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, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the adjutant general of a state National Guard unit, and the unit itself, are subject to the requirements of the Federal Service Labor-Management Relations Act (Act), 5 U.S.C. 7101 *et seq.*, when they act in their capacities as supervisors of dual status technicians, who are "[f]ederal civilian employe[es]," 10 U.S.C. 10216(a)(1).

2. Whether the Act violates the Militia Clauses, U.S. Const. Art. I, § 8, Cl. 15, 16, by providing dual status technicians the right to collectively bargain over certain conditions of their federal civilian employment.

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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 decision and 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 unreported but 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 (Pet. App. 168a-169a). 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. This case concerns the application of the Federal Service Labor-Management Relations Act (Act), 5 U.S.C. 7101 *et seq.*, to dual status military technicians in their capacity as federal civilian employees.

a. The Act provides generally for collective bargaining between federal agencies and the union representatives of their employees. The Act makes it an unfair labor practice for an agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Act; refuse to "negotiate in good faith" with a union; or "otherwise fail or refuse to comply with any provision" of the Act. 5 U.S.C. 7116(a)(1), (5), and (8). The Act defines "'employee'" to include any individual who is "employed in an agency" and defines "'agency'" to include "an Executive agency." 5 U.S.C. 7103(a)(2)(A) and (3).

The Federal Labor Relations Authority (FLRA) administers the Act. See 5 U.S.C. 7104, 7105. Among other things, the FLRA "resolves issues relating to the duty to bargain in good faith" and "conduct[s] hearings and resolve[s] complaints of unfair labor practices." 5 U.S.C. 7105(a)(2)(E) and (G).

b. A dual status military technician is "a federal civilian employee who provides technical or administrative assistance to the National Guard." *Babcock* v. *Kijakazi*, 142 S. Ct. 641, 643 (2022); see 10 U.S.C. 10216(a)(1) ("For purposes of * * * any * * * provision of law, a military technician (dual status) is a Federal civilian employee."); cf. 10 U.S.C. 10503(9). Dual status technicians are "required as a condition of [their] employment to maintain" National Guard membership. 10 U.S.C. 10216(a)(1)(B). But, as this Court recently confirmed, the civilian technician role is separate from the

National Guard military role, and "technicians perform work in two separate capacities." *Babcock*, 142 S. Ct. at 644; see *id.* at 646 ("[T]he fact that the Government hires only National Guardsmen to be technicians does not erase the distinction between the two jobs."). In their National Guard military capacities, dual status technicians participate in "part-time drills, training, and (sometimes) active-duty deployment" for which "they receive military pay and pension payments." *Id.* at 644; see 32 U.S.C. 502(a), 709(g)(2); 37 U.S.C. 204, 206.

In their technician roles, dual status technicians are primarily "engaged in 'organizing, administering, instructing,' 'training,' or 'maintenance and repair of supplies' to assist the National Guard." *Babcock*, 142 S. Ct. at 644 (quoting 10 U.S.C. 10216(a)(1)(C)); see 32 U.S.C. 709(a)(1) and (2). "A technician * * * is an employee of the Department of the Army or the Department of the Air Force * * * and an employee of the United States." 32 U.S.C. 709(e). For work done in the technician role, dual status technicians receive civil service pay and benefits from the federal government under Title 5 of the United States Code—just like other members of the federal civil service. See 5 U.S.C. 2105, 5105, 5332, 5342, 8332(b)(6), 8401(30); see also *Babcock*, 142 S. Ct. at 644. And because of the civilian nature of the technician role, dual status technicians "possess characteristically civilian rights to seek redress for employment discrimination and to earn workers' compensation, disability benefits, and compensatory time off for overtime work." *Babcock*, 142 S. Ct. at 646; see 5 U.S.C. 8337(h), 8451; 32 U.S.C. 709(f)(5) and (h); 42 U.S.C. 2000e-16.

