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 FOR THE STATE OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ALAN WILSON
SOUTH CAROLINA ATTORNEY GENERAL

ROBERT D. COOK
SOLICITOR GENERAL
JAMES EMORY SMITH, JR.*
*COUNSEL OF RECORD
DEPUTY SOLICITOR GENERAL
Rembert Dennis Building
Post Office Box 11549
Columbia, SC 29211
803-734-3680
esmith@scag.gov

Counsel for Amicus Curiae

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INTERESTS OF AMICUS CURIAE AND INTRODUCTION

Like Ohio, *amicus* South Carolina has an Adjutant General, a National Guard, and one or more state entities led by the State's Adjutant General. South Carolina utilizes approximately 1,255 National Guard military technicians to carry out federal and state military training and other missions. Most of South Carolina's technicians are dual-status technicians, whose employment is a hybrid of federal, state, civilian, and military characteristics. *See Ohio Adjutant General's Dep't, et al. v. Federal Labor Relations Authority*, 21 F.4th 401, 403-404 (6th Cir. 2021).[1]

In the decision below, the Sixth Circuit concluded that the Ohio National Guard acts as a "federal executive agency" under Title VII of the Civil Service Reform Act of 1978 ("Reform Act") in its capacity as the employer of these types of technicians. 21 F.4th at 408. As a result, the Sixth Circuit concluded that the Federal Labor Relations Authority ("FLRA") had jurisdiction over the Ohio National Guard with respect to labor-relations issues. *Id.*

If this Court were to affirm and follow the reasoning adopted by the Sixth Circuit, South Carolina could be subject to orders issued by the FLRA directing its Adjutant General and the South Carolina

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[1] Counsel of record for all parties provided written consent for Amicus to file its Brief. Rules 37.2(a) and 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made any monetary contribution to fund the preparation or submission of this brief.

National Guard to take remedial actions under the Reform Act.

For the reasons explained below, this Court should conclude that the Reform Act does not empower the FLRA to regulate the labor practices of state militias—including state National Guards.

SUMMARY OF ARGUMENT

The Reform Act confers labor-relations rights on employees of certain federal agencies and empowers the FLRA to issue orders enforcing certain rights against those federal agencies. The FLRA contends—and the Sixth Circuit agreed—that the act authorized it to issue orders directly to Ohio's Adjutant General and National Guard to enforce technicians' rights under the act. Although the plain text of the act forecloses the argument that state National Guards are federal agencies, historical and contemporary practices also weigh against any argument that state National Guards or their Adjutants General should be considered federal agencies.

ARGUMENT

The Reform Act gives the FLRA jurisdiction over "agenc[ies]." 5 U.S.C. § 7105(g). Under the act, an agency is defined to include "an Executive Agency." 5 U.S.C. § 7103(a)(3). The FLRA contends that state National Guards are considered federal executive agencies for purposes of the act. However, as Ohio has ably explained in its brief, the FLRA's argument is foreclosed by the plain text of the Reform Act.

Although this Court's analysis could begin and end with the statutory text alone, the historical treatment

of state National Guards and contemporary practices as to state National Guards reinforce the conclusion that state National Guards are not federal agencies. Indeed, since the founding, Congress and the States have treated the militia—and state National Guards—as state entities. Although Congress has increased federal requirements (and funding) for state National Guards in recent decades, Congress and the States have worked together to achieve a "delicate balance" between increased federal oversight and state control of the Guards.

The Sixth Circuit's decision below, which treats state National Guards and their Adjutants General as federal agencies, disrupts this delicate balance and runs counter to the historical treatment of state National Guards and contemporary practices as to state National Guards.

(1) Historical treatment confirms that state National Guards are not federal agencies.

Longstanding historical practice strongly weighs against treating state National Guards as federal agencies. *See Perpich v. Department of Defense*, 496 U.S. 334, 340 (1990) (looking to the history of the statutory schemes governing the state National Guards as explanatory authority). A brief survey of this history confirms that Congress has never intended to transform state National Guards into federal agencies.

The origins of state National Guards can arguably be traced directly back to colonial militias, which predate the founding of the country. *See Maryland for Use of Levin v. United States*, 381 U.S. 41, 46, *reh'g*

granted, judgment vacated sub nom. Maryland for the Use of Levin v. United States, 382 U.S. 159 (1965) ("The National Guard is the modern Militia reserved to the States by Art. 1, s 8, cl. 15, 16, of the Constitution."). During that time, the militia was largely the product of "English common law and colonial and military custom." *See* Patrick Todd Mullins, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 330 (1988)

During the founding era, a debate emerged regarding the militia. On the one hand, certain members of the founding generation, including George Washington and Alexander Hamilton, raised concerns about the military effectiveness of the militias. *See generally* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181, 1873 (1940). To address these concerns, these founders proposed the establishment of a "regular and disciplined army." *Perpich*, 496 U.S. at 340 n.6 (quoting The Federalist No. 25, pp. 156–157 (E. Earle ed. 1938)). On the other hand, other founders were concerned about the dangers posed by a professional standing Army. *See Perpich*, 496 U.S. at 340.

