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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMERICA FIRST POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The America First Policy Institute ("AFPI") is a non-profit, non-partisan research institute dedicated to advancing policies that put the American People first.[1] Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to the success of our country.

As part of its mission, AFPI seeks to prevent concentrations of power within regulatory agencies and check the unlawful or abusive exercises of power by unelected bureaucrats. AFPI recognizes that such abuses threaten popular liberty and government accountability. Thus, AFPI seeks to uphold the Framers' vision that strictly limited the federal government's authority and left most governing power to state and local governments. To this end, AFPI's Center for American Freedom performs oversight and research on the federal bureaucracy. The center is chaired by the Honorable David Bernhardt, who previously served as the 53rd Secretary of the Department of Interior in the Trump Administration, and its Director is James Sherk, who previously served as Special Assistant to the President for Domestic Policy and was the Trump Administration's top civil service reform and labor policy advisor. Through its efforts, the center holds the

[1] All the parties have provided written consent to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution intended to fund its preparation or submission.

administrative state accountable, prevents government abuse and corruption, and protects individual liberty.

Likewise, AFPI's public interest law firm, the Constitutional Litigation Partnership ("CLP"), supports AFPI's mission and the goal of constitutional restoration through merits litigation and the filing of *amicus curiae* briefs in state and federal courts. CLP is chaired by the Honorable Pam Bondi, who previously served as Florida Attorney General from 2011 to 2019, and its Chief of Staff is Catherine Cypher, who previously served as Special Assistant to the President and Director of Media Affairs for First Lady Melania Trump.

AFPI respectfully submits this *amicus curiae* brief to provide legal guidance and practical insight into the question before the Court: Does the Civil Service Reform Act of 1978 ("CSRA"), which empowers the Federal Labor Relations Authority ("FLRA") 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?

SUMMARY OF THE ARGUMENT

The Federal Service Labor-Management Relations Statute ("FSLMRS") sets forth the rights and obligations of unions and federal agencies in the federal-sector collective bargaining process and establishes the FLRA as an independent agency to adjudicate disputes. The FSLMRS defines "employees" subject to

its coverage as individuals "employed in an agency" where "agency" is defined as "an Executive agency," with several specific federal agencies carved out.

This definition excludes National Guard dual status technicians because they are employed by state Adjutants General, not "an Executive agency." Nothing in the text or history of the FSLMRS indicates that "an Executive agency" was meant to refer to state agencies or employees. Instead, the law is clear that state Adjutants General are state officers, not "Executive agencies." Further, the National Guard Technicians Act of 1968 (the "Technicians Act") establishes that dual status technicians are employed by state Adjutants General, not a federal "Executive agency." With the Technicians Act, Congress intended that "administration and supervision" of dual status technicians would "as a matter of law remain at the State level."

The FSLMRS was passed 10 years after the Technicians Act, and "there is no indication that issues relating to technician bargaining were separately considered by Congress when it enacted the [FSLMRS]." Indeed, there are strong textual clues that Congress intended the Technicians Act to govern technician employment specifically, not the more general FSLMRS, which nowhere alludes to or mentions dual status technicians.

Forcing state Adjutants General to collectively bargain with dual status technicians would radically alter the state character of technicians' employment. AFPI's own research demonstrates just how intrusive,

time-consuming, and wasteful federal-sector collective bargaining can be. Nothing in the text or history of the FSLMRS or the Technicians Act suggests that Congress meant to strip state Adjutants General of the basic tools to oversee dual status technicians. Instead, the text and history show the opposite—Congress sought to *preserve* the right of the Adjutant General to exercise plenary supervisory and disciplinary power over dual status technicians.

