No. 21-1454

In the Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEP'T, ET AL.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Civil Service Reform Act of 1978, which empowers the Federal Labor Relations Authority to regulate the labor practices of federal agencies only, *see* 5 U.S.C. §7105(g), empower it to regulate the labor practices of state militias?

2. The second Militia Clause empowers Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. Const. art. I, §8, cl. 16. Assuming the Civil Service Reform Act of 1978 permits the Federal Labor Relations Authority to regulate the labor practices of state militias, is the Act unconstitutional in its application to labor practices pertaining to militia members who are not employed in the service of the United States?

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REPLY

This case presents the question whether the Civil Service Reform Act of 1978 empowers the Federal Labor Relations Authority to regulate the petitioners' labor practices. The answer is no. The Reform Act empowers the Authority to regulate *only* federal "agenc[ies]," 5 U.S.C. §7105(g)(3); *accord* 5 U.S.C. §7118(a), which the Act defines to include *only* "Executive department[s]," "Government corporation[s]," and certain "independent establishment[s]" within the executive branch. 5 U.S.C. §105; *see also id.* at §§104, 7103(a)(3); Pet.14–15. But the petitioners—the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department—are not Executive departments, government corporations, or independent establishments. (This brief will refer to them collectively as the Ohio National Guard.) They are all state officials or state entities. It follows from these premises, which neither the Authority nor the intervenor-union disputes, that the Authority has no power to issue orders to the Ohio National Guard.

In this very case, two of the Authority's three members doubted their ability to issue orders to the Guard. *See* Pet.App.26a–27a (Abbott, M., concurring); *id.* at 28a–33a (Kiko, Ch., dissenting). For good reason. As just explained, such orders contravene the Act's plain text. Further, if the Reform Act *did* empower the Authority to regulate the Guard's labor practices, the Act would exceed Congress's constitutional authority. To be sure, the second Militia Clause empowers Congress to enact laws governing "such Part" of state militias "as may be employed in the Service of the United States." U.S. Const. art. I, §8, cl.16. But that clause cannot be read as empowering Congress to regulate the state militias' day-to-day labor relations. The

phrase "employed in the Service of the United States" covers individuals called into active duty for the country. And if the Reform Act applies to disputes between the Guard and individuals who work for it, it applies even with respect to labor relations concerning individuals who are *not* in active duty. The Reform Act would thus exceed the scope of Congress's Militia Clause power.

The Sixth Circuit accepted the Authority's reading anyway. It relied primarily on precedent. Pet.App. 11a–12a. And indeed, the circuits have uniformly held, often with little in the way of analysis, that the Reform Act empowers the Authority to regulate the labor practices of state national guards and state adjutants general. Pet.App.12a (collecting cases).

This is the rare case in which the Court should grant review notwithstanding the absence of any circuit split. The Authority is interfering with state governance using powers Congress never gave it. Allowing that to continue—notwithstanding the principle that federal agencies "possess only the authority that Congress has provided" them, *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (*per curiam*)—would undermine the horizontal separation of powers. And this particular overreach, because it interferes with matters at the core of state sovereign authority, would contribute to the "erosion of federalism." Br. of *Amici Curiae* Mississippi, *et al.*, 2. That is why Mississippi and ten other States submitted an *amicus* brief urging this Court to grant review. As if to bolster the sovereign interests this case implicates, the Authority's brief includes a bizarre footnote suggesting that state national guards and adjutants general must sometimes beg the United States Solicitor General for permission to appeal *their own cases* protecting *their own*

interests. US Br.16 n.3. If that is one consequence of the prevailing view in the circuit courts, it is all the more reason to grant review. The way a State may defend its interests in federal court is a matter worthy of this Court's attention. *See, e.g. Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1009 (2022); *cf. Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2197, 2200 (2022).

The unanimity in the circuits, combined with the weakness of the Authority's arguments, suggests the circuits have fallen into a groove. *See Ramaprakash v. FAA*, 346 F.3d 1121, 1122 (D.C. Cir. 2003). The longer they remain in that groove—the longer their erroneous view prevails—the less likely the issue is to reach this Court. States will simply stop wasting their time raising it. Before the law ossifies, this Court should grant review to "confirm that the current, … uniform standard … is the correct one." *United States v. Jeffries*, 692 F.3d 473, 486 (6th Cir. 2012) (Sutton, J., *dubitante*), *abrogated by Elonis v. United States*, 575 U.S. 723 (2015).

I. The Reform Act does not empower the Authority to regulate state national guards or state adjutants general.

Neither the Authority nor the intervenor-union disputes the importance of the question whether the Reform Act empowers the Authority to issue orders to state national guards and state adjutants general. Instead, they insist the Sixth Circuit decided the case correctly. In fact, the Sixth Circuit erred. But more importantly, the question is *at least* close. And this Court, not the courts of appeals, should have the last word on the answer to that question.

1. The Authority concedes the Reform Act gives it power only over federal agencies. US Br.2. It thus concedes that it lacks authority to regulate the Ohio National Guard unless the Guard is a federal agency. One might think those concessions would lead to a confession of error.

