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

AMICUS CURIAE BRIEF OF AMERICANS FOR FAIR TREATMENT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Fair Treatment ("AFFT") is a national non-profit organization that offers a free membership program to public employees and helps them to understand and exercise their First Amendment rights in the context of a unionized workplace. AFFT serves public employees in the State of Ohio; they and a host of others nationwide would be affected if the decision below of the Federal Labor Relations Authority ("FLRA") were permitted to stand.

FLRA's decision broadly holds that if a federal employee works for someone, that someone must be a federal agency. The import is that collective bargaining rights then attach to that employment relationship—and FLRA can give the employer orders. That conclusion is incorrect and worse lacks any limiting principle. Without one, it means FLRA can (and probably will) expand its once-limited jurisdiction to sweep in a host of unsuspecting state, local, tribal, and territorial ("SLTT") officials and others who happen to employ federal employees in the public interest.

Moreover, an expanded reach for FLRA would have tremendous First Amendment implications here and across the country. If FLRA's decision stands, Ohio National Guard technicians will be required to subsidize a union and in practice remain union members for potentially a year or longer. And the Ohio Adjutant General will be compelled to engage in forced speech that his captive audience technicians must view.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties consented to this filing.

SUMMARY OF ARGUMENT

FLRA is an independent federal agency responsible for expounding and enforcing collective bargaining rights within other federal agencies.[2] FLRA purported to substantially expand the scope of its jurisdiction by deeming the Ohio Adjutant General—an Ohio state official who is neither an officer of nor employed by the United States—to ***himself*** be a federal agency. If the conclusion sounds fanciful, that's because it is.

FLRA's quest to expand its jurisdiction lacks boundaries. FLRA's basic thesis is if someone or something employs a federal employee and is somewhat federally regulated then that person or thing is *ipso facto* a federal agency. The manifest problem beyond the fifty-four clearly affected national guards is that, under the Intergovernmental Personnel Act ("IPA"), a panoply of SLTT governments (including Indian tribes), colleges, and non-profits employ federal employees. FLRA's determination means these non-federal entities employing federal employees on multi-year or even indefinite assignments must also engage in collective bargaining and take orders from FLRA. "Commandeered" in this context is probably an understatement.

Permitting the expansion of FLRA's jurisdiction inexorably means that the First Amendment rights of untold thousands[3] will be violated. FLRA's order here says that the "mandatory" provisions of the expired

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[2] FLRA is itself exempt from collective bargaining. 5 U.S.C. § 7103(a)(3)(F).

[3] In 2019 there were approximately 60,000 technicians employed in a national guard. Erich B. Smith, *National Guard Technician Program Turns 50* (Jan. 28, 2019), https://www.nationalguard.mil/News/Article/1741764/national-guard-technician-program-turns-50/ [https://perma.cc/5LKS-Y7CF].

collective bargaining agreement ("CBA") are to be resurrected. One CBA article says that any technician who signs up to be a union member is compelled to have union dues forcibly deducted from his paychecks for at least one year, and under current practice is forced to remain a union member during that time. It also provides for a brief yearly window period in which member technicians are permitted to stop dues deductions after their first year of membership, and also in practice to resign union membership. Any attempt to disassociate from and stop subsidizing the union outside of those narrow confines is not allowed. FLRA further compelled the Ohio Adjutant General, a state employee not subject to its jurisdiction, to personally engage in the speech of saying that FLRA's theory of the case was correct, and to deliver that speech via email to much of the Ohio National Guard. This is regrettably par for the course in the world of public-sector unions.

ARGUMENT

I. The Ohio Adjutant General Is Not a Federal Agency and Classifying Him as Such Would Have Expansive Downstream Consequences

FLRA's decision below holds that Ohio's Adjutant General is a federal "agency" within the meaning of the Civil Service Reform Act of 1978.[4] 5 U.S.C. § 7103(a)(3). That is absurd.[5] Not only is the term

[4] FLRA further held that the Ohio National Guard and the Ohio Adjutant General's Department are also federal agencies because they "operate under the authority and direction of the Adjutant General[.]" Pet. App. 117a–18a.

