSTICE ROBERTS: Justice Alito?

 3   JUSTICE ALITO: Well, if the Adjutant

 4   General is like the Secretary of the Army,

 5   let's say that there is -- there are certain

 6   Army employees who have the right to bargain

 7   collectively.

 8   Presumably, the Secretary of Defense

 9   could order the Secretary of the Army to engage

10   in that bargaining personally, couldn't --

11   couldn't he?

12   MS. REAVES: So I think, in that

13   situation, and that was what I was trying to

14   get at for what purposes the Chief Justice's

15   question was asking for the comparison.

16   For the purposes of bargaining

17   comparison, you know, DOD civilian employees

18   have bargaining rights. Let's take -- set

19   aside these state -- state dual-status

20   technicians. So just normal federal civilian

21   employees of DOD have bargaining rights.

22   But they usually bargain not with the

23   head of DOD, they bargain because their units

24   are set at lower levels with, like, the entity

25   that controls their base or something along

1   those lines.

2   JUSTICE ALITO: No, they don't

3   normally do it. But is there any reason why

4   the Secretary of Defense couldn't say to the

5   Secretary of the Army, I -- I want you to do

6   it? Or couldn't the President order that?

7   MS. REAVES: So I -- I think two

8   responses to that. First, yes, I think that

9   that could be ordered. But, second, I think,

10   if the bargaining unit is certified at a lower

11   level, which is what matters for the purposes

12   of bargaining before the FLRA, you know, that

13   person wouldn't be the appropriate person to be

14   engaging in bargaining, but, of course, the

15   President could, you know, order that person to

16   actually go and engage.

17   JUSTICE ALITO: Well, what I'm getting

18   at is, if the Adjutant General is really a

19   component of the Department of Defense, are

20   there any limits on what the -- what the

21   Secretary of Defense could order the Adjutant

22   General to do in relation to collective

23   bargaining?

24   MS. REAVES: So I -- I -- I don't

25   think we've identified any limits. I think

1   there are enforcement limits. You know, if DOD

2   were to instruct the Adjutant General to do

3   something, the enforcement options that DOD

4   would have would be pulling threat -- federal

5   funding or federal recognition.

6   They don't have the option to remove

7   the federal -- the Adjutant General from their

8   state adjutant general role, although they

9   could remove him from his federal role.

10   JUSTICE ALITO: Yeah, they don't have

11   the -- the -- the authority to order the

12   removal of the Adjutant General. Could the

13   Adjutant General be ordered to do what was

14   broached at one point in this case and that is

15   to apologize personally to these employees for

16   violating their rights?

17   MS. REAVES: So I -- I don't think

18   that an order along those lines would be

19   distinct from the other types of orders that

20   we've suggested. You know, if there was a

21   valid basis for that order and that

22   instruction, you know, that instruction could

23   come from DOD, but it would be limited to these

24   enforcement options that DOD has.

25   JUSTICE ALITO: This is a very unusual

 1   scheme, and what you're asking for may have

 2   implications. Why isn't the best solution to

 3   this problem that -- for Congress to step in

 4   and specify what is to be done in this

 5   situation, this arguably sui generis situation?

 6   MS. REAVES: I think Congress already

 7   has said what it meant here, and I think the

 8   savings clause is one indication of that.

 9   Fifty years of uninterrupted collective

10   bargaining, I mean, seven circuits had come out

11   this way, and Congress has amended the

12   Technicians Act multiple times in those 50

13   years.

14   And I -- I think there's every reason

15   to believe that as long as Petitioners accept

16   the benefits of dual-status technicians, which

17   are free federal employees doing their

18   day-to-day work, they have to accept the

19   obligations that come along with that and have

20   come along with it for the last 50 years.

21   JUSTICE ALITO: Do you think that the

22   savings clause represents congressional

23   adoption of every administrative decision like

24   the Thompson Field decision that was issued

25   prior to that point?

