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,
Respondent.

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 3970, AFL-CIO,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE INTERVENOR-RESPONDENT

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QUESTION PRESENTED

Whether the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71, ("FSLMRS") may be applied to a state national guard and an adjutant general designated by the Secretary of the Army or the Air Force, as the case may be, to employ and administer civilian dual-status technicians appointed pursuant to the National Guard Technicians Act of 1968 ("Technicians Act") when:

(a) such civilian technicians are federal employees covered and guaranteed collective bargaining rights by the FSLMRS;

(b) application of the FSLMRS is limited exclusively to the civilian aspects of these technicians' employment; and

(c) the FSLMRS, since its enactment, has been consistently applied to adjutants general and state national guards with respect to their employment of civilian technicians.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel hereby certifies as follows:

Intervenor-Respondent American Federation of Government Employees, Local 3970, AFL-CIO is a non-profit labor organization that serves as the exclusive bargaining representative of units of federal employees pursuant to 5 U.S.C. §§ 7101-7135. Intervenor-Respondent does not have a parent company. No publicly held company has any ownership interest in the Intervenor-Respondent.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATUTORY AND REGULATORY PROVISONS INVOLVED	1
INTRODUCTION	1
SUMMARY OF THE ARGUMENT	8
ARGUMENT	13
I. The Purpose, Structure, and Text of the FSLMRS Compel Its Application to Petitioners with Respect to Civilian Technicians	13
A. The Technicians Act converted civilian technicians to federal employees	13
B. Civilian technicians, the adjutants general, and the state national guards were covered by the federal service labor-management relations program established by Executive Order 11491	17
C. Congress reinforced the collective bargaining rights of civilian technicians when it considered and enacted the prohibition on military unions	22

TABLE OF CONTENTS—Continued

Page

D. Congress incorporated the civilian technician bargaining scheme and coverage of the adjutants general into the FSLMRS 26

E. Application of the FSLMRS to Petitioners preserves the federal employee rights of civilian technicians as Congress intended 32

F. Application of the FSLMRS to Petitioners is consistent with the regulations of the Secretaries concerned and other laws governing Petitioners' employment of civilian technicians 37

II. The Federalism Canon Does Not Limit Petitioners' Coverage Under the FSLMRS With Respect to Civilian Technicians 43

CONCLUSION 47

Appendix—Statutory provisions 1a

TABLE OF AUTHORITIES

Page

Cases:

AFGE, Local 2782 v. FLRA,
702 F.2d 1183 (D.C. Cir. 1983) 26

AFGE, Local 3936 v. FLRA,
239 F.3d 66 (1st Cir. 2001) 17

Ass'n of Civilian Technicians, Schenectady Chapter v. FLRA,
230 F.3d 377 (D.C. Cir. 2000) 14

Ass'n of Civilian Technicians, Tex. Lone Star Chapter 100 v. FLRA,
250 F.3d 778 (D.C. Cir. 2001) 14

Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA,
360 F.3d 195 (D.C. Cir. 2004) 17, 25-26

Babcock v. Kijakazi,
142 S. Ct. 641 (2022) 2, 14

Bond v. United States,
572 U.S. 844 (2014) 43

Bureau of Alcohol, Tobacco & Firearms v. FLRA,
464 U.S. 89 (1983) 26

Cal. Nat'l Guard v. FLRA,
697 F.2d 874 (9th Cir. 1983) 17

Chaudoin v. Atkinson,
494 F.2d 1323 (3rd Cir. 1974) 16-17

Div. of Military & Naval Affairs, State of N.Y. v. FLRA,
683 F.2d 45 (2nd Cir. 1982) 17

Dyer v. Dep't of Air Force,
971 F.3d 1377 (D.C. Cir. 2020) 40-41

TABLE OF AUTHORITIES—Continued

Page

Federal/Postal/Retiree Coalition v. Devine,
751 F.2d 1424 (D.C. Cir. 1985) 31

Fla. Nat'l Guard v. FLRA,
699 F.2d 1082 (11th Cir. 1983) 17

Gilliam v. Miller,
973 F.2d 760 (9th Cir. 1992) 16

Holdiness v. Stroud,
808 F.2d 417 (5th Cir. 1987) 16

Ind. Air Nat'l Guard, Hulman Field, Terre Haute, Ind. v. FLRA,
712 F.2d 1187 (7th Cir. 1983) 17

Janus v. AFSCME,
138 S. Ct. 2448 (2018) 34

Library of Congress v. FLRA,
699 F.2d 1280 (D.C. Cir. 1983) 26

Lipscomb v. FLRA,
333 F.3d 611 (5th Cir. 2003) 14, 16

Mayo Found. for Med. Educ. & Research v. United States,
562 U.S. 44 (2011) 11, 20-21

N.J. Air Nat'l Guard v. FLRA,
677 F.2d 276 (3rd Cir. 1982) 13, 14, 17

N.Y. Tel. Co. v. N.Y. State Dep't of Labor,
440 U.S. 519 (1979) 29

Overseas Educ. Ass'n, Inc. v. FLRA,
876 F.2d 960 (D.C. Cir. 1989) 28, 30

Perpich v. Dep't of Def.,
496 U.S. 334 (1990) 12, 43-44, 46

Public Citizen v. Dep't of Justice,
491 U.S. 440 (1990) 30

TABLE OF AUTHORITIES—Continued

Page

Singleton v. Merit Systems Protection Board, 244 F.3d 1331 (Fed. Cir. 2001) 41

State of Neb., Military Dep't, Office of Adjutant Gen. v. FLRA, 705 F.2d 945 (8th Cir. 1983)..... 17

Administrative Cases:

Adjutant Gen. Dep't, State of Ohio, Air Nat'l Guard and AFGE, AFL-CIO, Ohio Council of Air Nat'l Guard Locals, A/SLMR No. 44, Case No. 53-2974 (May 20, 1971)..... 2

AFGE, Local 2955 and The Adjutant Gen. of Iowa, 2 F.L.R.A. 322 (1979) 19

Ass'n of Civilian Technicians and the Adjutant Gen., State of N.H., 7 F.L.R.A. 241 (1981) 11, 32

