No. 21-1454

IN THE

Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEPARTMENT, et al.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3970, AFL-CIO,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE INTERVENOR-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether civilian, dual-status National Guard technicians appointed and paid by the federal government are covered by the Federal Service Labor-Management Relations Statute ("FSLMRS"), 5 U.S.C. §§ 7101-7135, consistent with the National Guard Technicians Act of 1968 ("Technicians Act"), Public Law No. 90-486, 82 Stat. 775 (codified as amended at 32 U.S.C. § 709).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel hereby certifies as follows:

Intervenor-Respondent American Federation of Government Employees, Local 3970, AFL-CIO is a non-profit labor organization that serves as the exclusive bargaining representative of units of federal employees pursuant to 5 U.S.C. §§ 7101-7135. Intervenor-Respondent does not have a parent company. No publicly held company has any ownership interest in the Intervenor-Respondent.

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On Behalf of Intervenor-Respondent

July 2022

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 21 F.4th 401. The order denying rehearing en banc (Pet. App. 168a-169a) is available at 2022 WL 807540. The final order of the Federal Labor Relations Authority (Pet. App. 17a-33a) is reported at 71 F.L.R.A. 829. The decision of the administrative law judge (Pet. App. 34a-167a) is available at 2018 WL 3344946.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2021. A petition for rehearing was denied on February 14, 2022. The petition for a writ of certiorari was filed on May 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. The dispute in this case has a lengthy history throughout which the Petitioners' arguments, and misrepresentations, have been rejected. Because Petitioners raise nothing new here, and because Petitioners' arguments continue to lack merit, this court should reject them as well and deny the petition.

Beginning in or about early 2016, after 45 years of collective bargaining with the American Federation of Government Employees, Local 3970 ("Union") under the Federal Service Labor-Management Relations Statute ("FSLMRS"), 5 U.S.C. §§ 7101-7135, and the Executive Orders that preceded it, the Ohio National Guard[1] claimed, with no intervening change in law or circumstances, that it was no longer bound by the FSLMRS and that it no longer had any obligation to bargain with the Union. Administrative Law Judge ("ALJ") Decision, Pet. App. at 35a, 48a-54a. Specifically, the Ohio National Guard expressly repudiated its existing collective bargaining agreement ("CBA") with the Union, unilaterally terminated the deduction of employee dues allotments notwithstanding their explicit statutory authorization (*see* 5 U.S.C. § 7115) and the fact that such dues allotments are initiated via em-

[1] This brief refers to the Petitioners, the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department, collectively as the "Ohio National Guard."

ployee consent, and unilaterally implemented new policies regarding union dues deductions and merit promotions. *See* ALJ Decision, Pet. App. at 36a-37a, 132a, 138a-139a, 146a, 151a-152a. In response, the Union filed multiple unfair labor practices with the Federal Labor Relations Authority ("FLRA") which went to a hearing before an ALJ. The ALJ succinctly summarized this case: "In short, this is a case of 'union busting' in its purest form." ALJ Decision, Pet. App. at 36a.

2. The Union represents civilian dual-status technicians of the Ohio National Guard. ALJ Decision, Pet. App. at 41a. Under the National Guard Technicians Act of 1968 ("Technicians Act"), 32 U.S.C. § 709, a dual-status technician is a federal civilian employee of either the Department of the Army or the Department of the Air Force who must maintain membership in the National Guard as a condition of employment and wear a uniform while performing their civilian duties. *See* 32 U.S.C. § 709(b)(2), (b)(4), (e); 10 U.S.C. § 10216(a)(1); *see also Babcock v. Kijakazi*, 142 S. Ct. 641, 644 (2022). And the Technicians Act directs the Secretary of the Army or the Airforce to "designate the [state] adjutants general . . . to employ and administer the technicians authorized" by the Act. 32 U.S.C. § 709(d). That is, under the Technicians Act, the adjutants general employ and administer technicians by virtue of a delegation by the pertinent, federal departments.

3. The FSLMRS governs federal-sector collective bargaining and provides that "[e]ach employee shall have the right to form, join, or assist any labor organization" and "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102. Dual-status technicians, in their civilian capacity, are covered by the FSLMRS because they are, fundamentally, employees of an "Executive agency," i.e., the De-

partment of the Army or Air Force. *See* 5 U.S.C. § 7103(a)(2)-(a)(3); *see also* Pet. App. at 11a-14a; *FLRA v. Michigan Army National Guard*, 878 F.3d 171, 174 (6th Cir. 2017) ("*Michigan National Guard*"); *Lipscomb v. FLRA*, 333 F.3d 611, 615 (5th Cir. 2003) *cert. denied* 541 U.S. 935 (2004) ("*Lipscomb*"). Under the FSLMRS, dual-status technicians thus have the right to engage in collective bargaining with their employing agency with respect to the civilian aspects of their employment. Applied here, the FLRA certified AFGE Local 3970 as the exclusive representative of general schedule and wage board technicians within the Ohio National Guard. ALJ Decision, Pet. App. at 41a.