To the extent the FSLMRS is ambiguous, the canon of constitutional avoidance requires that the Court not interpret it to force state agencies and employees to administer a federal regulatory program. Here, holding that state Adjutants General are federal "Executive agencies" raises at least three serious constitutional questions: (1) the commandeering of state agencies to administer a federal program in violation of *Printz v. United States*, 521 U.S. 898 (1997); (2) the day-to-day employment of dual status technicians would be controlled in large measure by federally mandated procedures, rather than by the States themselves, in conflict with Article I, § 8, cl. 16 of the Constitution; and (3) including FSLMRS' coverage to include state Adjutants General raises questions of state sovereign immunity by forcing state entities to litigate a complaint brought by a private entity before a federal administrative tribunal, the FLRA, in violation of *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

Thus, AFPI respectfully urges the Court to reverse the Sixth Circuit's judgment and hold that dual status technicians are not covered by the FSLMRS.

ARGUMENT

I. Dual Status Technicians Are Excluded from Coverage Under the FSLMRS Because They Are Not Employed in an "Executive Agency."

The CSRA establishes "an enormously complicated and subtle scheme to govern employee relations in the federal sector, including the authorization of collective bargaining." *Steadman v. Governor, U.S. Soldiers' & Airman's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990). The FSLMRS, passed as Title VII of the CSRA, sets forth the rights and obligations of unions and agencies in collective bargaining and creates the FLRA to adjudicate disputes. *See* 5 U.S.C. §§ 7101–35. Section 7103(a)(2) of the FSLMRS defines "employees" subject to its coverage as individuals "employed in an agency." Section 7103(a)(3) defines "agency" as "an Executive agency," with several specific federal agencies carved out.

This definition excludes National Guard dual status technicians because they are employed by state Adjutants General, not "an Executive agency." *See* 5 U.S.C. § 7103(a)(2). Specifically, the dual status technicians in this case are employed by the Ohio National Guard and Ohio Adjutant General, state entities that

form no part of the Executive Branch. *See* Ohio Const. art. III, § 10 (the Governor of Ohio is "commander-in-chief of the military and naval forces of the state, except when they shall be called into service of the United States"); Ohio Const. art. IX, § 3 ("The governor shall appoint the Adjutant General" of the Ohio National Guard); Ohio Rev. Code Ann. § 141.02 (defining the Adjutant General as a state officer). Nothing in the text or history of the FSLMRS indicates that "an Executive agency" was meant to refer to state agencies or employees. Instead, the law is clear that state Adjutants General are state officers, not "Executive agencies." *Charles v. Rice*, 28 F.3d 1312, 1315 (1st Cir. 1994) ("In each state, the Guard is a state agency, under state authority and control."); *Johnson v. Orr*, 780 F.2d 386, 390–92 (3d Cir. 1986) (state Adjutants General act "under color of state law" in supervising and employing dual status technicians).

The Technicians Act establishes that dual status technicians are employed by state Adjutants General, not an "Executive agency." *See* 32 U.S.C. § 709(d) (providing that state Adjutants General will "employ and administer the technicians authorized by this section"). The law "grants technicians federal employee status 'for the limited purpose of making fringe and retirement benefits of federal employees and coverage under the Federal Tort Claims Act ["FTCA"] . . . available to National Guard technician employees of the various states.'" *Illinois Nat. Guard v. FLRA*, 854 F.2d 1396, 1398 (D.C. Cir. 1988) (quoting *American Federation of Government Employees Local 2953 v. FLRA*, 730

F.2d 1534, 1537 (D.C. Cir. 1984)). At the same time, the Technicians Act "giv[es] the Adjutants General (who are State officers) the statutory function of employing federal employees." H. Rep. No. 90-1823 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3318, 3330. In this way, the Technicians Act makes clear that technicians' day-to-day employment is under state, not federal, control. *See* 32 U.S.C. § 709(d).