Bradley v. Dep't of the Air Force, 2022 WL 4011898 (Aug. 31, 2022)..... 42-43

Div. of Military and Naval Affairs, N.Y. Nat'l Guard, Latham, N.Y. and Ass'n of Civilian Technicians, 56 F.L.R.A. 139 (2000) 2

Mich. Nat'l Guard and Local R8-22, Nat'l Ass'n of Gov't Emps., 74 FSIP 26, 1975 WL 4408 (1975)..... 19

Miss. Nat'l Guard, 172 Military Airlift Group (Thompson Field) and Int'l Union of Elec., Radio, and Mach. Workers, AFL-CIO, Case No. 41-1723, A/SLMR No. 20 (Apr. 2, 1971)..... 9, 19, 20-21, 31-32

TABLE OF AUTHORITIES—Continued

Page

Tex. Air Nat'l Guard and Tex. Air Nat'l Guard Council of Locals, AFGE, 72 FSIP 3, 1972 WL 3987 (1972) 19

Wis. Army Nat'l Guard, Office of the Adjutant Gen., and Wis. Chapter, Ass'n of Civilian Technicians, 83 FSIP 56 (1983) 32

Constitution, statutes, and regulations:

U.S. Const., Art. I, § 8 ..... 7, 43

5 U.S.C. § 105 33

5 U.S.C. § 7102 ..... 11, 34-35

5 U.S.C. § 7103(a)(2) 10, 27, 33

5 U.S.C. § 7103(a)(3) 10, 27, 33

5 U.S.C. § 7105(a)(2) 27

5 U.S.C. § 7105(g)(3) 27

5 U.S.C. § 7111 35

5 U.S.C. § 7112(a) 2

5 U.S.C. § 7114 35

5 U.S.C. § 7114(c) 45

5 U.S.C. § 7116(a) 4, 35

5 U.S.C. § 7116(a)(5) 35

5 U.S.C. § 7119 27

5 U.S.C. § 7135(b) 11, 30-31, 33, 41, 44

5 U.S.C. § 7511(b)(5) (2015) 40

10 U.S.C. § 101(a) 45

10 U.S.C. § 111(a) 33

TABLE OF AUTHORITIES—Continued

Page

10 U.S.C. § 111(b) 33
10 U.S.C. § 976 ..... 7, 22, 25, 44
10 U.S.C. § 10216(a) 7, 44
10 U.S.C. § 10216(a)(1) 2, 33
10 U.S.C. § 10216(a)(2) 2
10 U.S.C. § 10501(b) 37
10 U.S.C. § 10503(9) 12, 37, 45
10 U.S.C. § 10508 ..... 42, 43
10 U.S.C. § 10508(b)(3) 42
32 U.S.C. § 101 37
32 U.S.C. § 109(c) 46
32 U.S.C. § 314 15
32 U.S.C. § 314(d) 15, 33
32 U.S.C. § 709 ..... 42, 43
32 U.S.C. § 709(a) 12, 16, 33, 37, 45
32 U.S.C. § 709(d) 2, 15, 16
32 U.S.C. § 709(e) 2, 32-33, 44
32 U.S.C. § 709(f) (2015) 40, 41
32 U.S.C. § 709(f)(4) 40, 41
32 U.S.C. § 709(f)(5) 41

Civil Service Reform Act of 1978,
Pub. L. No. 95-454, 92 Stat. 1113 (1978) ... 26, 31, 36

Department of Defense Authorization Act, 1980,
Pub. L. No. 96-107, § 821(a), 93 Stat. 820 25

National Defense Authorization Act for
Fiscal Year 2017,
Pub. L. No. 114-328, 130 Stat. 2000 (2017) ... 40, 41

TABLE OF AUTHORITIES—Continued

Page

National Defense Act of 1916,
Pub. L. No. 64-85, 39 Stat. 166 (1916) 13

National Guard Technicians Act of 1968,
Pub. L. No. 90-486, 82 Stat 755 (1968) 9, 14

Pub. L. No. 95-610, 92 Stat. 3085 (1978) 25

Pub. L. No. 96-107, 93 Stat. 820
(Nov. 9, 1979) 25

5 C.F.R. § 2423.3(a) 35

Miscellaneous:

Executive Order 11491,
34 Fed. Reg. 17605 (1969) 2, 9, 10, 17-18, 27

H.R. Rep. No. 95-894, pt. 2 (1978)..... 7, 9, 24-26

H.R. Rep. No. 114-840 (2016) 40, 42

S. Rep. No. 90-1446 (1968) 15

Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Office and Civil Serv.,
95th Cong. (Mar.-May 1978) 28-29

Prohibit Unionization of the Military: Hearings on S. 274 Before the Subcomm. on Civil Serv. of the H. Comm. on Post Office and Civil Serv.,
95th Cong. (Jan. 31 and Feb. 1, 1978) 10, 23-24

Unionization of Military Personnel: Hearing on S. 274 Before the Investigations Subcomm. of the H. Comm. on Armed Servs.,
95th Cong. (Oct. 1977) 10

National Guard Technician Handbook,
National Guard Bureau (Jan. 2017) 38

TABLE OF AUTHORITIES—Continued

Page

Dep't of Def. Civilian Personnel Management System: Labor-Management Relations, Dep't of Def. Instruction ("DoDI") 1400.25, Vol. 711, Section 1.2(a) 39, 45

National Guard Technician and Civilian Personnel Voluntary and Non-Disciplinary Actions Program, CNGBI 1400.25, Vol. 715, Encl. A, Section 3(d)..... 39

National Guard Technician and Civilian Personnel Discipline and Adverse Action Program, CNGBI 1400.25, Vol. 752, Encl. A, Section 4 (same)..... 39-40

National Guard Technician and Civilian Personnel Absence and Leave Program, CNGBI 1400.25, Vol 630, Encl. K, Section 8... 40

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BRIEF FOR THE INTERVENOR-RESPONDENT

STATUTORY AND REGULATORY PROVISONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra* 1a-23a.