 1   MS. REAVES: I think it does indicate

 2   adoption of a precedential decision

 3   interpreting terms that are the same under the

 4   executive orders and the same under the Act,

 5   and that's what the Thompson Field decision is.

 6   JUSTICE ALITO: How many such

 7   executive decisions or regulations would be

 8   covered by that?

 9   MS. REAVES: I'm not sure, Justice

10   Alito. I'm not sure how many precedential

11   decisions there were.

12   JUSTICE ALITO: Well, would it be a

13   large number?

14   MS. REAVES: I think it would be at

15   least in the hundreds.

16   JUSTICE ALITO: And you think Congress

17   surveyed all of those and said we want to -- we

18   want to freeze all of those?

19   MS. REAVES: I don't know what

20   Congress was thinking, but I do know what

21   Congress said in the text, and it was that such

22   decisions would survive the Act's adoption.

23   CHIEF JUSTICE ROBERTS: Justice

24   Sotomayor?

25   JUSTICE SOTOMAYOR: Well, Congress did

1   have its attention drawn to the collective

2   bargaining aspects of this when they were

3   creating the carve-out for the -- correct?

4   MS. REAVES: That's correct, yes.

5   When Congress enacted Section 976, it was

6   explicitly thinking about technician service.

7   JUSTICE SOTOMAYOR: And it knew

8   because it was told by the National Guards that

9   they were required to collectively bargain and

10   also to submit to federal agency supervision of

11   that process, correct?

12   MS. REAVES: Yes, that's correct.

13   JUSTICE SOTOMAYOR: And they wanted

14   out of it and they didn't get it, correct?

15   MS. REAVES: That's correct, Justice

16   Sotomayor.

17   JUSTICE SOTOMAYOR: Thank you.

18   CHIEF JUSTICE ROBERTS: Justice Kagan?

19   Justice Gorsuch?

20   JUSTICE KAVANAUGH: Of what

21   significance is DOD's approval of the

22   collective bargaining agreement, if any?

23   MS. REAVES: DOD's approval does

24   indicate and confirm that DOD is the relevant

25   agency for these purposes. I think it's also

 1   helpful because it does indicate that to the

 2   extent there are some sort of concerns that

 3   bargaining might be touching on military

 4   matters in violation of Section 976, DOD can

 5   reject the bargaining agreement outright.

 6   So some of the concerns that

 7   Petitioners are raising about DOD being the

 8   right entity to deal with this can be done by

 9   DOD's review process.

10   And I think the third relevance that

11   that provision has is that it's yet another

12   indication that it's often not the high-level

13   agency or the entity at the very top of the

14   agency who's responsible for the collective

15   bargaining relationship and complying with the

16   FLRA on a day-to-day basis.

17   JUSTICE KAVANAUGH: On Justice

18   Gorsuch's questions about hypothetical schemes

19   that would be similar in some respects to this,

20   and I think he asked about would there be any

21   constitutional limits, I guess I would have

22   thought there might be, but they're not at

23   issue here and we don't have any constitutional

24   issues in this case.

25   MS. REAVES: I -- I certainly agree

 1   with that, Justice Kavanaugh. And I took

 2   Justice Gorsuch's question to be a

 3   hypothetical. It's obviously not at issue in

 4   this case. And I think, you know, to the

 5   extent that some of the amici have raised

 6   commandeering problems, you know, Petitioners

 7   have consented. That's very clear. And the

 8   second thing is Petitioners are not

 9   administering a federal regulatory scheme.

10   Petitioners are just complying with the federal

11   law.

12   JUSTICE KAVANAUGH: Then two more.

13   Third, on the role of the states, once Congress

14   decides that these technicians are going to

15   have collective bargaining rights, seems to me

16   more friendly to the state at that juncture to

17   have them collectively bargain than to have the

18   Assistant Secretary of Defense for Collective

19   Bargaining, hypothetically, collectively

20   bargain and force the state to comply with

21   certain conditions without the state sitting

22   across the table.