With the Technicians Act, Congress intended that the "administration and supervision" of dual status technicians would "as a matter of law remain at the State level." H. Rep. No. 90-1823, 1968 U.S.C.C.A.N. at 3320. Thus, a "principal feature" of the Technicians Act is "the 'requirement for Adjutants General to be the *sole agent* for employment and administration of [the] technician program under regulations prescribed by the Secretary concerned.'" *U.S. Dep't of Def. Nat'l Guard Bureau*, 55 F.L.R.A. 657, 660–61 (1999) (quoting S.R. Rep. No. 90-1446 at 2, 90th Cong. 2nd Sess. (1968) (emphasis in original)). "Although federal officials promulgate regulations governing technician working conditions . . . [t]hey retain no authority over the day-to-day employment of the technicians." *Id*. at 661. "*That authority is designated by statute to the states*." *Id.* (emphasis added). For this reason, the FLRA has said that state officials—not federal officials—"exercise authority over" the "conditions of employment" of dual status technicians. *Id*.

The FSLMRS was passed 10 years after the Technicians Act, and "there is no indication that issues relating to technician bargaining were separately

considered by Congress when it enacted the [FSLMRS]." *U.S. Dep't of Def. Nat'l Guard Bureau*, 55 F.L.R.A. at 661; *see also New Jersey Air Nat. Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir. 1982). Indeed, there are strong textual clues that Congress intended the Technicians Act to govern technician employment specifically, not the more general FSLMRS, which makes no reference whatsoever to dual status technicians. *Illinois Nat. Guard*, 854 F.2d at 1405 (observing "it is familiar law that a specific statute controls over a general one") (quoting *Townsend v. Little*, 109 U.S. 504, 512 (1883)).

For instance, "[u]nlike the Technician[s] Act, the [FSLMRS] does not contain any explicit language overriding all statutes with which it may conflict." *New Jersey Air Nat. Guard*, 677 F.2d at 283. "Quite to the contrary, the [FSLMRS] in several sections explicitly defers to existing laws where they conflict with the [FSLMRS]: the duty to bargain itself applies only 'to the extent not inconsistent with any federal law or any government-wide rule or regulation.'" *Id.* at 283 (quoting 5 U.S.C. § 7117(a)(1)). The controlling principle is thus:

> A preference for the specific over the general statute makes considerable sense in the situation we confront here. Congress in 1968 [with the Technicians Act] turned its attention to the very class of federal employees involved in this dispute. It crafted with care precise provisions intended to meet concerns of federalism and military control that are duplicated nowhere else in the federal service. . . . Turning to the 1978 legislation [the

> FSLMRS], we are met with a statute addressing the employment concerns of all federal employees—none of whom, with the exception of National Guard technicians, performs military roles under the supervision of state officials.

Id. at 285–86.

In sum, the plain text of the FSLMRS and the Technicians Act establish that dual status technicians are not employed in "an Executive agency" and, thus, are not subject to the FSLMRS' coverage. *See* 5 U.S.C. § 7103(a)(2). Rather, dual status technicians are employed by state Adjutants General.

II. Holding That Dual Status Technicians Are Covered Under the FSLMRS Would Undermine the Ability of State Adjutants General to Supervise and Control the Technicians' Employment.

Forcing state Adjutants General to collectively bargain with dual status technicians would radically alter the state character of technicians' employment—further suggesting that Congress did not include them within the coverage of the FSLMRS.

As this Court has noted, the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). Indeed,

AFPI's Center for American Freedom conducted a study that found that federal-sector grievance arbitrators overturn *over half*—58%—of removals of unionized employees who challenge their dismissal. *See* James Sherk, *Union Arbitrators Overturn Most Federal Employee Dismissals*, AFPI Center for American Freedom Research Report, at 4 (September 14, 2022).[2] In 38% of cases, arbitrators overturn the dismissal entirely and order that no punishment whatsoever be imposed on the employee, and in 20% of cases they reduce the dismissal to a suspension.[3] *Id*. at 5. Grievance arbitrators are even more lenient in cases involving suspensions of unionized federal employees, sustaining the agency's action in only 40% of cases. *Id*. at 5 n.16.