INTRODUCTION

Intervenor-Respondent, American Federation of Government Employees ("AFGE"), Local 3970, and Petitioners, the Ohio Adjutant General, the Ohio Ad-

jutant General's Department, and the Ohio National Guard, have a collective bargaining relationship that spans more than fifty years. This relationship dates back to 1971, when the Ohio National Guard first recognized Intervenor-Respondent as the exclusive representative, i.e., union, of civilian, "dual status" technicians ("civilian technicians") under Executive Order 11491, which controlled the federal sector labor-management relations program at that time. Pet. App. 41a; *see also Adjutant Gen. Dep't, State of Ohio, Air Nat'l Guard and AFGE, AFL-CIO, Ohio Council of Air Nat'l Guard Locals,* A/SLMR No. 44, Case No. 53-2974 (May 20, 1971); Executive Order 11491, Labor-Management Relations in the Federal Service, 34 Fed. Reg. 17605 (Oct. 29, 1969).

Pursuant to the Technicians Act of 1968, civilian technicians are federal, civilian employees of the Department of the Army or the Department of the Air Force, as the case may be, who are in the excepted service and who are designated by the Secretaries concerned to be employed and administered by the adjutants general. 32 U.S.C. §§ 709(d)-(e); 10 U.S.C. §§ 10216(a)(1)-(a)(2); *see also Babcock v. Kijakazi*, 142 S. Ct. 641, 645 (2022) ("[T]he role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard."). As federal, civilian employees, technicians share bargaining units with other federal, civilian employees of the National Guard who are in the competitive service under Title 5 of the United States Code. *See*, *e.g.*, *Div. of Military and Naval Affairs, N.Y. Nat'l Guard, Latham, N.Y. and Ass'n of Civilian Technicians*, 56 F.L.R.A. 139, 142-43 (2000); *see also* 5 U.S.C. § 7112(a) (granting the Federal Labor Relations Authority the power to determine the appropriateness of any unit and to, *inter alia*, "ensure employees the fullest freedom in ex-

ercising rights guaranteed under [the Federal Service Labor-Management Relations Statute]").

Petitioners and Intervenor-Respondent thus, over the last fifty years, have negotiated numerous collective bargaining agreements pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71, (the "FSLMRS") and the executive orders which preceded it. These agreements have covered civilian technicians and the Title 5 employees with whom they share their bargaining units. Pet. App. 35a. In fact, despite the present proceedings, the parties this year concluded negotiations on a new collective bargaining agreement, with a 5-year term and which covers civilian technicians and Title 5 employees. *See* Collective Bargaining Agreement 2022, Ohio National Guard and AFGE Local 3970, Art. 1, https://hr.ong.ohio.gov/Portals/0/technicians/regulations-and-policies/Collective%20Bargaining%20Agreement%2020220816.pdf?ver=USQiMXIHel7rXMEsMkxrtg%3d%3d (last visited December 5, 2022).

Nonetheless, on September 28, 2016, Petitioners repudiated a predecessor collective bargaining agreement between the parties which previously had been reviewed and approved by the Department of Defense. J.A. 44-46. Petitioners asserted that the FSLMRS did not apply to civilian technicians or to Petitioners. Pet. App. 49a-50a. While Petitioners in their merits brief focus on their subsequent, unilateral termination of dues allotments for over 80 union members, which followed this repudiation, they also unilaterally changed civilian technicians' conditions of employment and failed to comply with multiple mandatory provisions of the collective bargaining agreement. Pet. App. 135a-143a (finding that Petitioners unlawfully terminated authorized dues deductions); *id.* at 151a-154a

(finding that Petitioners unilaterally implemented a new merit promotion plan); *id.* at 129a-135a (finding that Petitioners imposed a new, *ad hoc* grievance procedure and a new policy on official time).

In response to Petitioners' repudiation of the parties' agreement and subsequent actions, Intervenor-Respondent filed six unfair labor practice charges with the Federal Labor Relations Authority ("FLRA"). The General Counsel of the FLRA issued complaints on five of the charges, alleging violations of 5 U.S.C. § 7116(a), which lists the unfair labor practices that may be committed by an agency. An administrative law judge ("ALJ") with the FLRA then held a hearing on the complaint in August 2017. Pet. App. 37a-39a. As pertinent here, Petitioners argued to the ALJ that the FSLMRS did not cover civilian technicians, the Ohio National Guard, or the Ohio Adjutant General, and that the FLRA lacked jurisdiction over Petitioners. Pet. App. 89a; *see also id.* at 97a-98a (describing Petitioners' position as "the [FSLMRS] never actually covered its technicians, and that the Adjutant General had no obligation to abide by federal laws he doesn't like.").

Further, while Petitioners now contend that it was a "federal officer" who "would not allow union payroll deductions without a form on file for each employee," the testimony before the ALJ was different. Pet. Br. 11. The federal officer in question, Colonel John P. Dernberger, United States Property and Fiscal Officer for the State of Ohio, actually testified that he had known for several years that dues deduction forms were not on file for many employees, that he took no action to terminate those dues deductions, and that he did not know why it became a priority when it did. J.A. 62. He further testified that it was the Ohio Adju-

tant General's Department who made the ultimate decision to terminate the dues deductions in late 2016. J.A. 62-63; *see also id.* at 65-66.

Following a comprehensive analysis of the history of civilian technicians' collective bargaining rights, Congressional action, and applicable case law, the ALJ held that civilian technicians, the Ohio National Guard, and the Ohio Adjutant General were covered by the FSLMRS and that the FLRA had jurisdiction over the parties. Pet. App. 96a-118a. In addition to finding that Petitioners violated the FSLMRS when they cancelled dues deductions without employees' consent, *id.* at 135a-140a, the ALJ made a credibility determination that Petitioners' "justifications for [their] actions [were] unconvincing." *Id.* at 140a. The ALJ explained, *inter alia*, that Department of Defense regulations only required the submission of a form to initiate dues deductions and that "[n]othing in [the regulation] requires that [the forms] be maintained in order for dues deductions to be continued." Pet. App. 140a. The ALJ further observed that Petitioners failed to claim, "that the [affected] employees did not initially submit [the forms]" and presented "no testimony or other evidence that the Agency had been deducting dues from employees against their wishes." *Id.* at 138a fn 41.