23   MS. REAVES: I very much agree with

24   that, Justice Kavanaugh. I think that not only

25   is it no way to run a railroad to have DOD

1   threaten to pull federal funding or federal

2   recognition to enforce this, it's also not ---

3   they're not -- also not the ideal party because

4   they don't supervise dual-status technicians on

5   a day-to-day basis and they don't hire or fire

6   them on a --

7   JUSTICE KAVANAUGH: Do you know --

8   MS. REAVES: -- regular basis.

9   JUSTICE KAVANAUGH: -- if Congress was

10   -- anyone in Congress actually said anything

11   like that?

12   MS. REAVES: I -- I --

13   JUSTICE KAVANAUGH: If you don't,

14   that's fine. Yeah, that's fine.

15   MS. REAVES: Yeah, I don't think

16   anything in Congress --

17   JUSTICE KAVANAUGH: But they did --

18   they did consider the collective bargaining

19   issue, though, because that was -- that was

20   raised as a concern by the state units of the

21   state guard units in the '70s, as I understand,

22   right?

23   MS. REAVES: That's correct. When 976

24   was adopted, which was about a year from when

25   the Reform Act itself was adopted, Congress

         1   really focused in on the technician issue

         2   itself, and there was initially legislation

         3   proposed that would have said that technician

         4   service is like active-duty military service

         5   and you can't bargain over it.

         6   And members of the military came

         7   before Congress and raised concerns that that

         8   would hurt relations between technicians and

         9   their immediate supervisors and also raised

        10   concerns that that would hurt military

        11   preparedness. And Congress just explicitly

        12   rejected that with the text of Section 976,

        13   which doesn't carve -- doesn't include

        14   technician service within the barred service.

        15   JUSTICE KAVANAUGH: One -- last one.

        16   I'm not aware of states coming to Congress to

        17   seek a change to this scheme recently, but you

        18   would know more than I about that.

        19   MS. REAVES: That's correct. There

        20   haven't -- hasn't been anything recent. There

        21   was a cert petition, Lipscomb, that was filed,

        22   I believe, about a decade ago, where a state

        23   raised this argument, and the Court denied that

        24   cert petition.

        25   JUSTICE KAVANAUGH: I meant to

 1   Congress.

 2   MS. REAVES: Oh, to Congress, I'm

 3   sorry. I'm not aware of states raising this

 4   with Congress, no.

 5   JUSTICE KAVANAUGH: Thank you.

 6   CHIEF JUSTICE ROBERTS: Justice

 7   Barrett?

 8   JUSTICE BARRETT: Ohio says that it

 9   would be impractical and even unlawful for it

10   to comply with the collective bargaining order

11   issued in this case and presumably in others as

12   well, and you dispute that.

13   Would you characterize it as an open

14   question on which you have the better of the

15   argument, but there's a risk that Ohio would be

16   right, or do you think Ohio is just crazy to

17   say it?

18   MS. REAVES: I think the latter.

19   JUSTICE BARRETT: With all -- with all

20   respect, of course, to General Flowers.

21   (Laughter.)

22   MS. REAVES: I think the latter,

23   Justice Barrett. I think the Sixth Circuit was

24   correct. What I take Petitioners to be

25   complaining about is the portion of the order

 1   requiring them to reinstate union dues

 2   withholding.

 3   And what happened is that, although

 4   DOD may be responsible for the withholding, the

 5   Petitioners are responsible for having on hand

 6   and filing the forms necessary for that. So

 7   what Petitioners did in this case is they filed

 8   forms canceling dues withholding on behalf of

 9   dual-status technicians. They signed those

10   forms. And that was something that was not

11   permitted under the relevant statutes and

12   regulatory provisions.

13   So I think it's fair that the Sixth

14   Circuit said, to the extent that Ohio took that

15   action, which may -- was outside the law, that

16   they can be required to correct that action.