The ability to remove, suspend, and discipline dual status technicians is fundamental to the ability of state Adjutants General to supervise their employment effectively. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203, 2207 (2020) (noting that "the threat of removal" is essential for "meaningful[] control" of a subordinate, and "bureaucratic minutiae . . . is no substitute for at will removal"); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) ("the executive power" as envisioned by

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[2] *Available at* https://americafirstpolicy.com/latest/20220914-union-arbitrators-overturn-most-federal-employee-dismissals.

[3] The FLRA cannot hear exceptions to arbitral awards involving dismissals, and only employees—not agencies—may seek judicial review of such awards. *See* 5 U.S.C. §§ 7121(f), 7122(a), and 7703(a). Arbitrators' decisions reinstating employees are, thus, almost always final, taking these personnel decisions outside of covered agencies' control. *See* Sherk, *supra*, at 4.

the Framers "included a power to oversee executive officers through removal"); *Edmond v. United States*, 520 U.S. 651, 664 (1997) ("The power to remove officers, we have recognized, is a powerful tool for control.") Granting dual status technicians collective bargaining rights would drastically undermine the ability of the Adjutant General to supervise them.

While some previous decisions suggest that adverse actions against technicians can never be the subject of collective bargaining, *see New Jersey Air Nat. Guard*, 677 F.2d at 282–86, the FLRA decision under review makes clear that adverse actions against technicians *can* be the subject of collectively-bargained grievance procedures. *See* Pet. App. 116a–17a ("[T]echnicians are free to challenge adverse actions beyond the Adjutant General (for instance to an arbitrator in a negotiated grievance procedure, or to the Authority), if their claims arise from their civilian duties.").[4] Indeed, one of the disputed subjects of bargaining in this case, over which the Adjutant General sought to assert control, was "[d]isciplinary and adverse actions." *Id*. at 51a. The fact that the FLRA's decision would allow grievance arbitrators to review and overrule the Adjutant General's decisions to remove, suspend, and discipline dual status technicians makes clear that the reservation of state control over technician employment in the Technicians Act is incompatible with

[4] The prohibition on the FLRA hearing exceptions to arbitral awards involving dismissals does not apply to other, less severe adverse actions, such as suspensions for 14 days or less. *See* 5 U.S.C. §§ 7121(f), 7122(a), and 7512(a).

holding that the Adjutant General is an "Executive agency" subject to collective bargaining under the FSLMRS.

Nothing in the text or history of the FSLMRS or Technicians Act suggests that Congress intended to strip state Adjutants General of the basic tools to oversee dual status technicians. Indeed, the text and history show the opposite—namely, Congress sought to *preserve* the right of the Adjutant General to exercise plenary supervisory and disciplinary power over dual status technicians. *New Jersey Air Nat. Guard*, 677 F.2d at 283 ("In the history of the Technician[s] Act, and in particular in the history of the specific provision declaring technicians to be federal employees, we find abundant evidence of serious congressional concern with ensuring the final authority of state Adjutants General."); *Johnson*, 780 F.2d at 392 (noting that "[t]he Guard has historically been a matter of intense interest on the state level and the state Guards have zealously fought to prevent federal encroachment" and with the Technicians Act, "Congress was apparently sensitive to this situation and elected to preserve the state administrative authority over the Guard"). Instead, "the scheme of the [Technicians Act] is to create the technicians as nominal federal employees for a very limited purpose [*i.e.*, federal retirement benefits and coverage under the FTCA] and to recognize the military authority of the states through their Governors and Adjutants General to employ, command and discharge them." *Local 2953*, 730 F.2d at 1537–38.

III. Holding That Technicians Are Covered Under the FSLMRS Would Raise Serious Constitutional Questions That Should Be Avoided.