As to the other charges, the ALJ found that:

(a) multiple Ohio National Guard communications interfered with and restrained employees in the exercise of their rights in violation of section 7116(a)(1) of the FSLMRS (Pet. App. 118a-129a);

(b) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it imposed a new, *ad hoc* grievance procedure (*id.* at 129a-133a);

(c) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it changed its policy regarding union official time (*id.* at 133a-134a);

(d) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it unilaterally implemented a new policy concerning union dues deductions (*id.* at 144a-151a); and

(e) the Ohio National Guard violated sections 7116(a)(1) and (a)(5) when it unilaterally implemented a new merit promotion plan without bargaining with Intervenor-Respondent. *Id.* at 151a-154a.

The ALJ therefore ordered the Ohio National Guard to cease and desist from: (1) failing or refusing to recognize and comply with the mandatory terms of the expired collective bargaining agreement (which continued to apply); (2) failing or refusing to maintain existing personnel policies, practices, and matters; (3) unlawfully terminating authorized union dues deductions, or threatening to do so; and (4) informing employees, supervisors, and managers that the Ohio National Guard is not bound by the FSLMRS and that the collective bargaining agreement is a nullity. Pet. App. 162a-163a. The ALJ also ordered, *inter alia*, the Ohio National Guard to post and disseminate a notice to be provided by the FLRA; to reinstate dues deductions for the affected employees; to reimburse the Union for lost dues deductions; and to rescind any unlawful changes to the civilian technicians' conditions of employment. Pet. App. 163-164a.

It was on this background that the Sixth Circuit rejected Petitioners' arguments that: (1) "the Ohio National Guard and the Ohio Adjutant General are not subject to" the FSLMRS; and (2) that the FSLMRS "does not give the technicians any rights for the

[FLRA] to enforce." Brief of Petitioners Before the Sixth Circuit, ECF Doc. 18 at 28, 31. The court of appeals found that "the FLRA has jurisdiction over state national guards and their adjutants general with respect to technician bargaining" because "in their capacity as employers of dual-status technicians who receive the benefits and rights generally provided for federal employees in the civil service, state national guards are executive agencies." Pet. App. 11a (internal citations and quotations omitted). The court further explained that "every other circuit that has considered this issue has similarly found that state national guards constitute executive agencies in their capacity as employers and supervisors of technicians." Pet. App. 11a-12a (collecting cases). The court of appeals also found that because civilian technicians "are 'federal civilian employees,' not uniformed services employees . . . they have collective bargaining rights under the" FSLMRS. Pet. App. 14a (quoting 10 U.S.C. § 10216(a)). The court also explained that this statutory construction is supported by the legislative history of 10 U.S.C. § 976, prohibiting military unions, because "the House Committee specifically rejected the idea that civilian technicians were members of the military." Pet. App. 14a (citing H.R. Rep. No. 95-894, pt. 2 (1978)).

The court of appeals similarly rejected Petitioners' argument that the Militia Clauses of the Constitution, Art. I, § 8, Cls. 15-16, bar Congress from providing civilian technicians with enforceable collective bargaining rights. Pet. App. 14a-15a. The court found that "it was not unconstitutional for the FLRA to enforce the [FSLMRS] by issuing orders to state national guards and their adjutants general . . . when the labor dispute at hand is related to the civilian aspects of a technician's job." *Id.* at 15a. The court

explained that this is so because in their "capacity as employer" of civilian technicians, Petitioners "were not acting as state agencies, but instead as federal executive agencies." *Id.*

Finally, the court of appeals rejected Petitioners' argument that it could not legally comply with the FLRA's order requiring the reinstatement of cancelled dues allotments. Pet. App. 16a. The court found that "it is neither unlawful nor impractical for [Petitioners] to comply with the FLRA's order to restore . . . erroneously cancelled dues allotments" resulting from Petitioners' submission of "Form 1188s on behalf of numerous technicians without their consent." *Id.*

The court of appeals was correct on all counts. Petitioners are covered by the FSLMRS with respect to civilian technicians' conditions of employment. Accordingly, the FLRA has the power to issue an enforceable order requiring Petitioners to cease and desist, and remedy, their unfair labor practices with respect to civilian technicians and Intervenor-Respondent.

SUMMARY OF THE ARGUMENT

The court of appeals was correct because Petitioners' use of civilian technicians is governed by a web of statutes and regulations, all of which lead unavoidably to the conclusion that Petitioners are subject to the FSLMRS for purposes of their employment and administration of civilian technicians. From passage of the Technicians Act in 1968, to issuance of Executive Order 11491 in 1969, to enactment of the FSLMRS in 1978 and the prohibition on military unions one month later, and onward to the current regulations of the National Guard Bureau, the conclusion is the same. Civilian technicians are federal employees, with federal employee rights. They bar-

gain under the FSLMRS with the adjutants general and state national guards, who, in turn, are agencies subject to the FSLMRS with respect to their employment of civilian technicians.

The Technicians Act converted civilian technicians from state employees to federal employees, not just for retirement or fringe benefit purposes but also for labor relations purposes except when serving in their military capacity. *See* National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755 (Aug. 13, 1968). As a result of their conversion to federal employees, civilian technicians were brought under the coverage of Executive Order 11491. *See* Exec. Order 11491, Labor-Management Relations in the Federal Service, 34 Fed. Reg. 17605 (Oct. 29, 1969). Civilian technicians thus unionized and bargained with adjutants general and state national guards under the order. *See, e.g., Miss. Nat'l Guard, 172 Military Airlift Group (Thompson Field) and Int'l Union of Elec., Radio, and Mach. Workers, AFL-CIO*, Case No. 41-1723, A/SLMR No. 20 (Apr. 2, 1971) ("*Thompson Field*").

Further, when Congress took up the question of whether to prohibit military unions, close in time to its consideration and passage of the FSLMRS, Congress made a deliberate decision to preserve the collective bargaining rights of civilian technicians. H.R. Rep. No. 95-894, pt. 2, at 6 (1978) (rejecting Senate provisions that would have "den[ied] to civilian technicians the right to representation in collective bargaining"). Congress made this deliberate decision knowing full well that: (a) the bargaining which civilian technicians engaged in was bargaining with the adjutants general and the state national guards; and (b) those very same adjutants general and state national guards had been covered by the procedures and

remedial authorities of Executive Order 11491. *See, e.g., Unionization of Military Personnel: Hearing on S. 274 Before the Investigations Subcomm. of the H. Comm. on Armed Servs.*, 95th Cong. 148-53 (1977) (entering *Thompson Field* into the record).