[5] This Court and others have not hesitated to intervene when FLRA exceeds its jurisdiction or otherwise patently misconstrues

"agency" carefully defined there and by reference to other parts of Title 5 to ***not*** include Major General Harris, but if there were any ambiguity the ordinary meaning of federal "agency" certainly does not include a living person. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."). The Fifth Circuit reached a contrary conclusion in 2003 but candidly observed that getting there required it to be totally unfair to the Reform Act's plain text: "We must admit that if one is searching for translucent, definitional, statutory words under the FSLMRA 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 (CA5 2003).

Indeed, to the extent there could be any actual federal agency involved here and within FLRA's jurisdiction it would have to be the Department of

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the Reform Act. *See, e.g.*, *IRS v. FLRA*, 494 U.S. 922, 928 (1990) ("The FLRA's position is flatly contradicted by the language of § 7106(a)'s command that 'nothing in this chapter'—i.e., nothing in the entire Act—shall affect the authority of agency officials to make contracting-out determinations in accordance with applicable laws."); *U.S. Dep't Treasury v. FLRA*, 43 F.3d 682, 689–90 (CADC 1994) ("The very preclusion of judicial review suggests powerfully that Congress could not have contemplated, let alone intended, that all or any part of American law would be definitively interpreted by the FLRA on review of one or a series of cases originally put to arbitration. To give any administrative tribunal such final authority to construe any or all statutes or treaties of the United States would be a staggering delegation, which surely would have provoked considerable congressional debate. That Congress would entrust such sweeping authority to a minor three-member commission with quite restricted expertise is, when one ponders the matter, utterly inconceivable.").

Defense. 5 U.S.C. § 101; *and see* 32 U.S.C. § 709(e) (technicians are "employee[s] of the Department of the Army or the Department of the Air Force"). But that too would make little sense because the expired CBA that FLRA is attempting to reanimate is not signed by or even on behalf of DoD; it is signed by a former Ohio Adjutant General and a former president of AFGE Local 3970. CBA at 20.[6] And in any event FLRA didn't give DoD an order. *See* Pet. App. 17a–25a.

A pernicious problem with FLRA's decision is that it cannot be limited to national guards by its reasoning or facts—nor is there any reason to think FLRA would independently try to so limit it. FLRA decided that Major General Harris is a federal agency because he employs some federal employees and is subject to certain DoD regulations. Pet. App. 113a, 117a–18a. But just like national guards, the IPA provides for federal employees to work for SLTT governments and even higher education institutions and non-profits. 5 U.S.C. §§ 3371–75; *see also id.* at § 3371(4)(C); 5 C.F.R. § 334.106(a). So too the Office of Personnel Management ("OPM") regulates how SLTT governments and others must act when employing federal workers under the IPA. 5 C.F.R. §§ 334.101–08; *see e.g.*, *id.* at § 334.103 (setting forth what SLTT governments and "other organizations" must submit to become "certified" to participate); *id.* at § 334.106(a) ("written agreement recording the obligations and responsibilities of the parties" required before assignment begins). Under the OPM regulations, a typical assignment is

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[6] Collective Bargaining Agreement Between the Adjutant General of Ohio and the American Federation of Government Employees, Local 3970: February 2011–January 2014, https://www.ong.ohio.gov/ohio_partnership/op-resources/CollectiveBargainingAgreementFeb11toJan14.pdf [https://perma.cc/JE2E-VLDT]

for up to two years and can then be extended for two more. *Id.* at § 334.104(a). That is plenty of time to establish a collective bargaining agreement. And in the case of Indian tribes, OPM says that federal employees may be assigned for "***any length of time***" so long as it would benefit the federal government and the Indian tribe.[7]

The follow-on consequence of FLRA's decision is it can transfigure all manner of states, localities, territories, Indian tribes, universities, and non-profits nationwide into federal agencies and give them orders to engage in collective bargaining[8] as it sees fit. That's a significant problem generally but is acutely concerning for Indian tribes that can have practically permanent federal employees on staff. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important backdrop, against which vague or ambiguous federal enactments must always be measured.") (cleaned up); *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("As full citizens, Indians share in the territorial and political sovereignty of the United States."). And for all concerned it raises the specter of weighty First Amendment violations discussed below.