4. As mentioned above, the Union and the Ohio National Guard have a collective bargaining relationship going back decades to 1971 when the Ohio National Guard first recognized the Union. ALJ Decision, Pet. App. at 41a. They negotiated a series of CBAs, the most recent of which for the purposes of this matter, was signed in 2011. ALJ Decision, Pet. App. at 35a, 43a. The Ohio National Guard and the Union, in fact, entered into negotiations for a new agreement as the expiration date of the parties' 2011 agreement approached. ALJ Decision, Pet. App. at 45a. When the parties were unable to reach a new agreement the Ohio National Guard issued a memorandum in 2014 that recommitted to being bound by the mandatory topics of bargaining in the 2011 CBA. ALJ Decision, Pet. App. at 45a.

But the Ohio National Guard did not keep this promise. On September 28, 2016, the Ohio National Guard issued a new memorandum repudiating the 2011 CBA and asserting that it was not covered or bound by the FSLMRS. ALJ Decision, Pet. App. at 49a-51a. The Ohio National Guard distributed this

memorandum to over 2,000 recipients, including over 280 bargaining unit employees. ALJ Decision, Pet. App. at 53a-54a.

After issuing the memorandum purporting to end all its obligations under the CBA, the Ohio National Guard next started to terminate Union dues deductions. The Ohio National Guard claimed that it could not find the Standard Form 1187s ("SF 1187s"), Request for Payroll Deductions for Labor Organization Dues[2], on file for the majority of dues paying members of the Union and sent letters to those members requesting, within 60 days, a copy of the original SF 1187 or the resubmission of a new SF 1187. ALJ Decision, Pet. App. at 66a-71a. The Ohio National Guard sent these letters even though it conceded it was the Ohio National Guard's obligation, rather than the employee's, to maintain the SF 1187s in its files. ALJ Decision, Pet. App. at 79a.

At the expiration of the letters' 60-day period if the Ohio National Guard had not received a new or original SF 1187, the Ohio National Guard completed SF 1188s for those employees and signed the SF 1188s on the employees' behalf without their consent. ALJ Decision, Pet. App. at 72a. Those SF 1188s were sent to the payroll office for processing thereby terminating the union dues deductions. ALJ Decision, Pet. App. at 72a. The Ohio National Guard terminated the dues of approximately 89 employees between September 2016 and June 2017. ALJ Decision, Pet. App. at 72a.

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[2] In the federal sector, bargaining unit employees submit SF 1187s to their respective agencies to have union dues deducted from their paycheck through dues allotments provided for by 5 U.S.C. § 7115(a). Employees submit Standard Form 1188s ("SF 1188s"), Cancellation of Payroll Deductions for Labor Organization Dues, to cancel those dues allotments.

As a result of the Ohio National Guard's conduct, the Union filed six ULP charges. The FLRA's General Counsel filed complaints on five of those ULP charges which proceeded to a hearing before the ALJ in August 2017. ALJ Decision, Pet. App. at 37a-39a. The ALJ issued a decision on June 18, 2018. ALJ Decision, Pet. App. at 34a-167a. In his decision, the ALJ upheld virtually every allegation, and sustained the five ULP charges, in whole or in part.

Specifically, the ALJ found that the Adjutant General of Ohio, the Ohio Adjutant General's Department, and the Ohio National Guard are agencies within the meaning of 5 U.S.C. § 7103(a)(3). ALJ Decision, Pet. App. at 96a-118a. On the merits the ALJ found that: 1) multiple Ohio National Guard communications interfered with and restrained employees in the exercise of their rights in violation of section 7116(a)(1) (ALJ Decision, Pet. App. at 118a-129a); 2) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it imposed a new, ad hoc grievance procedure (*id.* at 129a-133a); 3) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it changed its policy regarding union official time (*id.* at 133a-134a); 4) the Ohio National Guard violated sections 7116(a)(1) and (a)(8) when it unlawfully terminated employees' authorized dues allotments (*id.* at 135a-143a); 5) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it unilaterally implemented a new policy concerning union dues deductions (*id.* at 144a-151a); and 6) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it unilaterally implemented a new merit promotion plan. *Id.* at 151a-154a.

The ALJ subsequently ordered the Ohio National Guard to cease and desist from: 1) failing or refusing to recognize and comply with the mandatory terms of

the expired CBA; 2) failing or refusing to maintain existing personnel policies, practices, and matters; 3) unlawfully terminating authorized union dues deductions, or threatening to do so; and 4) informing employees, supervisors, and managers that the Ohio National Guard is not bound by the FSLMRS and that the CBA is a nullity. ALJ Decision, Pet. App. at 162a-163a. In addition, the ALJ ordered, *inter alia*, the Ohio National Guard to post and disseminate a notice to be provided by the FLRA; to reinstate dues deductions for the affected employees; to reimburse the Union for lost dues deductions; and to rescind any unlawful changes to the conditions of employment. ALJ Decision, Pet. App. at 163-164a.