c. Federal law requires each State to have an adjutant general, 32 U.S.C. 314(a), who is responsible for

overseeing both the military members of a state National Guard and its federal civilian employees, see 10 U.S.C. 10508(b). Federal law gives adjutants general specific authority over dual status technicians. The Secretary of the Army or the Secretary of the Air Force "designate[s] the adjutants general * * * to employ and administer" dual status technicians. 32 U.S.C. 709(d). An adjutant general who has been so designated acts on behalf of the federal government and hires individuals into the federal civil service when he hires them into their dual status technician roles. See 10 U.S.C. 10216(a)(1)(A); 32 U.S.C. 709(b) and (d). If a dual status technician is separated from the National Guard, federal law requires the adjutant general to discharge him from his technician role. 32 U.S.C. 709(f)(1). And federal law permits an adjutant general to "separate[]" dual status technicians "from [their] technician employment for cause" and discharge technicians for other reasons. 32 U.S.C. 709(f)(2); see 32 U.S.C. 709(f)(3).

2. From 1971 to 2016, the Ohio National Guard and its adjutant general recognized dual status technicians' collective bargaining rights and bargained with their union representative. Pet. App. 3a, 35a, 96a-98a. During that period, the Ohio National Guard complied with FLRA orders without challenging the FLRA's jurisdiction. *Id.* at 96a-97a. The most recent collective bargaining agreement between the Ohio National Guard and the union that represents its technicians was adopted in 2011 and was set to expire in 2014. *Id.* at 3a. After negotiations over a new agreement failed, the Ohio National Guard "recommitted to being bound by the mandatory bargaining topics set forth in the 2011 [agreement]." *Id.* at 4a.

In 2016, however, the Ohio National Guard changed course. In a memorandum sent to dual status technicians, it stated that it was "not bound by any provision of the [agreement] between the parties that expired in 2014." Pet. App. 4a (citation omitted); see *id.* at 45a-54a. More broadly, the memorandum declared that the Ohio National Guard "does not consider itself obligated to abide by the" Act in dealing with dual status technicians. *Id.* at 4a (citation omitted).

A dual status technician—like any other federal employee with collective bargaining rights—normally files a Standard Form 1187 to request payroll deductions for union dues; if he later wishes to cancel those deductions, he must file a different form, Standard Form 1188. Pet. App. 5a. After the Ohio National Guard sent the 2016 memorandum, it became apparent that the Guard lacked 1187 Forms that it should have had on file for numerous technicians who had opted to have union dues withheld. *Id.* at 4a-5a. The Guard then sent letters to those technicians asking them to submit 1187 Forms; if the technicians did not promptly do so, the Guard completed 1188 Forms on their behalf and signed the forms without asking for their consent. *Id.* at 5a. That resulted in the termination of union dues decisions for 89 dual status technicians. *Id.* at 5a-6a. The Guard also sent letters to technicians who had valid 1187 Forms on file, recommending the termination of their union dues deductions because there was no longer a collective bargaining agreement. *Id.* at 6a.

3. The union filed unfair labor practice charges against petitioners (the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department) with the FLRA's General Counsel. Pet. App. 6a. Following an investigation, the General Counsel

issued complaints alleging that petitioners (1) "refused to negotiate in good faith," and (2) "interfered with, restrained, and coerced employees in the exercise of their rights under the" Act by their treatment of technicians' union dues deductions. *Ibid.*; see 5 U.S.C. 7116(a)(1) and (5).

a. An FLRA Administrative Law Judge (ALJ) held a hearing and concluded that the FLRA had jurisdiction and that petitioners had engaged in unfair labor practices. Pet. App. 34a-167a. The ALJ found that dual status technicians "are employees within the meaning of the" Act and that petitioners "are agencies within the meaning" of the Act. *Id.* at 117a-118a; see *id.* at 96a-118a. The ALJ determined that petitioners had committed multiple unfair labor practices, including by failing to bargain in good faith and in their treatment of union dues withholdings. *Id.* at 118a-154a; see *id.* at 10a-11a. The ALJ ordered petitioners to follow the mandatory terms of the 2011 collective bargaining agreement, to bargain in good faith going forward, and to reinstate union dues withholding. *Id.* at 162a-167a; see *id.* at 11a.