The Constitution attempts to effectuate a compromise between these two positions. It authorizes Congress to raise and support a national Army but also retains the state militias. 496 U.S. at 340. In retaining the militia system, the Constitution grants Congress "limited" authority over the militias, reserving significant authority to the States. Specifically, article I, section 8, clause 15 provides that Congress shall have the power to "provide for calling

forth the Militia to execute the Laws of the Union, suppress insurrections and repel invasions." U.S. Const. art. I, § 8, cl. 15. Article I, section 8, clause 16 authorizes 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, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. art. I, § 8, cl. 16.

Significantly, this Constitutional structure expressly contemplates that certain power over the militias be reserved to the States, including the power of appointment, training, and governance in certain circumstances. *See Houston v. Moore*, 18 U.S. 1, 50 (1820) (Story, J., concurring) ("It is almost too plain for argument, that the power here given to Congress over the militia; is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the State authorities.").

For over a century following the ratification of the Constitution, Congress largely left the affairs of the militia to the States. The Militia Act of 1792 was "the only permanent legislation under which the militia was organized" for over a century. *See* Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. at 187. Under the law, almost every able-bodied man between the ages of 18 and 45 was enrolled in the militia. *Id*. However, the law imposed "no requirements as to drills or musters." *Id*. Further, the

few requirements of the act were "virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force." *Perpich v. Department of Defense*, 496 U.S. at 341.

The Militia Act of 1792 was finally repealed in 1901, and the "process of transforming 'the National Guard of the several States' into an effective fighting force then began." *Id* at 342.

In 1903, Congress enacted the Dick Act, which "divided the class of able-bodied male citizens between 18 and 45 years of age into an 'organized militia' to be known as the National Guard of the several States, and the remainder of which was then described as the 'reserve militia,' and which later statutes have termed the 'unorganized militia.'" *Id*. The act "created a table of organization for the National Guard conforming to that of the Regular Army, and provided that federal funds and Regular Army instructors should be used to train its members." *Id*. Practically speaking, the Dick Act began the long process of transforming the state National Guards into "an effective fighting force." *Id*.

Despite the changes brought by the Dick Act, Congress demonstrated "tender regard" for the sensibilities of the States as to control over militia affairs. *See* Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. at 196. Specifically, "Regular Army instructors were provided at the annual encampments only upon the application of State Governors, and copies of the reports made by these instructors were to be transmitted to the State Governors. Likewise, assignments of Regular Army officers to duty in connection with the Organized

Militia were subject to revocation at the request of the Governor." *Id*.

In part in response to the exigencies presented by the First World War, Congress asserted "greater federal control and federal funding of the Guard" in 1916 through the National Defense Act. *Perpich*, 496 U.S. at 343. In doing so, Congress expressly provided that the Army of the United States included both the Regular Army and the National Guard while in the service of the United States. *Id*.

The act was a "dramatic increase in federal control over the militia." *See* Mullins, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. at 334. Most significantly, the act gave the President the power "to draft state Guard members as federal reserve troops." *Id*. Additionally, the act conditioned new federal appropriations on new requirements for the state National Guards. *See id*. at 335.

Despite these changes, States retained significant authority over the National Guards. The governors of the various States—or the Adjutants General of the States—remained "in charge of the National Guard in each State except when the Guard was called into active federal service." *Maryland for Use of Levin*, 381 U.S. at 47.

In 1933, Congress amended the National Defense Act, creating the modern system of dual enlistment. Under this system, "all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." *Perpich*, 496 U.S. at 345. This system thus recognizes

two overlapping but "distinct" organizations—the state National Guards and the National Guard of the United States. *Id.*

In practical terms, this means that Guard members are ordinarily designated as inactive federal status. *See Bowen v. United States*, 49 Fed. Cl. 673, 676 (2001), *aff'd*, 292 F.3d 1383 (Fed. Cir. 2002). If Guard members are ordered into active federal service under authority provided in Title 10 of the United States Code, they are temporarily relieved of any state status. *Id.* Thus, although dual enlistment affects the status of individual Guard members, the dual enlistment process does not transform a state National Guard into a federal agency or entity. *See In re Sealed Case*, 551 F.3d 1047, 1055 (D.C. Cir. 2009) (Kavanaugh, J, concurring) (recognizing that state National Guard and the Army National Guard are distinct organizations).