5. The Ohio National Guard subsequently filed exceptions with the FLRA challenging the ALJ's decision. FLRA Decision, Pet. App. at 18a. The FLRA found that the Ohio National Guard's exceptions "served only to repeat its arguments below[.]" FLRA Decision, Pet. App. at 19a. Finding that the ALJ "committed no prejudicial errors in his factual finding or legal conclusions[,]" the FLRA adopted the ALJ's findings, conclusions, and recommended order and denied the Ohio National Guard's exceptions. *Id.*

6. a. Following the issuance of the FLRA's decision, the Ohio National Guard filed a petition for review in the Sixth Circuit. The court of appeals began its analysis of the substantive issues by discussing circuit precedent holding that the FLRA had jurisdiction over state national guards and their adjutant generals, in their capacity as employers of dual-status technicians. Pet. App. 10a-11a (citing *Michigan National Guard*, 878 F.3d at 178). The court reasoned that as employers of dual-status technicians who receive "the benefits and rights generally provided for federal employ-

ees in the civil service," state national guards and adjutant generals are executive agencies under the FSLMRS. Pet. App. at 11a (citing *Michigan National Guard*, 878 F.3d at 177 (quoting *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3rd Cir. 1982))). The court further explained that "every other circuit that has considered this issue has similarly found that state national guards constitute executive agencies in their capacity as employers and supervisors of technicians." Pet. App. at 11a-12a (string citing cases). Due to the "unanimity of thought," the court refused to create a circuit split and held that the Ohio National Guard is "a federal executive agency in its capacity as the employer of technicians." Pet. App. at 12a.

b. The court next considered whether dual-status technicians are covered by the FSLMRS. The court began its analysis by acknowledging that it had previously held in *Michigan National Guard* that dual-status technicians were covered by the FSLMRS and were entitled to "the right to form, join, and/or assist a labor organization, and the right for labor organizations to engage in collective bargaining with their employing guard over certain labor relations matters related to the civilian aspects of technician employment." Pet. App. at 13a (citing *Michigan National Guard*, 878 F.3d at 181).

But contrary to the petition, the court did not stop there. The court explained that a review of the applicable statutory provisions supported its conclusion. Specifically, 10 U.S.C. § 10216(a) provides that "'for purposes of this section and *any other provisions of* [] *law*,' dual-status technicians are 'federal civilian employees[.]'" Pet. App. at 14a (quoting 10 U.S.C. § 10216(a)) (emphasis in original). In other words, because dual-status technicians are federal *civilian* em-

ployees they have collective bargaining rights under the FSLMRS. Pet. App. at 14a. Finally, the court found that its statutory reading was supported by the legislative history of 10 U.S.C. § 976, a law prohibiting military unions, because "[t]he House Committee specifically rejected the idea that civilian technicians were members of the military." Pet. App. at 14a (citing H.R. Rep. No. 95-894(II) at 7 (1978)). The court explained that the legislative history "reflects Congress's efforts to ensure that dual-status technicians, in their civilian capacity, have collective bargaining rights that members of the uniformed services do not have." Pet. App. at 14a. Consequently, the court held that both the "[Ohio National] Guard and its technicians fall within the scope of the FLRA's jurisdiction." *Id.*

c. The court next turned to the Ohio National Guard's argument that the FLRA lacked jurisdiction under the Militia Clauses of the Constitution, art. I, § 8, cls. 15-16 and the Tenth Amendment. Pet. App. at 14a. The court firmly rejected this argument and explained that "[n]ot a single court of appeals has found that the FLRA lacks jurisdiction over dual-status technicians, or their employing agencies, when the labor dispute at hand related to the civilian aspects of a technician's job." Pet. App. at 15a. The court began its analysis by discussing the Fifth Circuit's decision in *Lipscomb* which considered a similar constitutional challenge. As the court explained, the *Lipscomb* court found that the Mississippi Adjutant General and Mississippi National Guard, in their capacity as the employer of dual-status technicians, "were not acting as state agencies, but instead as federal executive agencies." Pet. App. at 15a (citing *Lipscomb*, 333 F.3d at 618-19). And for that reason, the Fifth Circuit held that there were no constitutional infirmities with Congress giving the FLRA jurisdiction over the state na-

tional guard and adjutant general. Pet. App. at 15a. The court found the Fifth Circuit's reasoning persuasive and held that "[i]t is not unconstitutional for the FLRA to enforce the [FSLMRS] by issuing orders to state national guards in their role as employers of technicians. *Id.*

d. Finally, the court rejected the Ohio National Guard's argument that it could not legally comply with the FLRA's order requiring the reinstatement of cancelled dues allotments. Pet. App. at 16a. The court determined that the FLRA properly found that the Ohio National Guard violated the FSLMRS when it cancelled the dues allotments of employees without their consent. Pet. App. at 16a. And the court explained "[i]f the [Ohio National] Guard could so easily avoid compliance with an order under these circumstances, the [FSLMRS] would have no teeth." *Id.* Consequently, the court held that it is "neither unlawful nor impractical" for the Ohio National Guard to comply with the FLRA's order requiring it to restore the erroneously cancelled dues. *Id.*