The text of the FSLMRS is clear, and it unambiguously excludes dual status technicians from its coverage because they are not employed in "an Executive agency." *See* 5 U.S.C. § 7103(a)(2). To the extent the FSLMRS is ambiguous, the canon of constitutional avoidance requires that the Court not interpret the FSLMRS to force state agencies and employees to administer a federal regulatory program. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Here, interpreting the Ohio National Guard and Ohio Adjutant General to be federal "Executive agencies" raises at least three serious constitutional questions.

First, if the FSLMRS is held to cover dual status technicians, then Congress has compelled state agencies and officials to "participate . . . in the administration of a federally enacted regulatory scheme"—that is, federal-sector collective bargaining. *Printz v. United States*, 521 U.S. 898, 904 (1997). As noted above, the FLRA has made clear that the FSLMRS' bargaining scheme "is not workable if employees do not have a right to negotiate with the same officials who exercise

authority over these conditions of employment"—that is, "state officials." *U.S. Dep't of Def. Nat'l Guard Bureau*, 55 F.L.R.A. at 661. Thus, under the FSLMRS, state officials must collectively bargain with dual status technicians, with all the burdens associated with that process, including participating in negotiations, grievance proceedings, and unfair labor practice proceedings before the FLRA, grievance arbitrators, and Administrative Law Judges. A command by Congress to state Adjutants General that they must collectively bargain with certain members of National Guard units over employment conditions encroaches upon their day-to-day authority in order that they comply with a federal regulatory program.

This sort of "compelled enlistment of state executive officers for the administration of federal programs" is an unconstitutional infringement on state sovereignty. *Printz*, 521 U.S. at 905. The burdens placed on state Adjutants General under this reading go well beyond the "discrete, ministerial tasks specified by Congress" at issue in *Printz*, 521 U.S. at 929, and, instead, requires that state Adjutants General participate in the extensive and intricate collective-bargaining scheme established by the FSLMRS. Forcing state Adjutants General to participate in this scheme implicates the exact concerns at issue in *Printz*. "The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id*. at 919. Therefore, the Supreme Court has

consistently struck down "federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) ("*NFIB*").

There is no indication either in the Technicians Act, the FSLMRS, or any other law that Congress sought to force unwilling state employees to administer the intricate and complex collective bargaining scheme established by the FSLMRS, and doing so would raise serious constitutional questions under *Printz* and *NFIB*.

Second, the Militia Clause gives Congress the power:

> 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, 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. 16. "The National Guard is the modern Militia reserved to the States by [the Militia Clause]." *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated on other grounds*, 382 U.S. 41; *see also* Ohio Rev. Code Ann. § 5923.01 (defining the Ohio militia to include the Ohio National Guard). The Militia Clause provides that Congress may only govern such part of the Militia "as may be employed in the Service of the United States," reserving "to the States

respectively" day-to-day governance of the Militia "according to the discipline prescribed by Congress." The state's Governor "remain[s] in charge of the National Guard in each State except when the Guard [is] called into active federal service," and the Governor "administer[s] the Guard through the State Adjutant General." *Maryland*, 381 U.S. at 47.

While Congress may pass laws to provide for the "discipline" of the Militia, it may not "govern" the Militia unless it has called it into federal service. *See* U.S. Const. art. I, § 8, cl. 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."). If dual status technicians were held to be covered under the FSLMRS, however, their day-to-day employment would be governed by federally-mandated collective bargaining, arbitration, and grievance procedures, not the State themselves—even where the National Guard has not been pressed into federal service.

Because of these federalism concerns, the Justice Department has consistently interpreted the term "govern" in the dual status technicians context "to authorize regulations and orders that apply generally to all the states' National Guard while leaving control of the day-to-day operations to the states." *Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 992 (D.C. Cir. 2010). This "interpretation of 'govern' . . . reflects its judgment about the proper balance in the federal-state relationship contemplated by the Constitution and mandated by Congress." *Id*. at 994.