b. On appeal, the FLRA found that the ALJ "committed no prejudicial errors" and adopted the ALJ's findings, conclusions, and remedial order. Pet. App. 19a; see *id.* at 17a-34a. Then-Member Abbott concurred, noting that under "current judicial precedent" the FLRA was "bound to assume jurisdiction" but stating that he had "concerns regarding existing judicial and [FLRA] precedent which applies the [Act] to the Adjutant General." *Id.* at 26a-27a. Then-Chairman Kiko dissented; in her view, the "treatment of state Adjutants General as federal 'Executive agencies' is wrong." *Id.* at 28a (brackets omitted); see *id.* at 28a-33a.

c. The court of appeals denied petitioners' petition for review. Pet. App. 1a-16a.

The court of appeals found that because "the 'activity, makeup, and function of the Guard is provided for, to a large extent, by federal law,'" and because dual status technicians "receive 'the benefits and rights generally provided for federal employees in the civil service,'" "state national guards are executive agencies" "in their capacity as employers of" technicians. Pet. App. 11a (citations omitted). The court noted that "[e]very 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." *Id.* at 11a-12a. The court also found that because dual status technicians "are 'federal civilian employees,' not uniformed services employees, * * * they have collective bargaining rights under the" Act. *Id.* at 14a (quoting 10 U.S.C. 10216(a)(1)). The court noted that "[t]he legislative history of 10 U.S.C. § 976, which prohibits military unions," supported its reading because "[t]he House Committee specifically rejected the idea that civilian technicians were members of the military." *Ibid.* (citing H.R. Rep. No. 894, 95th Cong., 2d Sess. Pt. 2, at 7 (1978) (House Report)).

The court of appeals also rejected petitioners' argument that the Militia Clauses, U.S. Const. Art. I, § 8, Cl. 15, 16, bar Congress from conferring collective bargaining rights on dual status technicians. Pet. App. 14a-15a. The court again noted that, in their "capacit[ies] as employer[s] of dual-status technicians," petitioners "were not acting as state agencies, but instead as federal executive agencies." *Id.* at 15a. The court therefore determined that "[i]t is not unconstitutional for the FLRA to enforce the [Act] by issuing orders to state national

guards and their adjutants general * * * when the labor dispute at hand is related to the civilian aspects of a technician's job." *Ibid.*

The court of appeals finally rejected petitioners' sole merits argument: that they were unable to comply with the FLRA order to the extent it required them to reinstate union dues withholding. Pet. App. 16a; cf. Pet. 12. The court found that "[i]t is neither unlawful nor impractical for the Guard to comply with" an order to "restore" withholding that the Guard itself had "erroneously cancelled" by "submitt[ing] Form 1188s on behalf of numerous technicians without their consent." Pet. App. 16a.

d. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 168a-169a.

ARGUMENT

The court of appeals correctly held that dual status technicians have the right to collectively bargain under the Act because they are federal civilian employees and because petitioners act as representatives of a covered agency when supervising technicians. And because the federal government does not violate the Militia Clauses when it provides federal employees with federal employment rights, the court likewise correctly rejected petitioners' constitutional challenge. The court's decision does not conflict with any decision of this Court or another court of appeals, and the question presented does not otherwise warrant this Court's review. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the text of the relevant statutes requires petitioners to collectively bargain with the technicians' union and otherwise comply with the Act. And the court's resolution of that statutory question is consistent with the decisions of

all courts of appeals that have considered the issue—a decades-long consensus that petitioners themselves describe (Pet. 1) as including "[n]early ever circuit." See, *e.g.*, *New Jersey Air Nat'l Guard* v. *FLRA*, 677 F.2d 276, 285-286 (3d Cir.), cert. denied, 459 U.S. 988 (1982); *Lipscomb* v. *FLRA*, 333 F.3d 611, 617-618 (5th Cir. 2003), cert. denied, 541 U.S. 935 (2004); *FLRA* v. *Michigan Army Nat'l Guard*, 878 F.3d 171, 174 (6th Cir. 2017); *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *Nebraska* v. *FLRA*, 705 F.2d 945, 952-953 (8th Cir. 1983); *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *Association of Civilian Technicians* v. *FLRA*, 230 F.3d 377, 378 (D.C. Cir. 2000); cf. *American Fed'n of Gov't Emps.* v. *FLRA*, 239 F.3d 66, 69-71 (1st Cir. 2001); *New York Council* v. *FLRA*, 757 F.2d 502, 506 (2d Cir.), cert. denied, 474 U.S. 846 (1985).