17   And I think, in any event, though,

18   that's really a side show in this case, because

19   Petitioners haven't in any way suggested that

20   they're unable to comply with the remainder of

21   the FLRA's orders.

22   And so, to the extent there's some

23   minor thing that on the facts of this case you

24   might think problematic doesn't in any

25   undermine -- any way undermine that generally

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 1    there aren't a problem with FLRA orders.
 2              JUSTICE BARRETT:  Well, I mean, I
 3    guess the reason why I ask is that you've
 4    pointed out the real practical problems that
 5    would arise if DOD was the one sitting on the
 6    other side of the bargaining table.  And Ohio
 7    says:  Well, wait, wait, wait, wait, there are
 8    real practical problems and legal problems that
 9    arise if we're the ones sitting on the
10    bargaining table because then the FLRA issues
11    orders that we actually can't carry out.
12              And even if the Sixth Circuit was
13    right about the order in this case on that
14    particular issue, can you imagine other things?
15    I mean, is Ohio right that there would be a
16    practical problem whichever way you go because
17    there might be a number of things that are
18    controlled by DOD regulations that the Ohio
19    Adjutant General just can't control?
20              MS. REAVES:  I'm not aware of
21    anything.  And I actually think the onus is on
22    Ohio here because we've spent 50 years
23    collectively bargaining.  And there are many
24    court of appeals and FLRA decisions about this.
25              Ohio hasn't been able to identify any
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1 difficulties or any sorts of things that they

2 couldn't comply with in any of those other

3 orders.

4   CHIEF JUSTICE ROBERTS: Justice

5 Jackson?

6   JUSTICE JACKSON: So I just -- I think

7 I don't really see the federalism or

8 commandeering concern, and I'm -- I'm worried

9 that it's because maybe I don't understand what

10 it is that adjutant generals do or what the

11 federal law is requiring.

12   I -- I thought that by virtue of this,

13 they weren't subjecting themselves to federal

14 authority for all purposes in that it wasn't

15 that they were converting themselves into an

16 agency sort of writ large in general, and so

17 all of the things that apply to agencies in the

18 federal law somehow attach.

19   I thought that the adjutant generals

20 are only subject to the FLRA's authority when

21 they're acting on -- with that hat on, that is,

22 the capacity to be the employer of this group

23 of federal employees. Am I right? Isn't there

24 sort of like really a limited scope of FLRA

25 authority being exerted here?

1   If -- if they're hiring state people

2   or if they're supervising state people, the

3   FLRA is not involved. It's just when this

4   group of federal employees that everybody

5   concedes are there are being supervised by this

6   state officer, must the state officer comply

7   with the Federal Labor Relations Authority

8   about collective bargaining? Am I right about

9   that?

10   MS. REAVES: That's absolutely

11   correct, Justice Jackson. They -- state

12   adjutants generals don't have to collectively

13   bargain over their federal or state military

14   service of dual-status technicians. And they

15   also don't have to bargain over anything that

16   implicates or potentially implicates that from

17   dual-status technicians' civilian federal

18   service. That comes from Section 709(f). So

19   you're completely right.

20   JUSTICE JACKSON: Thank you.

21   CHIEF JUSTICE ROBERTS: Thank you,

22   counsel.

23   Mr. Grajales.

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 1            ORAL ARGUMENT OF ANDRES M. GRAJALES

 2             ON BEHALF OF THE UNION RESPONDENT

 3            MR. GRAJALES:  Thank you, Mr. Chief

 4    Justice, and may it please the Court:

 5            A ruling in favor of the union here is

 6    not going to affect any other aspect of the

 7    Petitioners, nor is it going to affect any

 8    other state entity.  The scheme is completely

 9    unique for both technicians but also for the

10    National Guard.

11            And the authority for that is set

12    forth in the militia clauses themselves and in

13    the Technicians Act, and those are where we

14    also find the limits on that authority.