Congress, moreover, made the decision not to deprive civilian technicians of their collective bargaining rights or to relieve the adjutants general and state national guards of their obligations under the federal service labor-management relations program, the relevant authority over which Congress had transitioned to the FLRA only one month earlier with passage of the FSLMRS, despite the fact that there were express calls by the adjutants general to include civilian technicians in the prohibition on military unions so that the adjutants general and state national guards would no longer be covered by the program. *See Prohibit Unionization of the Military: Hearings on S. 274 Before the Subcomm. on Civil Serv. of the H. Comm. On Post Office and Civil Serv.,* 95th Cong. at 74 (Jan.31 and Feb. 1, 1978) (statement of Maj. Gen. Francis S. Greenlief (Ret.), Exec. Vice President of NGAUS) (requesting legislation that would "remove the National Guard technicians from the Executive order").

But Congress did not only preserve Petitioners' coverage under the FSLMRS by knowingly rejecting, after enactment of the FSLMRS, calls by the adjutants general to include civilian technicians in the prohibition on military unions, Congress did so in two additional ways in the FSLMRS itself. First, Congress defined the terms "employee" and "agency" so as to make them indistinguishable from their definitions under Executive Order 11491 as applied to civilian technicians. *Compare* 5 U.S.C. §§ 7103(a)(2)-(a)(3) with Executive Order 11491, §§ 2(a)-(b). Congress also grant-

ed employees' numerous rights under the FSLMRS, including the right to bargain collectively, with the intent that they be meaningful rights. 5 U.S.C. § 7102. This alone, when read in context with Congress's refusal to prohibit the unionization of civilian technicians and its knowledge of the manner in which they bargained collectively and with whom, compels Petitioners coverage under the FSLMRS. This, in turn, makes unassailable the FLRA's power to issue an order to Petitioners requiring them to remedy their unfair labor practices under the FSLMRS.

Second, were this not enough, Congress codified a savings provision in the FSLMRS which provides that decisions under Executive Order 11491, *e.g.*, *Thompson Field*, remain in full force and effect unless (1) revised or revoked by the President, (2) superseded by specific provisions of the FLMRS, or (3) superseded by regulations or decisions issued pursuant to the FSLMRS. 5 U.S.C. § 7135(b). None of these things have occurred with respect to Petitioners' coverage under the FSLMRS. Instead, on the heels of its passage, the FLRA exercised authority under the FSLMRS over the adjutants general and the state national guards with respect to the collective bargaining rights of civilian technicians. *See*, *e.g.*, *Ass'n of Civilian Technicians and the Adjutant Gen., State of N.H.*, 7 F.L.R.A. 241 (1981) (ordering an adjutant general to negotiate over a union bargaining proposal) ("*ACT New Hampshire*"); *see also Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 54 (2011) (quoting *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979) ("contemporaneous construction by those presumed to have been aware of congressional intent" carries "particular force") ("*Mayo Foundation*"). The savings provision in section 7135(b), therefore, eliminates any doubt

that the FSLMRS may be applied to Petitioners' with respect to civilian technicians.

Petitioners' appeal to the federalism canon likewise fails. The Technicians Act, the validity of which Petitioners do not challenge, was intended to work in conjunction with the hybrid federal-state nature of the National Guard, which Petitioners also do not challenge. *See generally Perpich v. Dep't of Def.*, 496 U.S. 334 (1990) (explaining that the hybrid nature of the national guard was a permissible exercise of Congressional authority). The Technicians Act converted civilian technicians from federally subsidized state employees to full-fledged federal employees to advance important federal objectives: uniformity of personnel training, equipment, and readiness. Congress determined that these important federal objectives would best be met by converting civilian technicians from state employees to federal employees with federal employee rights, subject to certain express exceptions none of which are applicable here.

Congress, moreover, in establishing civilian technicians in part as a benefit to the states, also funded the states' use of civilian technicians by, *inter alia*, paying their salaries. Congress specifically provided that civilian technicians may be employed under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and that the policies and programs for their employment and use may be established in a similar fashion. *See* 32 U.S.C. 709(a); 10 U.S.C. § 10503(9). Numerous policies issued by the Secretaries concerned, through the National Guard Bureau within the Department of Defense, in turn support application of the FSLMRS to Petitioners. It is for these reasons and a host of others that there is no genuine federalism concern

with the FLRA issuing an order to Petitioners with respect to the civilian, labor relations aspects of Petitioners' employment of civilian technicians. Petitioners perform a federal function when they employ civilian technicians and are an "agency" under the FSLMRS when they do so.

The ruling of the Sixth Circuit, and every other court of appeals to consider the question, is the only one that harmonizes the purpose, structure, and text of the statutory scheme governing the employment and administration of civilian technicians as federal employees. Petitioners facile reading of the FSLMRS would render civilian technicians' status as federal, civilian employees a nullity. The judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. The Purpose, Structure, and Text of the FSLMRS Compel Its Application to Petitioners with Respect to Civilian Technicians.

A. *The Technicians Act converted civilian technicians to federal employees*. Prior to the Technicians Act, technicians were considered state employees. *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3rd Cir. 1982) ("*N.J. Air Nat'l Guard*"). The Technicians Act, while retaining the hybrid system established by the National Defense Act of 1916, Pub. L. No. 64-85, 39 Stat. 166 (June 3, 1916), made two important changes with respect to the employment of civilian technicians.