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[7] OPM, *Policy, Data, Oversight*, https://www.opm.gov/policy-data-oversight/hiring-information/intergovernment-personnel-act/#url=Provisions [https://perma.cc/L2XH-9ZVQ] (last visited Nov. 15, 2022) (emphasis added).

[8] Collective bargaining is mandatory under the Reform Act. *See* 5 U.S.C. § 7111(a); 5 U.S.C. § 7116(a)(1), (2), (5), (8).

II. Allowing FLRA's Decision to Stand Would Suborn Serious First Amendment Violations

1. The First Amendment guarantees public-sector employees the right to choose whether (or not) to associate with and to financially support a labor union. *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018) ("public-sector agency-shop arrangements violate the First Amendment . . . ."). That right includes the ability to change one's mind and to dissociate from a union. *See id.* at 2463; *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12 (1986) ("forced associations that burden protected speech are impermissible"); *Debont v. City of Poway*, No. 98CV0502-K, 1998 WL 415844, at *6 (S.D. Cal. April 14, 1998) ("[A]t the heart of the First Amendment . . . is the freedom of expression, the freedom of speech, the freedom to associate, the freedom not to associate, and ***all of which inherently also involve the freedom to change one's mind***.") (emphasis added).

The expired CBA here contains an article that, by its terms and typical practice, violates the First Amendment in two distinct ways by severely constraining technicians' ability to disassociate from and stop subsidizing AFGE. CBA, art. XVIII. FLRA has deemed this article "mandatory," which means it "must be maintained" even though the CBA is no more. Pet. App. 131a–32a, 136a. If this Court allows FLRA's decision to stand, it will accordingly be breathing new life into that CBA—agreed to more than a decade ago, signed by officials who no longer occupy their offices, and made with an express end-date. And the double-offending "mandatory" article will reemerge to violate Ohio Guard technicians' constitutional rights.

The article first burdens technicians' freedom to choose whether to continue associating with and supporting the union by forcing them, for a period of at least one year after agreeing to be AFGE members, to financially support AFGE via wage garnishments and, in practice, to remain union members. CBA, art. XVIII ("Union members may voluntarily revoke dues withholding after a one-year period."). The forced membership issue arises because unions and agencies alike treat OPM's Standard Form 1188 as the sole method by which union members can ***both*** stop dues deductions ***and*** resign from union membership.[9] *See* Pet. App. 21a (requiring Major General Harris to "[r]einstate to dues withholding status all technicians removed from dues withholding since September 16, 2016, who did not fill out dues revocation forms in the anniversary month of their allotment" without reference to whether the technicians independently attempted to resign from the union). As applied by current practice, for example, if the CBA is resurrected by this Court, a technician who, say, joins AFGE on June 25, 2024, will have to wait until June 25, 2025, before he may exercise his First Amendment right to disassociate from the union and stop financially supporting it.[10]

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[9] *Amicus curiae* does not believe this practice is permissible. *See, e.g.*, 5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity . . . ."). The SF-1188 is by its terms how federal employees may stop agencies from deducting union dues from their paychecks; it says nothing about union membership. *See* Pet. App. 5a ("If employees want to cancel dues allotments, they must submit a . . . Standard Form 1188—cancellation of payroll deductions . . . .").

[10] Presumably this CBA provision is derived from 5 U.S.C. § 7115(a), which likewise violates the First Amendment by compelling federal employees to have dues deducted from their

The article goes on to further encumber technicians' association rights by imposing what is often called a "window period" that permits cessation of dues deduction and currently, in practice, resignation from the union, only during a brief period once a year. CBA, art. XVIII ("[U]nion members may choose to revoke withholding for dues annually only during their membership anniversary month."). To comply with this, technicians must track when they became union members and submit their resignation requests consonantly. And missing the "window" by just a day—perhaps by being out sick or being "relieved from duty" having been called up into federal service, 32 U.S.C. § 325(a)—means having to wait another almost twelve months to resign[11] and being forced to pay hundreds of dollars.[12] If FLRA's order stands, it fully intends to make the Adjutant General comply. *See* Pet. App. 21a.