15            Ultimately, this is a policy

16    disagreement that Ohio can take to Congress,

17    but Congress as it stands today understood the

18    matter to be settled.  They understood

19    adjutants general and the state National Guards

20    to be covered.  And that is the Thompson Field

21    decision, which was a definitive decision.  The

22    very first question that was answered in that

23    case was whether the order in that case could

24    be applied to the Adjutant General and the

25    state National Guard.
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1   And we then have to look at the

2   context, which is what 7135 requires, to see

3   that that carried forward to the FLRA. And I

4   just want to get into one more thing, which is

5   Petitioners now concede, A, that the civilian

6   technicians are federal employees, B, that they

7   have bargaining rights, and, C, that the FLRA

8   could certify units on a regional basis, which

9   is what the FLRA has done, in essence, using

10   its authority under 7112 of the statute.

11   And they also fight against, they say

12   they can do that, but they can't redress

13   bargaining obligations, that has to be DOD.

14   But, really, what they're saying is it's now

15   just a question of degree, and that bargaining

16   at DOD doesn't work for the reasons you've

17   heard already, but it's inconsistent with the

18   statutory scheme.

19   And the one thing I want to point out

20   is, if bargaining were moved to DOD, it would

21   render parts of the statute inoperative. Under

22   709(d) and 709(e) and 709(f), the Technicians

23   Act gives day-to-day supervision over working

24   conditions and conditions of employment to the

25   Ohio Adjutant General.

 1   Under 7121 of the statute, a

 2   negotiated grievance procedure must have

 3   arbitration and that arbitration must be

 4   binding. If we go to -- if the union goes to

 5   arbitration with DOD, but DOD can't issue an

 6   order to the Adjutant General, that arbitration

 7   becomes advisory, and that is inconsistent with

 8   the statute.

 9   And I'd be happy to take any

10   questions.

11   CHIEF JUSTICE ROBERTS: Well, you --

12   you say it becomes advisory, but as -- what is

13   the limit under your theory as to what the

14   Department of Defense can order the state

15   National Guard to do?

16   MR. GRAJALES: Well, the outer limit

17   is unclear, but what we can say is that if they

18   can't -- under 709(f) and 709(d), the Adjutant

19   General has authority to suspend, to discharge,

20   to do any number of things that directly affect

21   technicians' civilian aspects of employment.

22   If the statute leaves that to the Adjutant

23   General, then that poses a problem with the

24   authority of DOD to issue an order.

25   And if we go to arbitration with DOD,

1   we say we -- say the union gets a favorable

2   arbitration award on a suspension, and an

3   arbitrator says that five-day suspension that

4   was based on a civilian incident should be

5   overturned and should be rescinded and taken

6   out of a technician's record.

7   CHIEF JUSTICE ROBERTS: Well, I guess

8   what concerns -- and maybe my perception of

9   it's wrong -- but my concern, the Adjutant

10   General is being treated as an agency, the idea

11   is you can't be treated as half an agency, and

12   if they're treated as all an agency, their

13   character as a state entity is essentially

14   gone.

15   MR. GRAJALES: We would not agree with

16   that. This is a very unique and very limited

17   scenario where they're acting as a federal

18   actor. They're wielding federal power.

19   They're supervising federal employees. So

20   they're not acting in -- with their state hat

21   on.

22   JUSTICE SOTOMAYOR: So --

23   JUSTICE GORSUCH: If I -- oh, I'm

24   sorry.

25   JUSTICE SOTOMAYOR: Thank you. I --

 1   I'm trying to look at what the -- the Board did

 2   below and what the state agency -- Guard, was

 3   arguing. Below, I'm not sure why they're

 4   collecting the forms that say deduct my union

 5   dues, because I thought it was the federal

 6   government who paid the dual citizens' salary.