But the Authority persists. Its argument rests entirely on the fact that the Authority's order in this case concerns a labor dispute between the Guard and "dual status military technicians." US Br.2. As the name suggests, dual-status technicians "perform work in two separate capacities." *Babcock v. Kijakazi*, 142 S. Ct. 641, 644 (2022). "First, they work full time as technicians in a civilian capacity." *Id.* "Second, they participate as National Guard members in part-time drills, training, and (sometimes) active-duty deployment." *Id.* Technicians are federal employees. 32 U.S.C. §709(e). But federal law gives state adjutants general the power to hire these technicians. And technicians perform work in state national guards while remaining, for statutory purposes, federal employees. 10 U.S.C. §10216(a)(1)(A); 32 U.S.C. §709(b) & (d).

The Authority claims that the Ohio National Guard acts as a "representative" or "agent" of a federal agency—namely, the Department of Defense—when it deals with technicians. Therefore, it reasons, the Authority has the power to regulate the Guard's labor practices. *See, e.g.*, US Br.4, 10; *see also, e.g.*, Interv. Br.14–16. The problem with this argument is that the conclusion does not follow from the premises. The Guard can serve as the *representative* of the federal agency only because it is *not* the federal agency. If it were, it would not need to hire technicians on the federal government's behalf—it would *be* the federal government and would do the hiring directly. Because

the Guard is not a federal agency, and because the Reform Act empowers the Authority to issue orders only to federal agencies, the Authority lacked the power to issue the order at issue in this case.

This principal-agent arrangement is commonplace. In many contexts, an actor may represent a government agency without *being* the government. For example, a private prison guard represents the State in the sense of having the power to restrain the liberty of incarcerated convicts. But that same guard does not become the government in the sense of enjoying the same qualified immunity as a guard the State employs directly. *See Richardson v. McKnight*, 521 U.S. 399, 401 (1997). Take another example. A federal contractor may represent the government as its agent, but the contractor is not the government itself. And as a result, the contractor does not enjoy the same "embracive immunity" as the government. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166 (2016). General agency law aligns with these cases. That is why an entire Restatement details the relationship between agent and principal—the two roles are not one and the same. *See* Restatement (Third) of Agency (2006).

Along the same lines, federal law allows the federal government to lend its employees to state and local governments. *See generally* Intergovernmental Personnel Act of 1970, Pub. L. 91–648, 84 Stat. 1920, 5 U.S.C. §§3371–3376. Under that law, when a federal employee is loaned to another government, the federal government continues to pay the employee's salary. "But in all other respects, the individual is subject to the direction and control of the organization to which he is providing services." *Camden v. Maryland*, 910 F. Supp. 1115, 1116 n.1 (D. Md. 1996). The

loaned employee is "*de facto* an employee" of the borrowing entity. *Id.* In a similar way, although technicians are formally federal employees, the Technicians Act, gave state adjutants general "the statutory function of employing [these] Federal employees." S. Rep. No. 90-1446, at 15 (1968); *see also* National Guard Technicians Act, Pub. L. No. 90-486, 82 Stat. 755, 32 U.S.C. §709. As the Intergovernmental Personnel Act illustrates, employing federal employees does not make the employer a federal agency. That goes double for employing technicians, who are only "nominal federal employees for a very limited purpose." *Am. Fed'n of Gov't Emps., Local 2953 v. Fed. Labor Relations Auth.*, 730 F.2d 1534, 1537–38 (D.C. Cir. 1984).

In sum, the Ohio National Guard is not a federal agency, even if it sometimes represents one or acts as its agent. The Reform Act empowers the Authority to issue orders *only* to federal agencies. It follows, as night the day, that the Reform Act gives the Authority no power to issue orders to the Guard.

2. The Authority responds that this view of technician employment "sidelines" this Court's recent *Babcock* decision. US Br.11. Not so. *Babcock* did not address anything relevant to the question whether the Ohio National Guard is a federal agency. Instead, it held that pension payments related to work that technicians performed in their "civilian" roles did not qualify, under the Social Security Act, as "payment[s] based wholly on service as a member of a uniformed service." 142 S. Ct. at 644 (quoting 42 U.S.C. §415(a)(7)(A)(III)). True, *Babcock* recognizes that technicians are federal employees. But the Guard does not argue otherwise; this case presents the

question whether the Guard is a federal agency (it is not), not whether technicians are federal employees.

The Authority also accuses the Guard of overlooking two provisions of the Technicians Act—32 U.S.C. §709(d) and (e)—that it says bear on the question presented. In fact, neither is relevant. Those provisions explain that state adjutants generals employ technicians under regulations set by the Army or the Air Force. 32 U.S.C. §709(a), (e). But they do not say that state adjutants general *are* the Army, the Air Force, the Department of Defense, or any other federal agency. In any event, the Guard has never disputed that adjutants general must comply with federal laws regarding dual-status technicians. Indeed, the Guard expressly recognized that the Army and Air Force can withhold federal funding to state national guards that do not follow binding laws and regulations. Pet.17. None of that, however, has any bearing on the only question that matters here, which is whether state national guards and state adjutants general are federal agencies for purposes of the Reform Act.