First and foremost, it explicitly converted civilian technicians from state employees to federal employees. The act provided that, "[u]nder regulations prescribed by the Secretary of the Army or the Secretary of the Air Force," persons may be employed as techni-

cians and that technicians so employed shall be employees of "the Department of the Army or the Department of the Air Force, as the case may be," and employees "of the United States." Technicians Act, Pub. L. No. 90-486, § 2(1), 82 Stat. 755 (Aug. 13, 1968). Although the conversion of civilian technicians to federal employees was subject to a limited number of specified exceptions, inapplicable here, the act made civilian technicians federal employees for all other purposes when acting in their civilian capacity.[1] *Id.*, § (3)(b), 82 Stat. at 757 (stating that "except as provided in this Act . . . and notwithstanding any law, rule, regulation, or decision to the contrary" civilian technicians shall be considered employees of the Department concerned and of the United States "**to the same extent as other employees of the Department of the Army or the Department of the Air Force**.") (emphasis added); *see also N.J. Air Nat'l Guard*, 677 F.2d at 279 (Civilian technicians were "afforded the benefits and rights generally provided for federal employees in the civil service."); *Lipscomb v. FLRA*, 333 F.3d 611, 614 (5th Cir. 2003); *Babcock v. Kijakazi*, 142 S. Ct. at 645 ("[T]he role, capacity, or

[1] While civilian technicians obviously occupy "dual status" positions, under which they are required to be members of the national guard, the military aspects of their employment are not at issue here. The courts and the FLRA, moreover, have exercised care not to intrude into the military aspects of technician employment. *See, e.g.*, *Ass'n of Civilian Technicians, Tex. Lone Star Chapter 100 v. FLRA*, 250 F.3d 778, 780 (D.C. Cir. 2001) (affirming the FLRA and recognizing that "National Guard technicians may not negotiate over military aspects of civilian technician employment"); *Ass'n of Civilian Technicians, Schenectady Chapter v. FLRA*, 230 F.3d 377, 378 (D.C. Cir. 2000) ("[F]or obvious reasons, Congress made it illegal for [technicians] to bargain over the terms and conditions of military service").

function in which a technician serves is that of a civilian, not a member of the National Guard.").

Second, the Technicians Act imposed a statutory requirement that the Secretary concerned designate the adjutants general to "employ and administer" civilian technicians. The technicians thus became "employ[ed] and administer[ed]" by the state adjutants general provided for in 32 U.S.C. § 314, by designation of the Secretaries concerned. 32 U.S.C. § 709(d). Federal law in turn requires the adjutants general to "make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe[.]" 32 U.S.C. § 314(d). The Technicians Act, in other words, converted civilian technicians to federal employees but also required the Secretaries concerned to delegate the day-to-day administration and supervision of civilian technicians to the adjutants general. *See* S. Rep. No. 90-1446, at 2 (Jul. 22, 1968) ("In effect, the technicians will become Federal employees receiving the salaries, fringe and retirement benefits, but with certain administrative control regarding employment supervision remaining with the adjutants general of the jurisdiction concerned under regulations prescribed by the Secretary concerned."); *see also* Department of the Army, Delegation of Authority Under the National Guard Technicians Act of 1968 (Dec. 31, 1968), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/go6885.pdf (delegating authority to the Army Chief of Staff to administer the Army National Guard Technicians Program and designating and empowering state adjutants general to employ and administer civilian technicians).

In keeping with the hybrid character of the National Guard, the Technicians Act allowed the adjutants gen-

eral to "employ and administer" civilian technicians on behalf of the Secretary concerned, subject to regulations prescribed by the Secretary concerned. *See* 32 U.S.C. § 709(a), (d). As the Fifth Circuit explained in *Lipscomb*, the National Guard is "a hybrid entity that carefully combines both federal and state characteristics[.]" *Lipscomb*, 333 F.3d at 614 (internal quotations omitted). While many of the National Guard's daily operations are "under control of the states, . . . [they are] governed largely by substantive federal law" and, since 1916, the National Guard "has been trained in accordance with federal standards and is armed and funded by the United States government." *Id.*

Consequently, state adjutants general wield federal power when fulfilling their federally designated duties as the employers of civilian technicians, who the Technicians Act made federal employees when performing work in their civilian capacity. *See Lipscomb*, 333 F.3d at 618 ("[T]he hybrid character of the [Mississippi Adjutant General] includes a federal component, which in his capacity as employer of the technicians renders him an 'Executive agency.'"); *Gilliam v. Miller,* 973 F.2d 760, 762 (9th Cir. 1992) ("We agree that the [Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."); *Holdiness v. Stroud*, 808 F.2d 417, 421 (5th Cir. 1987) ("although the National Guard Technicians Act confers federal status on civilian technicians while granting administrative authority to State officials, headed in each state by the Adjutant General, by virtue of the hybrid character of the Guard, the Adjutant General is, at least for some purposes, simultaneously a federal agent.") (internal quotations omitted); *Chaudoin v. Atkinson,* 494 F.2d 1323, 1329 (3rd Cir. 1974) (finding that the Technicians Act, "charges the adjutant generals with employ-

ment and administration of the civilian technicians who are federal employees" and "there can be no doubt that the Adjutant General of Delaware is an agency or an agent of the United States[.]").[2]

B. *Civilian technicians, the adjutants general, and the state national guards were covered by the federal service labor-management relations program established by Executive Order 11491.* Little more than a year after the passage of the Technicians Act, President Nixon issued Executive Order 11491. This order overhauled the federal labor relations program first established by Executive Order 10988 in 1962. The order applied to all employees in the executive branch, including civilian technicians, and to agencies in the executive branch, with specified exceptions that did not include an adjutant general or a state national guard.[3] Exec. Order No. 11491, § 3. The order, in this

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[2] In addition, at least six other circuit courts have acknowledged the FLRA's jurisdiction over the civilian aspects of a technician's employment covered by the FSLMRS; even when reversing, vacating, or modifying the FLRA's decision on the merits. *See Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195, 195-196 (D.C. Cir. 2004) (recognizing the FLRA's jurisdiction and the right of dual-status technicians to engage in collective bargaining, but setting aside portions of the FLRA's decision concerning the scope of the duty to bargain) *accord AFGE, Local 3936 v. FLRA*, 239 F.3d 66, 70 (1st Cir. 2001); *State of Neb., Military Dep't, Office of Adjutant Gen. v. FLRA*, 705 F.2d 945, 953 (8th Cir. 1983); *Ind. Air Nat'l Guard, Hulman Field, Terre Haute, Ind. v. FLRA*, 712 F.2d 1187, 1191 (7th Cir. 1983); *Fla. Nat'l Guard v. FLRA*, 699 F.2d 1082, 1087-88 (11th Cir. 1983); *Div. of Military & Naval Affairs, State of N.Y. v. FLRA*, 683 F.2d 45, 48 (2nd Cir. 1982); *see also Cal. Nat'l Guard v. FLRA*, 697 F.2d 874, 879-880 (9th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d at 286.