 7   MR. GRAJALES: So that just

 8   strengthens our argument that the scheme as it

 9   stands today, it ain't broke. What it

10   demonstrates is how the Technicians Act

11   operates in conformity -- or how the statute

12   operates in conformity with the Technicians

13   Act. And how it works in practice is those

14   forms are given to the Guard and then they are

15   processed, and then the dues are -- through DOD

16   and the dues are with -- with -- actually

17   withheld in the salary --

18   JUSTICE SOTOMAYOR: By DOD?

19   MR. GRAJALES: -- by DOD.

20   JUSTICE SOTOMAYOR: But the only thing

21   is that the Guard collects the form for the

22   government?

23   MR. GRAJALES: That has always been

24   the case. And -- and to that point --

25   JUSTICE SOTOMAYOR: All right. Now --

1   MR. GRAJALES: -- we don't agree with

2   their --

3   JUSTICE SOTOMAYOR: -- they also tried

4   from what I understand -- they'll probably take

5   umbrage at me calling this -- they tried to

6   union-bust because they said they were no

7   longer going to collectively bargain over

8   certain terms of employment, correct?

9   MR. GRAJALES: That's correct.

10   JUSTICE SOTOMAYOR: And what the

11   agency then said is, uh-uh, that's part of

12   collective bargaining. Those are terms that

13   have to be, were, and should continue to be

14   collectively bargained, correct?

15   MR. GRAJALES: That's -- yes.

16   JUSTICE SOTOMAYOR: Merit

17   promotions --

18   MR. GRAJALES: As I understand the

19   question is, what they repudiated the FLRA

20   found they were required to bargain over, and

21   they were required to abide by mandatory terms

22   of the collective bargaining agreement.

23   JUSTICE SOTOMAYOR: So they were

24   basically saying to the Department of the Army,

25   yes, we're giving you the opportunity to hire

 1   our employees, but you have to collectively

 2   bargain with them. And they were saying, eh, I

 3   don't really want to, so I won't.

 4   MR. GRAJALES: Well --

 5   JUSTICE SOTOMAYOR: I'm going to keep

 6   them. I'm going to employ them. I'm not going

 7   to pay them. But I'm not going to do what I

 8   promised to do when I took them. I'm not going

 9   to collectively bargain with them.

10   MR. GRAJALES: Yes, and that's a

11   function of the designation, again, to go back

12   to that. That's the answer here, is the

13   Technicians Act. The Technicians Act creates a

14   split scheme, and it's part of the National

15   Guard. And that was the choice that Congress

16   made when it made these employees federal

17   civilian employees. And Congress certainly

18   knew that they were bargaining with adjutant

19   generals. It's in the record. I mean, that --

20   Thompson Field is in and of itself unique in

21   that it was entered into the congressional

22   record. So we don't really need to look to

23   other decisions or other terms to determine

24   what Congress intended here.

25   JUSTICE GORSUCH: Counsel, though --

 1   JUSTICE SOTOMAYOR: Sorry. Entered

 2   into the record -- I'm sorry.

 3   JUSTICE GORSUCH: No, please.

 4   JUSTICE SOTOMAYOR: Just entered into

 5   the record when?

 6   MR. GRAJALES: The congressional --

 7   the Thompson Field decision was entered into

 8   the congressional record when Congress was

 9   considering and debating the ban on military

10   unions in 976. It was deliberately put into

11   the record. And there's a great deal of

12   testimony, which we refer to in our brief,

13   where not only is the Guard or representatives

14   of the Guard complaining and asking to be

15   relieved of their bargaining obligations under

16   the executive order, union representatives are

17   also explaining to Congress how that bargaining

18   scheme works. And --

19   JUSTICE GORSUCH: Counsel, I -- I'm --

20   I'm sorry to interrupt, but I just want to make

21   sure I understand your -- your -- your -- your

22   argument both -- to -- to both of my colleagues

23   here.

24   So the Adjutant General of Ohio is a

25   federal agency to the extent -- sometimes, to

1   the extent that he's dealing with dual-status

2   technicians in their civilian capacity?