a. The Act makes it an unfair labor practice for an agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Act. 5 U.S.C. 7116(a)(1). The Act defines "'employee'" to include any individual who is "employed in an agency." 5 U.S.C. 7103(a)(2)(A). Petitioners do not appear to seriously dispute that when a dual status technician performs work in his civilian technician role, he is "employed in an agency." *Ibid.* In any event, the relevant statutory text is clear: a "technician * * * is an employee of the Department of the Army or the Department of the Air Force." 32 U.S.C. 709(e); see 10 U.S.C. 10216(a)(1)(A). And a series of nesting statutory definitions provides that those Departments are components of an agency for purposes of the Act. The Act defines "'agency'" to include "Executive agenc[ies]," 5 U.S.C. 7103(a)(3), and the term "Executive agenc[ies]"

includes "Executive department[s]," 5 U.S.C. 105. The Department of Defense—of which the Department of the Army and the Department of the Air Force are components, 10 U.S.C. 111(b)(6) and (8)—is an Executive department and therefore an Executive agency. 5 U.S.C. 101. Dual status technicians are therefore "employed in an agency"—the Department of Defense—for purposes of the Act, and, like other civilian employees of that agency, are covered by the Act. 5 U.S.C. 7103(a)(2)(A); see *Lipscomb*, 333 F.3d at 616.

When supervising dual status technicians working in their technician jobs, petitioners are representatives of that federal agency. The Ohio Adjutant General, his Office, and the Ohio National Guard supervise dual status technicians only because the Secretary of the Army or the Secretary of the Air Force has "designate[d]" the Ohio Adjutant General "to employ and administer the technicians." 32 U.S.C. 709(d). Such designation authorizes the adjutant general to appoint dual status technicians into the federal civil service when he hires them. See 10 U.S.C. 10216(a)(1)(A); 32 U.S.C. 709(b) and (d). And that designation is the sole basis for the adjutant general's ability to make other decisions that impact technicians' employment in the federal civil service. See, *e.g.*, 32 U.S.C. 709(f). Petitioners are therefore agents of the Department of the Army or the Department of the Air Force when supervising dual status technicians, and—because those are components of the Department of Defense, a covered agency under the Act—petitioners must comply with the Act's collective bargaining requirements.

The "plain meaning" of the relevant statutory text "'becomes even more apparent when viewed in' the broader statutory context" governing dual status

technicians. *Babcock* v. *Kijakazi*, 142 S. Ct. 641, 645 (2022) (citation omitted). As this Court recently recognized, "the role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard," and "[t]he statute defining the technician job makes that point broadly and repeatedly"—including by providing technicians with a host of "characteristically civilian" employment "rights." *Id.* at 645-646; see pp. 2-3, *supra*. Congress's extension of collective bargaining rights possessed by other federal civil servants to dual status technicians comports with its broad treatment of technicians as federal civilian employees.

The Act's history confirms that Congress intentionally included dual status technicians within the Act's ambit. When Congress enacted the Act in 1978, dual status technicians had been subject to federally supervised collective bargaining for many years. See House Report 4-7 (noting that by 1978 over 63,000 technicians were represented in collective bargaining as a result of Executive Orders). In crafting the Act, Congress continued that practice: Although it excluded certain other employees from Act's coverage, it did not exclude dual status technicians. See 5 U.S.C. 7103(a)(2); see also 5 U.S.C. 7135(b) (providing that "[p]olicies, regulations, and procedures established under and decisions issued under * * * any * * * Executive order, as in effect on the effective date [the enactment of the Act], shall" generally "remain in full force and effect").