[3] Between passage of the Technicians Act in August of 1968 and issuance of Executive Order 11491 in October 1969, civilian

regard, defined "agency" as an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5 other than the General Accounting Office. *Id.* at § 2(a).

Among the changes that Executive Order 11491 made to the federal sector labor relations system, the order established: (a) the Federal Labor Relations Council to administer and interpret the order, *id.* at § 4; (b) the Federal Service Impasses Panel to consider negotiation impasses between Federal agencies and labor organizations, *id.* at §§ 5, 16, 17; and (c) the Assistant Secretary of Labor for Labor-Management Relations to, *inter alia*, decide questions as to appropriate bargaining units for the purpose of exclusive recognition and decide unfair labor practice complaints that were not subject to a collective bargaining agreement. *Id.* at § 6(a). The order also gave the Assistant Secretary the power to require an agency or a labor organization to cease and desist from violating any provision of the order and to require such agency or labor organization to "take such affirmative action as he considers appropriate to effectuate the policies of this Order." *Id.* at § 6(b).

Following these changes, and in accordance with their federal employee status under the Technicians Act, civilian technicians formed or joined labor organizations, sought and were granted exclusive recognition of federal employee bargaining units within state national guards, bargained and reached collective bargaining agreements with state adjutants general, and successfully enforced those agreements through the administrative avenues provided by the order.

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technicians, adjutants general, and state national guards were likewise covered by Executive Order 10988.

Multiple matters involving the collective bargaining rights of civilian technicians, for example, were heard and decided, and remedies were routinely ordered, by adjudicatory bodies established by Executive Order 11491. Bargaining disputes between technicians and state national guards were submitted to the Federal Service Impasses Panel. *See, e.g.*, *Tex. Air Nat'l Guard and Tex. Air Nat'l Guard Council of Locals, AFGE*, 72 FSIP 3, 1972 WL 3987 (1972) (submitting an impasse concerning bargaining ground rules to the panel for resolution); *Mich. Nat'l Guard and Local R8-22, Nat'l Ass'n of Gov't Emps.*, 74 FSIP 26, 1975 WL 4408 (1975) (submitting an impasse concerning promotion procedures to the panel for resolution). Challenges to arbitration awards resulting from grievance procedures negotiated between civilian technicians and state national guards also were reviewed by the Federal Labor Relations Council. *See, e.g., AFGE, Local 2955 and The Adjutant General of Iowa*, 2 F.L.R.A. 322 (1979) (resolving a petition for review of an arbitration award initially submitted to the Federal Labor Relations Council). And disputes as to the recognition of a labor organization as the exclusive representative of employees were heard by the Assistant Secretary of Labor. *See Thompson Field*, A/SLMR No. 20.[4]

In fact, arguments very similar to those made by Petitioners here, and advanced by amici in support of Petitioners, were presented in *Thompson Field* by the Mississippi National Guard to the Assistant Secretary

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[4] Consolidated with *Miss. Nat'l Guard, Camp Shelby and AFGE, Local 3151*, Case No. 41-1741. The Assistant Secretary of Labor's decisions can be found on the FLRA's website. *Thompson Field* is available at 126-130 of https://www.flra.gov/system/files/webfm/Authority/Archival%20Decisions%20&%20Leg%20Hist/ASLLMR%20Decisions%20&%20Reports%20on%20Rulings%20VOL%201.pdf.

of Labor in an effort to avoid being required to bargain with a labor organization representing civilian technicians. *Thompson Field*, A/SLMR No. 20 at 2-5. The first question raised in *Thompson Field*, in which two unions filed representation petitions with the Assistant Secretary seeking exclusive recognition of civilian technicians employed by the Mississippi National Guard, was whether the provisions of Executive Order 11491 were "applicable to an Activity which employs National Guard technicians and is administered by a State Adjutant General who is a State employee[.]" *Id.* at 1; *see also id.* at 2 ("In this respect, the Activity contended, among other things, that the provisions of Executive Order 11491 did not apply in this matter because the employees involved are under the operational control of the Adjutant General of the State of Mississippi, who is appointed and employed pursuant to State law and that the Executive Order is neither binding nor applicable to employees of the State of Mississippi.").

The Mississippi National Guard thus opposed recognition and argued, *inter alia*, that: (1) the terms and provisions of Executive Order 11491 were not "binding upon or applicable to the sovereign State of Mississippi"; (2) the Technicians Act was limited to granting technicians federal retirement benefits and coverage under the Federal Tort Claims Act; and (3) the laws of the State of Mississippi did not grant the adjutant general the authority to negotiate, or enter into, contracts with labor organizations. *Thompson Field*, A/SLMR No. 20 at 3-5.

The Assistant Secretary, who was, to be sure, writing close in time to the 1968 passage of the Technicians Act and the 1969 issuance of Executive Order 11491, rejected all of these arguments in a published decision. *Id.* at 6-7; *see also Mayo Foundation, 562 U.S.* at 54

("contemporaneous construction by those presumed to have been aware of congressional intent" carries "particular force"). First, he found that the Mississippi National Guard and its adjutant general were subject to Executive Order 11491 because civilian technicians were federal employees. *Thompson Field*, A/SLMR No. 20 at 5-6. The Assistant Secretary also noted that the Departments of the Army and the Air Force had issued regulations treating civilian technicians as federal employees and considered them to be federal employees for the purposes of Executive Order 11491. *Id.* Second, the Assistant Secretary determined that the Technicians Act was not limited to merely granting civilian technicians federal retirement benefits and coverage under the Federal Tort Claims Act because the congressional purpose of the conversion was for technicians to be given "Federal employee status." *Id.* at 7 (internal citations and quotations omitted).

Finally, with respect to the Mississippi Adjutant General's authority to negotiate a collective bargaining agreement, the Assistant Secretary concluded that Title 32 designated the adjutant general to act as "an agent of the Secretaries of the Army and the Air Force" to ensure that personnel and labor relations policies affecting civilian technicians "are administered in conformity with Federal standards." *Id.* at 7. The Assistant Secretary also found that the Mississippi Adjutant General possessed the necessary authority to comply with the terms and provisions of the order and, hence, to bargain and enter into a collective bargaining agreement with a labor organization representing technicians. *Id.*

Thus, from the inception of the Technicians Act and Executive Order 11491, the adjutants general and the state national guards have been required to bargain

with the labor organizations representing civilian technicians, and have been subject to the remedial authority of the federal bodies charged with enforcing the federal labor relations program.