3   MR. GRAJALES: That is our argument.

4   However, I would limit it even further, which

5   is --

6   JUSTICE GORSUCH: But -- but he's not

7   -- he's not a federal agency for other

8   purposes?

9   MR. GRAJALES: Right. Only for this

10   limited -- limited purpose of dealing with the

11   civilian aspects of technicians' employment.

12   JUSTICE GORSUCH: Okay.

13   MR. GRAJALES: And that is the --

14   JUSTICE GORSUCH: Now, when I turn to

15   those definitions in -- in Section 105 -- 5

16   U.S.C. 105, I think, is what you've -- you've

17   -- you've pointed to, I -- I don't see that --

18   that kind of distinction that -- that he's --

19   that -- that there can be agent -- executive

20   agencies sometimes, that they're evanescent,

21   that they are -- they occasionally pop up and

22   then they disappear.

23   And the other thing I don't see is --

24   in the definition of 105, it -- it speaks of

25   the executive departments from 101, but it --

1   doesn't mention 102, which are the military

2   departments. What do we do about that?

3   MR. GRAJALES: Well, the military

4   departments, I don't -- we don't believe that's

5   a question here -- are by their own -- I think

6   it's 10 U.S.C. 111 --

7   JUSTICE GORSUCH: Yeah, 10 --

8   MR. GRAJALES: -- think that they are

9   --

10   JUSTICE GORSUCH: -- 10 U.S.C.

11   suggests they are, but --

12   MR. GRAJALES: They -- they says that

13   they are.

14   JUSTICE GORSUCH: Yeah. Right. And

15   105 says they are -- what a -- in 5 U.S.C. So

16   what do I do about that?

17   MR. GRAJALES: You have to read those

18   together. I don't -- we don't agree that 105

19   says they are not. They are --

20   JUSTICE GORSUCH: No, it -- it -- it

21   -- it leaves that impression, though, because

22   it -- it -- it includes 101, 103, 104, but it

23   doesn't include 102, right?

24   MR. GRAJALES: But it includes the

25   Department of Defense --

1   JUSTICE GORSUCH: Right, but it

2   doesn't --

3   MR. GRAJALES: -- which is an

4   executive department, and --

5   JUSTICE GORSUCH: In 101. But the

6   military departments in 102 are not included.

7   I -- I -- I -- I see the tension. I do. And I

8   see your point that 10 U.S.C. should control

9   over 5 U.S.C. I'm just wondering why.

10   MR. GRAJALES: Because it's the only

11   way -- way that it makes sense, is if you read

12   those statutes together, Congress intended for

13   the Department of Defense to be composed of

14   Department of the Army and the Department of

15   the Air Force --

16   JUSTICE GORSUCH: All right.

17   MR. GRAJALES: -- and which they

18   become agencies through that -- through that

19   mechanism.

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel.

22   Justice Thomas?

23   Justice Alito?

24   Justice Gorsuch, anything further?

25   No?

1   Justice Barrett?

2   Justice Jackson?

3   JUSTICE JACKSON: Aren't -- just in

4   response quickly to Justice Gorsuch's point

5   with respect to 101 and 102, I thought that

6   what was happening there was -- was the fact

7   that the Arm -- the Departments of Air Force

8   and Army used to be outside of DOD, Congress

9   brought them in, and then arrangements were

10 made to make clear that they were now inside

11 DOD, the military departments are a part of DOD

12 right now.

13   And there may be other statutes in

14 which they are referenced separately, which is

15 why you have 102, but --

16   MR. GRAJALES: I confess and I

17 apologize that --

18   JUSTICE JACKSON: Yes.

19   MR. GRAJALES: -- I don't know the

20 history --

21   JUSTICE JACKSON: I see.

22   MR. GRAJALES: -- but I agree with the

23 conclusion that that is what they did.

24   JUSTICE JACKSON: Yes. Thank you.

25   CHIEF JUSTICE ROBERTS: Thank you,

         1   counsel.