7. The Sixth Circuit denied the Ohio National Guard's petition for rehearing en banc because the panel concluded that the issues raised in the petition were fully considered upon the original submission and because no circuit judge requested a vote on the suggestion for rehearing en banc. Pet. App. at 168a-169a.

ARGUMENT

The petition for certiorari should be denied. Petitioners present no question that warrants this Court's review. The petition instead reflects Petitioners' run-of-the-mill disagreement with an unfavorable outcome. The Sixth Circuit correctly held that both the Ohio National Guard and dual-status technicians fall within

the jurisdiction of the FLRA. Pet. App. at 10a-15a. The decision does not conflict with any decision of this Court or of any other court of appeals. This Court, in fact, previously denied certiorari in a case raising a similar question. *Lipscomb v. FLRA*, 333 F.3d 611, 615 (5th Cir. 2003) *cert. denied* 541 U.S. 935 (2004). The Court was right to do so then and should do so again now.

As Petitioners concede, there is no split among the circuits. Pet. at 13, 28-29. But the reason for this is not, as Petitioners suggest, that each of the circuits is wrong. Every circuit to address the civilian employment of dual-status technicians, including the Sixth Circuit in the opinion below, has uniformly found that dual-status technicians are covered by the FSLMRS when acting in their civilian capacity. *See*, *e.g.*, Pet. App. at. 14a; *Michigan National Guard*, 878 F.3d at 174; *Lipscomb*, 333 F.3d at 620; *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195, 195-196 (D.C. Cir. 2004); *AFGE Local 3936 v. FLRA*, 239 F.3d 66, 70 (1st Cir. 2001); *State of Nebraska, Military Dep't, Office of Adjutant Gen. v. FLRA*, 705 F.2d 945, 953 (8th Cir. 1983); *Ind. Air Nat'l Guard, Hulman Field, Terre Haute, Ind. v. FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983); *Cal. Nat'l Guard v. FLRA*, 697 F.2d 874, 879-880 (9th Cir. 1983); *Fla. Nat'l Guard v. FLRA*, 699 F.2d 1082, 1087-88 (11th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 286 (3d Cir. 1982); *Division of Military & Naval Affairs, State of New York v. FLRA*, 683 F.2d 45, 48 (2d Cir. 1982). This uniformity of opinion is grounded not in error but in deliberate and reasoned statutory construction that gives effect to the text, purpose, and structure of the laws governing the employment of dual status technicians, including the FSLMRS and the Technicians Act. Put differently, the problem for Petitioners is that the circuits are right.

Petitioners' constitutional argument, moreover, is a digressive treatise that misses the mark. Pet. at 20-24. There is no constitutional infirmity in Congress regulating the employment of dual-status technicians in their capacity as federal, civilian employees. Petitioners' assertions to the contrary are without merit and are misleading because they fail to acknowledge or address both the federal and civilian aspects of the dual-status technicians' employment.

Dual-status technicians' primary responsibilities are the "organizing, administering, instructing, [and] training of the National Guard" and "the maintenance and repair of supplies issued to the National Guard or the armed forces." 32 U.S.C. § 709(a)(1)-(2). Dual-status technicians are, in this respect, an instrument of the Federal Government and essential to the effectiveness and readiness of the National Guard. As such, regulation of the civilian aspects of dual-status technicians' employment falls well within the authority of Congress and the Executive Branch. *Cf. Perpich v. Dep't of Def.*, 496 U.S. 334, 349 (1990) (Militia Clauses are grants of authority to Congress, not limitations on its power). There is thus no constitutional impediment to civilian technicians being subject to the same laws and rules governing other federal civilian employees when acting in their civilian capacity, while being subject to military control when activated to military service. *Cf. id.* at 342-45 (1990). Petitioners' arguments to the contrary hold no water. Nor would they be conducive to the long-term readiness of the National Guard, inasmuch as they would lead to the reduction or elimination of an important, federal (and federally funded) training and support asset.