Historically, members of the Guard were considered state employees "even though they [were] paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards." *Maryland*, 381 U.S. at 48. Thus, the Court has reasoned that "[t]heir appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States," and "[c]ivilian caretakers should not be considered as occupying a different status." *Id.*

The Technicians Act gave dual status technicians federal status "for the limited purpose of making fringe and retirement benefits of federal employees and coverage under the [FTCA] . . . available to National Guard technician employees of the various states." *Local 2953*, 730 F.2d at 1537. But Congress also meant to "recognize the State character of the Guard" and "giv[e] the Adjutants General (who are State officers) the statutory function of employing federal employees," directing that "administration and supervision" of the technicians would "as a matter of law remain at the State level." H. Rep. No. 90-1823, 1968 U.S.C.C.A.N. 3318, 3330, 3320. It would violate the Militia Clause for Congress to command that day-to-day administration and governance of Guard employees be undertaken by a federal "Executive agency." Yet that is what a broad interpretation of Section 7103(a) would do—require a federal "Executive agency" to directly supervise members of "the modern militia" even where they had not been called into the

"Service of the United States." U.S. Const., art. I, § 8, cl. 16.

Third, interpreting the FSLMRS' coverage to include state Adjutants General raises serious state sovereign immunity questions. "Dual sovereignty is a defining feature of our Nation's constitutional blueprint." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *Id*. at 752 (quoting *The Federalist* No. 81, p. 487–88 (C. Rossiter ed. 1961) (emphasis in original)). "The founding generation thought it neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons." *Id*. at 760 (internal quotation marks omitted). Indeed, it is indisputable that "[t]he generation that designed and adopted our federal system considered [the state's] immunity from private suits central to sovereign dignity," and "the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden v. Maine*, 527 U.S. 706, 715–16 (1999) (citations omitted). Thus, state sovereign immunity bars the FLRA "from adjudicating complaints filed by a private party against a nonconsenting state." *Fed. Mar. Comm'n*, 535 U.S. at 760.

This principle applies with equal force to compelled litigation before administrative tribunals. As the Court observed,

> if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency. . . .

Fed. Mar. Comm'n, 535 U.S. at 760.

Here, two state entities—the Ohio National Guard and Ohio Adjutant General—have been forced to litigate a complaint brought by a private entity—AFGE Local 3970—before a federal administrative tribunal—the FLRA. FLRA proceedings are just as much like ordinary civil litigation as Federal Maritime Commission proceedings. And there is no indication that the State of Ohio ever consented to this intrusion on its sovereign dignity. Thus, requiring the Ohio National Guard to submit to the jurisdiction of the FLRA without its consent violates its sovereign immunity.

No one seriously contends that the FSLMRS explicitly *covers* dual status technicians. The Fifth Circuit has conceded as much: "if one is searching for translucent, definitional, statutory words under the [FSLMRS] stating that the entities composing the Mississippi National Guard constitute an 'Executive

agency,' the search will be disappointing." *Lipscomb v. FLRA*, 333 F.3d 611, 618 (5th Cir. 2003). The canon of constitutional avoidance, thus, strongly counsels against holding that dual status technicians covered under the FSLMRS. *See Catholic Bishop*, 440 U.S. at 503–04 (holding that the canon of constitutional avoidance required reading the National Labor Relations Act (NLRA) to exclude from its coverage lay faculty members of religious schools who taught both religious and secular subjects due to the "serious First Amendment questions" that would arise if the NLRA were interpreted as requiring parochial schools to collectively bargain with their faculty members).

CONCLUSION

The Technicians Act establishes that dual status technicians are employed by state Adjutants General, not the federal government. Because FSLMRS makes clear that its coverage is limited to individuals employed by "an Executive agency," it excludes dual status technicians. Principles of constitutional interpretation require this reading because a contrary one would impermissibly force unwilling state officials to administer a federal regulatory program. Thus, AFPI respectfully urges the Court to reverse the Sixth

Circuit's judgment and hold that dual status technicians are not covered by the FSLMRS.

DATED: November 15, 2022

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