This system of dual enlistment has undoubtedly strengthened and increased the size of our Nation's military force. *See Perpich*, 492 U.S. at 346. In the process, and as explained more fully below, it has, at the same time, reserved "significant" powers to the States. *See id.*

In more recent years, Congress has extended federal benefits to certain employees of the state National Guards. For example, the National Guard Technician Act of 1968 extended "fringe and retirement benefits of federal employees" to National Guard technician employees of various states. *Am. Fed'n of Gov't Emps. AFL-CIO, Loc. 2953 v. Fed. Lab. Rels. Auth.,* 730 F.2d 1534, 1537 (D.C. Cir. 1984). The

act thus treats "technicians as nominal federal employees for a very limited purpose" while also recognizing "the military authority of the states through their Governors and Adjutants General to employ, command and discharge them." 730 F.2d at 1537–38. "The employment, discipline and discharge of technicians remains completely with state officials, and their day to day activities on the job are controlled at the state level." *Id.* at 1538.

The FLRA itself has previously recognized the limited scope of the Technician Act, acknowledging that the act itself recognized the state character of the Guard. *See U.S. Dep't of Def. Nat'l Guard Bureau (Activity) & Ass'n of Civilian Technicians (Lab. Org./petitioner) & Washington Nat'l Guard, et. al. (Intervenors)*, 55 F.L.R.A. 657, 661 (July 30, 1999).

And because technicians occupy a position that is "irreducibly military in nature" and subject to the control of state Adjutants General, courts have frequently declined to allow federal agencies to issues orders regarding technicians directly to state Adjutants General. *See Leistiko v. Stone*, 134 F.3d 817, 821 (6th Cir. 1997); *Wright v. Park*, 5 F.3d 586, 589 (1st Cir. 1993) (describing a technician's military and civilian roles as "inextricably intertwined"); *see also Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 96 (2nd Cir. 2004) (noting that any attempt to "surgically dissect and analyze" the line between civilian and military control would "itself threaten to intrude into their military relationship.").

Through all of these developments, Congress has sought to exercise greater control and oversight of the

state National Guards. However, in doing so, it has never purported to transform state National Guards into a federal agency. On the contrary, since 1792, Congress has expressly recognized the authority of States and their National Guards over a wide variety of matters, including over Guard members in their non-federalized military status and over specific employment-related decisions affecting dual status technicians. Such practice is consistent with the Constitution and the founders' intention to reserve power to the States to appoint, train, and govern their own militias. A contrary approach would obviously raise serious constitutional concerns. *See Printz v. United States*, 521 U.S. 898 (1997); *see also New York v. United States*, 505 U.S. 1444 (1992).

The Sixth Circuit's decision below represents a marked departure from this long history and should be reversed.

(2) Contemporary practices confirm that state National Guards are not federal agencies.

Contemporary practices as to the state National Guards also weigh against treating them as federal agencies. While the FLRA is correct that federal law imposes certain requirements on state Adjutants General, that law does not transform Adjutants General or state National Guards into federal entities. On the contrary, federal law seeks to achieve a "delicate balance" of power between federal oversight and state control.

As part of the balance of power, state National Guards and their Adjutants General remain subject to their state-established military and civilian chains of

command. In South Carolina, for example, the Adjutant General of South Carolina is a constitutional officer. See S.C. Const. art. XIII, section 4; *see also* S.C. Code Ann. § 25-1-350 (establishing the general powers and duties of the Adjutant General). The Governor of South Carolina appoints the Adjutant General with the advice and consent of the South Carolina Senate. *See* S.C. Const. art. VI, section 7; S.C. Code Ann. § 25-1-320.

The South Carolina Adjutant General is responsible for the day-to-day management of the South Carolina National Guard. South Carolina law sets forth the Adjutant General's various duties, responsibilities, and authority as a state official. *See, e.g.*, S.C. Code Ann. §§ 25-1-310, *et seq*. (Adjutant General's duties); 25-1-1610, *et seq*. (Adjutant General's authority and responsibility as to state real property).