1. The Sixth Circuit correctly held, in agreement with every other circuit to address the question, that dual-

status technicians and their employers, i.e., state national guards and adjutant generals, are covered by the FSLMRS when the technicians are acting in their civilian capacity. Pet. App. at 14a ("[B]oth the [Ohio National] Guard and its technicians fall within the scope of the FLRA's jurisdiction."). In every case the courts determined, correctly, that the plain language of both the Technicians Act and the FSLMRS gave the FLRA jurisdiction over dual-status technicians and their employing agencies. *See*, *e.g., Lipscomb*, 333 F.3d at 620.

The FSLMRS applies to "employees" of an "Executive agency." *See* 5 U.S.C. § 7103(a)(2)-(a)(3). Petitioners contend (Pet. 13-20) that the Ohio Adjutant General, his department, and the Ohio National Guard are not executive agencies under the FSLMRS because they function purely as state entities. Petitioners' argument, however, fails to meaningfully confront 1) that dual-status technicians are federal civilian employees of the Department of the Army or Air Force (*see* 32 U.S.C. § 709(e); 10 U.S.C. § 10216(a)(1)); and 2) that the Ohio Adjutant General's authority to "employ and administer" those technicians is delegated to him by the Secretary of the Army or Air Force under 32 U.S.C. § 709(d). Simply put, Petitioners are acting as the employer of federal civilian employees under the authority of the Secretary of the Army or Air Force pursuant to federal law. Consequently, in their capacity as employers of dual-status technicians, the Ohio Adjutant General, his department, and the Ohio National Guard constitute executive agencies under the FSLMRS.

a. Dual-status technicians are indisputably federal civilian employees covered by the FSLMRS because the Technicians Act expressly provides that a dual-status technician is "an employee of the Department of the Army or the Department of the Air Force, as the

case may be, *and an employee of the United States*." 32 U.S.C. § 709(e) (emphasis added). Moreover, 10 U.S.C. § 10216(a)(1), which the Technicians Act references (*see* 32 U.S.C. § 709(b)(1)), leaves no room for argument when it provides that "[f]or the purposes of this section and *any other provision of law,* a military technician (dual status) is a *Federal civilian employee*[.]" (emphasis added); *see also Babcock v. Kijakazi*, 142 S. Ct. at 645 ("[T]he role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard."). And dual-status technicians continue to be federal civilian employees under the plain terms of both 32 U.S.C. § 709(e) and 10 U.S.C. § 10216(a) regardless of whether their units are operating as the state National Guard units or called into federal service under 10 U.S.C. § 12405.

Further, while the FSLMRS exempts certain employees and agencies from the FLRA's jurisdiction, those exemptions are specific and do not include either dual-status technicians or the Ohio National Guard. *See* 5 U.S.C. § 7103(a)(2)-(a)(3); *see also* Pet. App. at 13a-14a (dual-status technicians are "federal civilian employees, not uniformed services employees")(internal quotations omitted); *Lipscomb*, 333 F.3d at 615 (explaining that neither the National Guard nor the dual-status technicians are excluded from coverage under the FSLMRS). As federal civilian employees of either the Department of the Army or the Air Force, dual-status technicians are employees of an Executive agency and covered by the FSLMRS. *See* Lipscomb, 333 F.3d at 616.

b. The Ohio Adjutant General, his department, and the Ohio National Guard, in their capacity as employers of dual-status technicians, constitute Executive agencies under the FSLMRS. As the Fifth Circuit ex-

plained in *Lipscomb*, the National Guard is "a hybrid entity that carefully combines both federal and state characteristics[.]" *Lipscomb*, 333 F.3d at 614 (internal quotations omitted). While many of the National Guard's daily operations are "under control of the states, . . . [they are] governed largely by substantive federal law." *Id.* For example, since 1916, the National Guard "has been trained in accordance with federal standards and is armed and funded by the United States government." *Id.*

One aspect of this hybrid state-federal design is that state adjutant generals are charged by federal statute with employing and supervising federal civilian employees. 32 U.S.C. § 709(d)-(e); *see also Lipscomb*, 333 F.3d at 614. Specifically, the Technicians Act provides that the Secretaries of the Army and the Air Force: "shall designate the adjutants general . . . . to employ and administer the technicians authorized by this section." 32 U.S.C. § 709(d). Thus, state adjutant generals themselves occupy a hybrid state-federal position with respect to their federal duties as the employers of dual status-technicians. *See Lipscomb*, 333 F.3d at 617-618.