         2   MR. GRAJALES: Thank you.

         3   CHIEF JUSTICE ROBERTS: Rebuttal,

         4   General Flowers?

         5   REBUTTAL ARGUMENT OF BENJAMIN M. FLOWERS

         6   ON BEHALF OF THE PETITIONERS

         7   MR. FLOWERS: Thank you, Mr. Chief

         8   Justice. I have just one quick point and then

         9   two larger points.

        10   The quick point responds to Justice

        11   Alito's question about the single decision and

        12   what do we make of that. This Court in

        13   Department of Interior v. FLRA looked at one of

        14   those decisions by the Assistant Secretary, and

        15   it said, basically, one decision is worth

        16   virtually nothing. That's 526 U.S. at page 95.

        17   Now for the two bigger points. The

        18   first and the most fundamental is that I think

        19   what this argument shows, what the briefing

        20   shows, is that the only way you get the

        21   Petitioners into the definitions here is to

        22   fight the text. There's just no way to get

        23   there.

        24   Now the Authority says you look to

        25   709(d) and we're designees. That's true, but

 1   why does it matter? Why is a designee become

 2   an agency under Title V? And let's also keep

 3   in mind that the relevant definitions here, the

 4   Title V definitions, are not part of the Reform

 5   Act. The Reform Act incorporates them, but the

 6   Title V definitions apply throughout Title V.

 7   So there were questions about

 8   consequences. Think of the other entities that

 9   might qualify as agencies under their theory.

10   This Court in Maryland v. United States said

11   that state militias, even though they care for

12   equipment on behalf of the government, do not

13   thereby become the federal government. I think

14   that may go out the window.

15   What do we do with federal employees

16   who are all agents of the federal government?

17   Are they now federal agencies for purposes of

18   Title V? What about the state actors who run

19   our employment systems as agents of the federal

20   government? Are they now federal agencies for

21   purposes of Title V? I can't see why the

22   answer would be no.

23   So, other than just an ad hoc -- a

24   decision that's good for this particular

25   context and this particular case, there's just

1   no way to read us into the Act.

2   And that brings me to my second good

3   point. There's no reason to fight the text so

4   hard. The Defense Department can handle this,

5   and it's, in fact, better positioned to handle

6   this. First, they have control over many of

7   the issues with respect to which the

8   technicians may wish to bargain and with

9   respect to which the Authority may wish to --

10   to -- to make orders.

11   I think there was a suggestion that we

12   might be crazy for saying that we would violate

13   the law by -- by reinstating dues. I might be

14   crazy but not for that reason. We would have

15   to break into the federal computer system and

16   reinstate the dues ourselves because we do not

17   actually withhold the dues. The federal

18   government does.

19   In addition to the control they have,

20   there's no reason to think we're going to spar

21   with the Department of Defense. That's just

22   not the way it goes. We do follow National

23   Bureau -- Bureau regulations, but then you

24   might ask -- I think Justice Kavanaugh asked

25   this -- well, why does Ohio care then, why are

1   you even here?

2   Well, here's my answer, is that when

3   we work through the Department of Defense or

4   when the Authority has to go against the

5   Department of Defense, we have the Defense

6   Department and the President as Commander in

7   Chief as a buffer, and if they see what's going

8   on and say, no, if you order that, it's going

9   to interfere with the military interests of the

10   United States, A, the FLRA is probably going to

11   take that seriously when deciding what to --

12   what to order or what to request, and, B, if

13   somehow the Authority does order the President

14   to do something that is contrary to military

15   interests, there may well be a situation where

16   the President's in court saying you cannot

17   command us to do that. You cannot make us

18   withhold all the federal recognition or funding

19   from the state guards.

20   So, if there are no further questions,

21   we simply ask that you reverse the Sixth

22   Circuit.

23   CHIEF JUSTICE ROBERTS: Thank you,

24   counsel. The case is submitted.

25

1   (Whereupon, at 12:42 p.m., the case

2   was submitted.)

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