And while state National Guards are expected to conform to certain federal laws and regulations, they are also governed through state legislation. *See, e.g.*, S.C. Code Ann. § 25-1-30 ("The Governor shall cause the National Guard of South Carolina always to conform to all such Federal laws and regulations as may from time to time be operative and applicable except where in conflict with the laws of this State."); *see also* Wy. Stat. Ann. § 19-9-101(a) ("The Wyoming national guard is governed by the laws of the state, orders of the governor, orders and regulations prescribed or promulgated by the adjutant general and by the applicable laws, regulations and customs covering the United States army and air force."). In fact, federal law actually requires state Adjutants

General to adhere to state laws. *See* 32 U.S.C. § 314(a) ("There shall be an adjutant general in each State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands. He shall perform the duties prescribed by the laws of that jurisdiction.").

Additionally, except when called into active federal service, state Adjutants General and state National Guards are not subject to commands or orders from federal civilian or military officials through the President, the Department of Defense, or its subcomponents—the Departments of the Army and Air Force. Indeed, federal law recognizes only limited remedial action against state National Guards except as to those units or guard members who are engaged in active federal service pursuant to Title 10 of the United States Code. *See*, *e.g.*, 32 U.S.C. § 108 (authorizing the withholding of funds); *see also* 32 U.S.C. §§ 301, 322-324 (withdrawal of federal recognition for enlisted members and officers); 10 U.S.C. §§ 10105(1), 10111(1) (federally-recognized units or organizations of states' Army and Air National Guards are part of the Army and Air National Guard of the United States).

Given these express statutory limitations, it would be strange—if not incomprehensible—to think that Congress intended to transform state National Guards into federal agencies subject to the commands of the FLRA through a vehicle as innocuous as the Reform Act. *See Bond v. United States*, 572 U.S. 844, 858, 134 S.Ct. 2077, 2089 (2014); *see also West Virginia v. EPA*, 142 S.Ct. 2587, 2609 (2022).

Given the significant authority reserved to the States, courts from across the country have recognized that the day-to-day operations of the state National Guards are under the control of the States. *See Singleton v. M.S.P.*B., 244 F.3d 1331, 1333 (Fed. Cir. 2001) ("Within each state, the national guard is a state agency, under state authority and control. "); *see also Knutson v. Wisconsin Air Nat. Guard*, 995 F.2d 765, 767 (7th Cir. 1993) ("In each state the National Guard is a state agency, under state authority and control. At the same time, federal law accounts, to a significant extent, for the composition and function of the Guard. Accordingly, the Guard may serve the state in times of civil strife within its borders while also being available for federal service during national emergencies.").

And given this level of state control, courts have reasonably concluded that state National Guards should be treated as state entities under the law in a variety of circumstances. For example, for purposes of the Eleventh Amendment, courts have routinely concluded that state National Guards and their Adjutants Generals are state entities or officials. *See*, *e.g.*, *Meadows v. State of Indiana,* 854 F.2d 1068 (7th Cir. 1988). Likewise, courts have concluded that state Adjutants Generals are state employees—not federal employees. *See Singleton*, 244 F.3d at 1336–37 ("The adjutant general of the ONG is not a federal employee, as that term is defined in Title 5. Therefore, no order of the Board may be directed to the adjutant general. The Governor of Ohio similarly is not a federal employee, and consequently no order of the Board could command the Governor to order a corrective act to be taken by the adjutant general.").

The application of the Posse Comitatus Act also illustrates the state status of Guards. Under the act, the Army and the Air Force may not be used "to aid civil authorities in the enforcement of civilian laws." *Gilbert v. United States*, 165 F.3d 470, 472 (6th Cir. 1999); *see* 18 U.S.C. § 1385 ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."). Significantly, courts have concluded that the act does not prohibit civilian authorities from employing state National Guard units to enforce the law. *See Gilbert*, 165 F.3d at 474 ("We conclude, accordingly, that officers of the Kentucky National Guard did not violate the Posse Comitatus Act when they participated in the surveillance of appellants' marijuana cultivation and harvesting, arrested them for those unlawful activities, and searched them and the area in which they had been growing their contraband crop."). In reaching this conclusion, courts have emphasized that Guard units retain their state status until they are called into active federal service under Title 10 of the United States Code. *See id.* at 473.

Consistent with these practices and decisions, this Court should reverse the decision below and conclude that Ohio's Adjutant General and National Guard are a state official and entity—not a federal agency or an agent or proxy for the Department of Defense—and that the FLRA has no statutory power to issue orders or commands directly to them.

CONCLUSION

This Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

ALAN WILSON
South Carolina Attorney General

ROBERT D. COOK
Solicitor General
JAMES EMORY SMITH, JR.*
*Counsel of Record
Deputy Solicitor General
Rembert Dennis Building
Post Office Box 11549
Columbia, SC 29211
803-734-3680
esmith@scag.gov

Counsel for Amicus Curiae

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