Here, the Ohio Adjutant General, acting on behalf of the Secretaries of Army and the Air Force, "employ[s] and administer[s]" federal civilian employees of the Department of the Army or the Air Force, i.e., dual-status technicians. *See* 32 U.S.C. § 709(d)-(e); 10 U.S.C. § 10216(a)(1). The Department of the Army and the Air Force are components of the Department of Defense (*see* 10 U.S.C. § 111(b)(6), (b)(8)) which is an Executive agency. *See* 5 U.S.C. § 105 (defining agency to mean "an Executive Department, a Government Corporation, and an independent establishment"); 5 U.S.C. § 101 (designating the Department of Defense

as an "Executive department"). Consequently, it is indisputable that the Ohio Adjutant General acts as the employer of federal civilian employees of an Executive agency. And as the statutory employer of Army or Air Force civilian employees, the "hybrid character of the [Ohio Adjutant General] includes a federal component which . . . renders him an Executive agency." *See Lipscomb*, 333 F.3d at 618. Likewise, the Ohio National Guard and the Ohio Adjutant General's Department are executive agencies because "they exist and operate under the authoritative direction and control of the adjutant general." *Lipscomb*, 333 F.3d at 619-20.

Every court of appeals to review this issue has agreed that state national guards and adjutant generals constitute federal executive agencies in their capacity as employers of federal civilian technicians. *See generally* Pet. App. at. 12a ("[T]he [Ohio National] Guard is a federal executive agency in its capacity as the employer of technicians."); *Lipscomb*, 333 F.3d at 618 ("[T]he hybrid character of the [Mississippi Adjutant General] includes a federal component, which in his capacity as employer of the technicians renders him an 'Executive agency.'"); *Gilliam v. Miller,* 973 F.2d 760, 762 (9th Cir. 1992) ("We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."); *Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987) ("although the National Guard Technicians Act confers federal status on civilian technicians 'while granting administrative authority to State officials, headed in each state by the Adjutant General,' by virtue of the hybrid character of the Guard, the Adjutant General is, at least for some purposes, simultaneously a federal agent."); *Chaudoin v. Atkinson,*494 F.2d 1323, 1329 (3d Cir. 1974) (holding that the Technicians Act, "charges the adjutant generals with em-

ployment and administration of the civilian technicians who are federal employees . . . [,] there can be no doubt that the Adjutant General of Delaware is an agency or an agent of the United States[.]"). In addition, at least five other circuit courts have acknowledged the FLRA's jurisdiction over the civilian aspects of a technician's employment; even when reversing, vacating, or modifying the FLRA's decision on the merits.[3] Not a single circuit court of appeals has found that the FLRA lacks jurisdiction over dual-status technicians or state national Guards when the issue at hand concerns civilian labor-management relations matters.

In the decision below, the Sixth Circuit reiterated its previous holding in *Michigan National Guard* that the FSLMRS "clearly provides labor rights and protections to dual-status technicians, and that the FLRA has jurisdiction over state national guards and their adjutants general with respect to technician bargaining." Pet. App. at 11a (citing *Michigan Army National Guard*, 878 F.3d at 178) (internal quotations omitted). The court explained that "in their capacity as employers of dual-status technicians who receive 'the benefits and rights generally provided for federal employees in

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[3] *See Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195, 195-196 (D.C. Cir. 2004) (recognizing the FLRA's jurisdiction and the right of dual-status technicians to engage in collective bargaining, but setting aside portions of the FLRA's decision concerning the scope of the duty to bargain) *accord AFGE, Local 3936 v. FLRA*, 239 F.3d 66, 70 (1st Cir. 2001); *State of Nebraska, Military Dep't, Office of Adjutant Gen. v. FLRA*, 705 F.2d 945, 953 (8th Cir. 1983); *Ind. Air Nat'l Guard, Hulman Field, Terre Haute, Ind. v. FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983); *Cal. Nat'l Guard v. FLRA*, 697 F.2d 874, 879-880 (9th Cir. 1983); *Fla. Nat'l Guard v. FLRA*, 699 F.2d 1082, 1087-88 (11th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 286 (3d Cir. 1982); *Division of Military & Naval Affairs, State of New York v. FLRA*, 683 F.2d 45, 48 (2d Cir. 1982).

the civil service,' state national guards are executive agencies." *Id.* at 11a (citing *Michigan Army National Guard*, 878 F.3d at 177 (quoting *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3rd Cir. 1982))) (internal citations omitted).

Similarly, the Fifth Circuit in *Lipscomb* firmly rejected the Mississippi Adjutant General's argument that the application of the FSLMRS to state national guards and adjutant generals "conflicts with the statutory scheme under which the Guard operates, with precedents of the Supreme Court and this Circuit, [and] with the Tenth and Eleventh Amendments to the United States Constitution[.]" 333 F.3d at 613. In so doing, the court held that the Mississippi Adjutant General and the Mississippi National Guard were executive agencies for purposes of the FSLMRS. *Id.* at 617-620. Specifically, the Fifth Circuit found that the "hybrid character of the [Mississippi Adjutant General] includes a federal component, which in his capacity as employer of the technicians renders him an 'Executive agency'" under the FSLMRS. Id. at 618. Based on its conclusion that the adjutant general is an executive agency, the court determined that the Mississippi National Guard is also an executive agency because it "exist[s] and operate[s] under the authoritative direction and control of the adjutant general." *Id.* at 619. The reasoning of the Fifth and Sixth Circuits is convincing because it is consistent with the text, purpose, and structure of the Technicians Act and the FSLMRS.