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paychecks for the union's benefit for at least one year after joining, and as applied to remain union members. *Compare* 5 U.S.C. § 7115(a) ("[A]ny such [dues deduction] assignment may not be revoked for a period of 1 year."), *with Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").

[11] Let us imagine hypothetically a technician who chooses to join AFGE on June 25, 2024. Per the CBA article, he may not resign his union membership and stop dues deductions until June 25, 2025. But the "window period" also interacts with that one-year resignation prohibition and prevents him from resigning outside the month of June. That means he would be permitted to exercise his First Amendment rights only during the six-day span of June 25–30, 2025, two days of which are weekend days. If he missed that window he would be forced into unwilling membership and subsidy of AFGE for yet another twelve months—until at least June 1, 2026.

[12] A typical amount of union dues might be $25 per biweekly paycheck. Over a year, that adds to $650.

2. FLRA's decision further violates the First Amendment by compelling speech. The First Amendment protects "the decision of both what to say and what ***not*** to say." *Riley v. Nat'l Fed'n Blind, Inc.*, 487 U.S. 781, 797 (1988) (emphasis added). But FLRA ordered Major General Harris to personally sign and post "for sixty consecutive days" at Guard facilities "statewide" a "notice." Pet App. 20a. Because FLRA lacks jurisdiction over Major General Harris, *see supra* pp. 3–4, and he accordingly has no official capacity vis-à-vis FLRA, this is compulsory speech in his personal capacity.[13] The required "notice" not only discusses in detail FLRA's decision but it's littered with disputed and incorrect legal conclusions—and worse requires Major General Harris to say those conclusions are correct. *See* Pet. App. 22a–25a; *e.g.*, *id.* 22a–23a ("**WE RECOGNIZE** and will comply with the mandatory terms of the expired collective-bargaining agreement . . . ."); *id.* 22a ("The Statute gives dual-status technicians . . . [the right to] form, join or assist any labor organization . . . ."). The First Amendment violation is patent. *W. Va. Bd. Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").[14]

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[13] It's worth noting that FLRA also lacks authority to give orders to federal agency officials in their official capacities. 5 U.S.C. § 7105(g)(3). It may only give orders to agencies and labor organizations. *Id*.

[14] *See also McClendon v. Long*, 22 F.4th 1330, 1337 (CA11 2022) (the government's use of another's property as a "stationary billboard" for its ideological messages is "a classic example of compelled government speech").

FLRA didn't stop there, though. It also required Major General Harris to communicate a copy of the compelled personal capacity "notice" via his "email system" to "all technicians, managers, and supervisors in the Ohio Army and Air National Guard." Pet. App. 20a.[15] Therefore FLRA made doubly sure that no one concerned in the Ohio National Guard could avoid the "notice"—they cannot avert their eyes[16]—because reading emails from their commanding officer is a mandatory part of their job duties. *See Clay v. Greendale Sch. Dist.*, __ F. Supp. 3d __, 2022 WL 1443075, at *8 (E.D. Wis. May 6, 2022) ("Because school email is generally used for curriculum and instruction, students must check their email accounts—they are 'captive audiences' even outside of the traditional classroom.").

"Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail." *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 737 (1970). FLRA has entirely dispensed with this lesson and in so doing proposes to vitiate the First Amendment rights of Major General Harris and every single technician, manager, and supervisor in the Ohio National Guard.

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[15] As to the latter two, the ALJ below described this as a "nontraditional" remedy. Pet. App. 159a.

[16] *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) ("[T]he burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.").

CONCLUSION

Ohio's Adjutant General is a person, not a federal agency. FLRA lacked authority to give him an order. Any contrary conclusion would turn the Reform Act on its head and lead to First Amendment violations affecting thousands of people. FLRA's decision should be reversed.

Respectfully submitted,

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