There is thus no textual, contextual, or historical basis for petitioners' statutory interpretation—which both sidelines *Babcock* and fails even to cite two provisions central to resolving the first question presented. See 32 U.S.C. 709(d) (establishing the relationship between the federal government and adjutants general

with regard to technician employment); 32 U.S.C. 709(e) (establishing that technicians are federal employees).

b. Petitioners' remaining arguments lack merit. As an initial matter, because dual status technicians are *federal* employees, this case does not implicate "the usual constitutional balance of federal and state powers," *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (citation and internal quotation marks omitted). Contra Pet. 19-20. When performing duties in his technician role, a dual status technician works as a federal civilian employee; he does not work as a member of a state National Guard or militia. See pp. 2-3, *supra*. Thus, when the federal government regulates the employment conditions applicable to the technician role, it merely regulates the employment conditions of its own employees—which does not implicate the relationship between state National Guards and the federal government. Indeed, federal law bars dual status technicians from bargaining over the conditions of their separate National Guard military service, so the FLRA has no jurisdiction over the technicians' separate employment in the National Guard—including training or service in either state or federal status. 10 U.S.C. 976; see, *e.g.*, *Association of Civilian Technicians*, 230 F.3d at 380 (holding that dual status technicians could not bargain over "how the technicians will be paid while on active duty").[1]

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[1] Congress has also provided that some conditions of technicians' employment are subject to the sole discretion of the adjutants general, see 32 U.S.C. 709(f), and the courts of appeals have consistently recognized that such conditions are not subject to collective bargaining under the Act, see, *e.g.*, *New Jersey Air Nat'l Guard*, 677 F.2d at 280-286; see also *Lipscomb*, 333 F.3d at 614-615 (collecting cases).

Petitioners likewise err in relying (Pet. 18-19) on the constitutional-doubt canon. That interpretive principle applies only when there are "competing plausible interpretations of a statutory text," *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005)—not when, as here, the statutory text and context are clear. And, in any event, interpreting the Act to generally cover dual status technicians does not raise "grave and doubtful constitutional questions," *United States ex rel. Attorney Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). See pp. 14-15, *infra*.[2]

2. Petitioners contend (Pet. 20-24) that requiring them to collectively bargain with dual status technicians over certain conditions of technician employment violates the Militia Clauses. The court of appeals correctly rejected that argument. And the court's resolution of that issue does not conflict with any decision of this Court or of another court of appeals. Cf. *Lipscomb*, 333 F.3d at 618 & n.7 (rejecting similar Tenth and Eleventh Amendment challenges to the Act's coverage of dual status technicians).

The Militia Clauses provide that "[t]he Congress shall have Power" "[t]o provide for calling forth the Militia" and "for organizing, arming, and disciplining, the

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[2] Petitioners note (Pet. 18) that some courts of appeals have treated adjutants general as acting under color of state law for the purposes of 42 U.S.C. 1983. But the pre-*Babcock* decision petitioners cite confirmed that adjutants general act as agents of the federal government when they are engaged in the supervision of dual status technicians performing work in their technician roles. *Johnson* v. *Orr*, 780 F.2d 386, 392 (3d Cir.) (explaining that "in administering the technician program generally and in his authority to dismiss technicians specifically, the adjutant general acts as an agent of the Secretary of the Air Force" and therefore "as a federal agent"), cert. denied, 479 U.S. 828 (1986).

Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. Art. I, § 8, Cl. 15, 16. Petitioners assert (Pet. 22) that because the second Clause gives States control over appointing state National Guard officers and training the state National Guard pursuant to Congress's plan, "Congress lacks the power to subject the Ohio militia to federal control under the" Act.

But the statutory scheme governing dual status technicians—including their right to collectively bargain—does not implicate the Militia Clauses because it does not impose any conditions on the terms of a technician's state National Guard or militia service. Petitioners' entire constitutional argument is premised on equating a dual status technician's state National Guard service with his federal technician work. But that premise is flawed for at least two reasons. First, it assumes that dual status technicians are operating as members of the state National Guard when they are engaged in technician work. But this Court rejected that premise in *Babcock*, finding that the "statute defining the technician job" "broadly and repeatedly" confirms that "the role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard." 142 S. Ct. at 645; see *Perpich* v. *Department of Def.*, 496 U.S. 334, 348 (1990). And second, petitioners' argument ignores the fact that dual status technicians are *federal* employees, *Babcock*, 142 S. Ct. at 643-644; see 10 U.S.C. 10216(a), which means that Congress may provide them with federal collective bargaining rights without running afoul of the Militia Clauses.