2. The application of the FSLMRS to dual-status technicians is further bolstered by the legislative history of 10 U.S.C. § 976 which prohibits membership in military unions, the organizing of military unions, and the recognition of military unions. *See* Pet. App. at 14a. The House Committee on Post Office and Civil Service

rejected Senate provisions that would have "den[ied] to civilian technicians the right to representation in collective bargaining [that] has been available to such employees since 1968 under Executive Order 11491." H.R. Rep. No. 95–894(II), at 6 (1978), reprinted in 1978 U.S.C.C.A.N. 7586, 7590. The Committee specifically rejected "the premise . . . that civilian technicians, while serving in their civilian capacity, are members of the military." *Id.* at 7. Accordingly, the Sixth Circuit found that "[t]he legislative history of 10 U.S.C. § 976 . . . reflects Congress's effort to ensure that dual-status technicians, in their civilian capacity, have collective bargaining rights that the members of the uniformed services do not have." Pet. App. at 14a. Therefore, it is beyond cavil that Congress intended for dual-status technicians to be covered by the FSLMRS and to be entitled to collective bargaining rights.

3. Petitioners' arguments that Article I, § 8, cls. 15 and 16 of the Constitution and the Tenth Amendment prohibits the FLRA from exercising jurisdiction in this case are equally unavailing. Pet. at 20-24, 47. Both the Fifth and Sixth Circuits have addressed and rejected these arguments in a convincing fashion. *See* Pet. App. at 14a-15a; *Lipscomb*, 333 F.3d at 618.

In both cases, those courts clearly explained that it is not unconstitutional for the FLRA to enforce the FSLMRS by issuing orders to state national guards and adjutant generals in their role as employers of federal civilian employees. Pet. App. at 14a-15a; *Lipscomb*, 333 F.3d at 617-620. In *Lipscomb*, the Fifth Circuit found that its "consideration of many factors . . . —most arising from the Technicians Act—leaves no doubt that the hybrid character of the [Mississippi Adjutant General] includes a federal component, which in his capacity as employer of the technicians renders

him an 'Executive agency'." 333 F.3d at 618. Consequently, the *Lipscomb* court held that the Constitutional arguments raised by the state national guard and the adjutant general must fail "[b]ecause of the federal character that the [Mississippi Adjutant General] assumes under the Technicians Act, and because the FLRA asserts its jurisdiction over these entities only in their federal capacities[.]" *Id.* The Sixth Circuit found the *Lipscomb* court's reasoning to be persuasive and reached the same conclusion. Pet. App. at 15a.

Here, Petitioners assert that the FSLMRS is unconstitutional because it "empowers the [FLRA] to direct state militias' labor practices." Pet. at 20-24. But this simply isn't true. To begin with, this argument fails because the FLRA has never asserted authority over members of a state national guard in an active-duty status. And the FLRA has, in fact, expressly disavowed any authority over military decision-making. *See e.g.*, *Ass'n of Civilian Technicians, Schenectady Chapter and N.Y. Air Nat'l Guard, Latham, N.Y.*, 55 F.L.R.A. 925, 933 (1999) (finding a union proposal concerning the posting of military assignments outside the duty to bargain because it "relates to the staffing of a military assignment and attempts to influence a military decision"); *Ass'n of Civilian Technicians, Texas Lone Star Chapter 100 and Texas Adjutant General's Dep't*, 55 F.L.R.A. 1226, 1229-30 (2000) (finding a union proposal allowing a civilian technician to supervise a higher-ranked active-duty Guard member outside of the duty to bargain because it "concern[s] the military aspects of civilian technician employment").

Petitioners' argument also fundamentally misunderstands the employment status of dual-status technicians and the role of the Ohio National Guard in supervising them. Technicians are federal civilian employees.

That these civilian employees may also be members of the Ohio National Guard does not change this fundamental fact. *Cf. Babcock*, 142 S. Ct. at 645 ("Congress consistently distinguished technician employment from National Guard service"). In their civilian capacity, dual-status technicians are not employees of the State of Ohio nor are they functioning as employees of the Ohio National Guard. Instead, dual-status technicians are federal civilian employees of the Department of the Army or Air Force. 32 U.S.C. § 709(e). Accordingly, the FLRA is, in fact, regulating the labor practices of federal employees—not those of state militias.

Petitioners do not, moreover, question the constitutionality of 32 U.S.C. § 709(d), which, if they choose to employ them at all, requires Petitioners to "employ and administer" federal civilian technicians under regulations set forth by the Secretary of the Army or the Air Force. *See* 32 U.S.C. § 709(a), (d). Consequently, the fact that the Ohio National Guard must execute this requirement in compliance with applicable federal labor law does not create a genuine Tenth Amendment question. *C.f. Perpich v. Dep't of Def.*, 496 U.S. at 349-351 (explaining that a rights-granting interpretation of the Militia Clauses properly "recognizes the supremacy of federal power in the area of military affairs.").