Finally, the Authority's response to the tension between the decision below and Federal Circuit cases does nothing to undermine the case for certiorari. Recall that federal law empowers the Merit Systems Protection Board to "order any Federal agency or employee to comply with" its decisions. Pet.30 (quoting 5 U.S.C. §1204(a)(2)). The Federal Circuit cases in question hold that the Board lacks the power to adjudicate disputes between technicians and state adjutants general or state national guards, since neither adjutants general nor state national guards are federal agencies. *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331, 1336–37 (Fed. Cir. 2001); *DiManni v. R.I. Army Nat'l Guard*, 62 F. App'x 937, 942

(Fed. Cir. 2003). The Authority responds by noting that Congress recently enacted a law giving the Board the power to adjudicate some of these disputes. US Br.16 (citing 32 U.S.C. §709(f)(5)); *accord* Interv. Br.21–24. True enough. But while the amendment changes the result in some cases involving technicians, it does not call into question the Federal Circuit's conclusion that neither state adjutants general nor state national guards qualify as federal agencies in their dealings with technicians. That reasoning, which the newly enacted law does not upset, conflicts with the Sixth Circuit's reasoning below.

* * *

An agency "cannot operate independently of the statute that authorize[s]" it to act. *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (internal quotation marks omitted). The Authority is acting in contravention of this principle. The Court should grant certiorari and reverse.

II. The Authority's interpretation of the Reform Act raises constitutional doubts under the second Militia Clause.

The foregoing shows that the Ohio National Guard ought to prevail under the plain text of the Reform Act. If the Court agrees, it need not address the second question presented, which asks whether the Reform Act is unconstitutional if interpreted to allow the Authority to issue orders to the Guard. Nonetheless, the Court *could* consider the question. It could do so when applying the constitutional-doubt canon to the first question presented. Alternatively, it could consider the Reform Act's constitutionality if it agrees with the Authority's interpretation. *See* Pet.20–24. In sum, while the first question presented is the focus of

this suit and independently worthy of the Court's review, there is no barrier to this Court's granting the second question presented if it wishes to do so.

The Authority does not disagree, though it claims the Guard's constitutional arguments are meritless. US Br.12–16. To the Authority's eyes, the constitutional issue evaporates so long as the technicians' national-guard and civilian roles are viewed in isolation. US Br.14. It notes that, "[w]hen 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." US Br.12. And it stresses that technicians have collective-bargaining rights *only* with respect to their technician roles; "federal law bars dual status technicians from bargaining over the conditions of their separate National Guard militia service." *Id.* In light of all this, the Authority argues, the Reform Act leaves undisturbed the States' constitutional authority to govern their militias. US Br.14.

The Authority misunderstands the constitutional problem. While Congress has the power to confer labor-relations rights on technicians, it has no power to enforce those rights through orders issued to state militias and state adjutants general. Put differently, the Ohio National Guard does not bear the burden of identifying a constitutional provision the Reform Act would violate if interpreted in the manner the Authority suggests. Instead, the Authority must identify some constitutional provision empowering Congress to enact such a law. *See* U.S. Const. amends. IX, X. The second Militia Clause is the best candidate. But it empowers Congress only to "provide for organizing, arming, and disciplining, the Militia, and for *governing such Part of them as may be employed in the*

Service of the United States." U.S. Const. art. I, §8, cl. 16 (emphasis added). The States argued, and the Authority does not contest, that "employed in the Service of the United States," means "called into active service for the country." Pet.23. The trouble for the Authority is that, on its reading, the Reform Act governs labor practices even with respect to technicians who are *not* called into active service. As a result, this Clause cannot justify the Reform Act if the Act is interpreted in the way the Authority suggests.

What other clause might allow Congress to enact a law doing what the Authority understands the Reform Act to do? The Authority does not point to any.

The intervenor-union makes one argument that the Authority does not. Its argument rests on two provisions in the Technicians Act. *See* 32 U.S.C. §709(a) & (d); Interv. Br.21. Those provisions require state national guards to follow Army or Air Force regulations when they employ technicians. If state national guards fail to follow these regulations, the federal government can withdraw federal recognition and withhold federal funds. 10 U.S.C. §10503(8); 32 U.S.C. §108; Pet.8–9. The Ohio National Guard did not challenge the two provisions in question. And the intervenor-union says the Guard thereby implicitly conceded that the Army and the Air Force can regulate the Guard. *See* Interv. Br.21.

This argument, once again, misunderstands the problem. The Ohio National Guard does not question the federal government's power to influence the operation of state militias through the granting and withholding of benefits. The constitutional question arises only because the Reform Act, on the Sixth Circuit's reading, empowers the Authority to issue direct

orders to state entities and state officials. As this Court has long recognized, there is a constitutionally significant difference between encouraging the States to adopt a policy and ordering them to do so. *See New York v. United States*, 505 U.S. 144, 168 (1992). To prevail, the Authority or the intervenor-union must identify a provision empowering them to regulate directly the labor relations of state militias. They have yet to do so.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

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