The FLRA has jurisdiction over petitioners only because the Ohio Adjutant General plays a statutorily designated role in a federal agency when he supervises technicians. See pp. 3-4, 10, *supra*. Petitioners do not challenge the validity of the statutes requiring the Adjutant General to act on behalf of the Department of the Air Force and the Department of the Army in supervising dual status technicians in their federal civilian capacities. And, as discussed, see p. 12, *supra*, the FLRA may not compel petitioners to bargain with dual status technicians over the conditions of their separate state National Guard employment, training, or service. The FLRA therefore has no authority over petitioners' "Appointment of * * * Officers" and "training [of] the Militia according to the discipline prescribed by Congress." U.S. Const. Art. I, § 8, Cl. 16. The court of appeals correctly concluded that there are no constitutional concerns with the FLRA enforcing the Act when the labor dispute is "related to *the civilian aspects* of a technician's job." Pet. App. 15a (emphasis added).

3. Petitioners identify no conflict between the court of appeals' decision and any decision of this Court or of another court of appeals. The court of appeals' decision was unanimous, and no judge requested a vote on petitioners' request for en banc rehearing. Pet. App. 168a-169a. And this case does not otherwise merit this Court's review: Congress's determination that a discrete category of federal employees is entitled to collectively bargain over some conditions of their federal employment does not raise broad questions about "horizontal * * * separation of powers." Pet. 25. Nor does the federal government's regulation of the collective bargaining rights of federal civilian employees "provide[]

the Court with an opportunity to say something about [the] meaning" of the Militia Clauses. Pet. 27.

Petitioners finally suggest (Pet. 30-31) that this Court's review is warranted because the court of appeals' interpretation of the Act "conflicts with the Federal Circuit's interpretation" of the statutory provisions governing the scope of review by the Merit Systems Protection Board (Board). That suggestion is misguided. The Federal Circuit once found that the Board could not adjudicate disputes between dual status technicians and adjutants general. See, *e.g.*, *Singleton* v. *MSPB*, 244 F.3d 1331, 1336-1337 (2001). In 2016, however, Congress adopted a statutory provision confirming that the Board may consider certain claims brought by technicians. See 32 U.S.C. 709(f)(5); see also 5 U.S.C. 7511 (2012 & Supp. IV 2016), 5 U.S.C. 7512, 7513(d); National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 512, 130 Stat. 2112; H.R. Rep. No. 840, 114th Cong., 2d Sess. 1017 (2016) (explaining that Section 709(f)(5) "would clarify that military technicians, under certain conditions, may appeal adverse employment actions to the * * * Board"). The Federal Circuit has since recognized that dual status technicians have "a right of appeal to the Board under" Section 709(f) if their claims do not "fall[] within [the] exception[s]" to that provision. *Dyer* v. *Department of the Air Force*, 971 F.3d 1377, 1384 (2020). Any tension that might exist between the decision below and the outdated Federal Circuit decisions on which petitioners rely thus lacks any current real-world impact.[3]

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[3] Federal law provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." 28

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2022

U.S.C. 518(a); see 28 C.F.R. 0.20(a); see also *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 93 (1994). Any certiorari petition filed by petitioners in their capacities as federal employers of dual status technicians would therefore require the authorization of the Solicitor General, which has not been given. Here, however, petitioners do not seek review, as federal agencies, of any question concerning the substantive rights and obligations defined by the Act. Rather, petitioners assert that they are not properly regarded as federal agencies to begin with. Under those circumstances, the United States does not believe that the Solicitor General's authorization is required and therefore does not object to the filing. See Br. in Opp. at 14 n.4, *Lipscomb* v. *FLRA*, 541 U.S. 935 (2004) (No. 03-737).