4. Finally, the Petitioners' reliance on *Singleton v. Merit System Protection Board*, 244 F.3d 1331 (Fed. Cir. 2001) ("*Singleton*") and its progeny for the proposition that a circuit split exists is as disingenuous as it is misplaced. *See* Pet. at 30-31; *see also* ALJ Decision, Pet. App. at 116a-117a (ably explaining why *Singleton* "sheds no light" in the instant case). *Singleton* addressed the authority of the Merit Systems Protection Board ("MSPB"), a different agency subject to different statutory provisions, and the scope of its jurisdic-

tion. *Singleton*, 244 F.3d at 1336-37. There is nothing in *Singleton* that restricts the jurisdiction of the FLRA because it involves the interpretation of a different statute, i.e., 5 U.S.C. § 1204.

Of equal importance, *Singleton* was decided prior to statutory amendments to the Technicians Act which superseded *Singleton's* holding in its entirety. *Cf. Dyer v. Dep't of the Air Force*, 971 F.3d 1377, 1382 (D.C. Cir. 2020) ("*Dyer*") (explaining that the Technicians Act "has been clarified to allow civilian dual-status technicians to appeal some adverse employment actions to the [MSPB]"). Specifically, the National Defense Authorization Act for Fiscal Year 2017 ("2017 NDAA"), Public Law 114-328, 130 Stat. 2000 (Dec. 23 2016), amended 32 U.S.C. § 709(f)(4) to clarify the rights and protections of technicians. *See Dyer*, 971 F.3d at 1381.

Prior to the 2017 amendments, technicians were excluded from the definition of "employee" in 5 U.S.C. § 7511, concerning the appeal of adverse actions. *See* 5 U.S.C. § 7511(b)(5) (2015); *see also Dyer*, 971 F.3d at 1381. And section 709(f)(4) of Title 32 of the United States Code similarly limited the right of dual-status technicians to appeal certain personnel actions. *See* 32 U.S.C. § 709(f)(4) (2015) (The right of appeal "shall not extend beyond the adjutant general of the jurisdiction concerned."); *see also Dyer*, 971 F.3d at 1381.

But the 2017 NDAA expanded the rights of technicians by narrowing the limitation in Section 709(f)(4) to only those situations involving "fitness for duty in the reserve components" or conduct "occurring while the member is in a military pay status." *See* 2017 NDAA Pub. L.114-328, 130 Stat. 2000, § 512; 32 U.S.C. § 709(f)(4); *see also Dyer*, 971 F.3d at 1381. The 2017 NDAA also added a new paragraph (*see* 32 U.S.C. § 709(f)(5)) mandating the application of 5 U.S.C. §§ 7511, 7512,

7513 and section 717 of the Civil Rights Act of 1991 to appeals concerning any activity not covered by 32 U.S.C. § 709(f)(4). *See Dyer*, 971 F.3d at 1381.

Simply put, the 2017 amendments reinforced that dual-status technicians have the same rights as other federal civilian employees when working in their civilian capacity. The amendments explicitly gave dual-status technicians the right to appeal covered personnel actions to both the MSPB and the Equal Employment Opportunity Commission. And those same amendments opened the door for dual-status technicians to grieve those covered personnel actions under the FSLMRS. *See* 5 U.S.C. § 7121(e)(1) (creating an election of remedies permitting a federal employee to challenge certain personnel actions through either the negotiated grievance procedure or by filing an appeal with the MSPB); *see also Buffkin v. Dep't of Def.*, 957 F.3d 1327, 1329 (Fed. Cir. 2020) (explaining that under 5 U.S.C. § 7121(e)(1) federal employees may challenge certain personnel actions by either filing an appeal with the MSPB or by filing a grievance under a collective bargaining agreement's negotiated grievance procedure).

The amended language of the Technicians Act further codifies the civilian/military distinction for dual-status technicians and makes clear that not only does the FLRA have the ability to issue binding decisions, the MSPB and the EEOC can now do so as well. It would be entirely senseless for Congress to expand the civilian rights of dual-status technicians if it had intended for those rights to be unenforceable. The amendments to the Technicians Act in the 2017 NDAA further demonstrate Congress's intent that dual-status technicians are to accrue the rights and benefits of federal employment when acting in their civilian capacity.

Singleton and its progeny do not create a circuit split because those decisions: a) involve the interpretation of a different statute governing the jurisdiction and authority of a separate and distinct administrative adjudicator, the MSPB; and b) have been superseded by subsequent congressional amendments to the Technicians Act.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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