C. *Congress reinforced the collective bargaining rights of civilian technicians when it considered and enacted the prohibition on military unions.* Prior to passage of what is now 10 U.S.C. § 976, the Congressional Subcommittee on Civil Service of the Committee on Post Office and Civil Service held two days of hearings on January 31 and February 1, 1978.[5] These hearings concerned S. 274, which would have included civilian technicians in the prohibition barring military service members from belonging to or forming a union.

Two issues emerged and were hotly debated during the hearings: (1) whether regular, non-employee members of the National Guard, so-called weekend warriors, would end up or could be prohibited from belonging to unions in their everyday lives outside of their National Guard service; and (2) whether civilian technicians, who were plainly understood to be eligible to form and join labor organizations and bargain collectively with the adjutants general of the various states by virtue of the Technicians Act and Executive Order 11491 (and Executive Order 10988 before it), should be prohibited from forming, joining, or maintaining their membership in a labor organization.

Among the witnesses before the subcommittee were representatives of the Department of Defense, several unions representing civilian technicians, and an officer of the National Guard Association of the United States ("NGAUS") representing 53 adjutants general.

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[5] Other subcommittees, such as the Investigations Subcommittee of the House Armed Services Committee also held hearings.

Prohibit Unionization of the Military: Hearings on S. 274 Before the Subcomm. on Civil Serv. of the H. Comm. on Post Office and Civil Serv., 95th Cong. iii, 76 (Jan. 31 and Feb. 1, 1978) ("*House Civil Service Hearing*"). The subcommittee was also provided with letter testimony from the Missouri Adjutant General. As most relevant here, various members of the subcommittee, the Missouri Adjutant General, and the NGAUS (again on behalf of the adjutants general) urged passage of S. 274 without change.

The NGAUS, for example, conceded that it had been aware that the Technicians Act would allow unions into the civilian technician program but specifically requested that civilian technicians, state national guards, and state adjutants general be excluded from coverage under Executive Order 11491. *House Civil Service Hearing* at 75 (statement of Maj. Gen. Francis S. Greenlief (Ret.), Exec. Vice President of NGAUS) ("We were aware that the bill would allow unions into the program."); *see also id.* at 73 ("If National Guard technicians were excluded from Executive Order 11491, their membership in labor organizations would not be precluded, but the requirement for collective bargaining and negotiation would be eliminated. Since NGAUS is not opposed to labor organizations per se, exclusion of National Guard technicians from the provisions of Executive Order 11491 would be an acceptable alternative to banning labor organizations from the National Guard technician program."); *id.* at 74 (requesting legislation that would "remove the National Guard technicians from the Executive order"). The Missouri Adjutant General also asserted, by letter entered into the record, that the ability of civilian technicians to engage in collective bargaining with the adjutants general and state national guards had led to a "divisiveness resulting from a divided loyal-

ty—to the Guard and to the technician union." *Id.* at 66, (letter of Maj. Gen. Robert E. Buechler, Missouri Adjutant General).

Testimony from the unions provided a counterpoint in opposition to S. 274 and provided historical insight into the unionization and rights of civilian technicians. *Id.* at 22 (statement of Vincent J. Paterno, President, Ass'n of Civilian Technicians) ("The civilian employees, call them technicians if it better serves to confuse their role, are the caretakers and custodians of federal property, funds, and manpower. This bill will enhance the ability of those in charge of state programs to abuse the federal interest vested in them and will tend to replace federal guardians with personal servants."); *see also id.* at 15 (statement of Charles E. Hickey, Jr., Nat'l Vice-President, Nat'l Ass'n of Gov't Employees) ("Since the inception of the Federal Labor Management Program created by Executive Order 10988, Reserve Civilian Technicians have been eligible to join a union and to bargain collectively with their employees [sic]. National Guard Technicians have been part of the Federal Labor Management Program since becoming federal employees in 1969. This program has existed under five presidents for fifteen years. It has been changed on four occasions and is currently governed by Executive Order 11491 as amended."). The subcommittee hearings left no question that negotiations under Executive Order 11491 were conducted between civilian technician unions and state adjutants general. *See id.* at 35 (statement of Vincent J. Paterno) (describing negotiations with state adjutants general).

Following these subcommittee hearings, the full House Committee on Post Office and Civil Service rejected "the premise of S. 274 that civilian technicians,

while serving in their civilian capacity, are members of the military." H.R. Rep. No. 95-894, pt. 2, at 7 (1978). The House then amended S. 274 with the explicit purpose of preserving the rights of civilian technicians to bargain collectively, which it knew was undertaken with the adjutants general of the respective states. *Id.* at 2 ("The effect of the amendment is to preserve the right of civilian technicians to be members of, and be represented by, a labor organization under the provisions of Executive Order 11491."); *see also id.* at 2-3 (listing and explaining the amendments made to preserve the collective bargaining rights of civilian technicians). The Senate then accepted the House's changes in what became the final bill. *See generally* Pub. L. No. 95-610, 92 Stat. 3085 (Nov. 8, 1978) (codified as amended at 10 U.S.C. § 976).[6]

The compromise bill, which preserved the collective bargaining rights of civilian technicians and the obligation of the state adjutants general to bargain with the exclusive representatives of those technicians subject to Executive Order 11491, passed on November 8, 1978—roughly one month after passage of the Civil Service Reform Act. *See Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195, 198 (D.C. Cir. 2004) ("The House Committee on Post Office and Civil Service rejected Senate provisions that would have fully included civilian technicians as members of the armed forces, explaining that it 'was not persuaded by the arguments . . . that collective-bargaining activities by employee representatives detracted from the preparedness of the National Guard.'")

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[6] This act was originally codified at 10 U.S.C. § 975 and was renumbered to 10 U.S.C. § 976 by the Department of Defense Authorization Act, 1980. *See* Pub. L. No. 96-107, § 821(a), 93 Stat. 820 (Nov. 9, 1979).

quoting H.R. Rep. No. 95–894, pt. 2, at 6 (1978). All told, the debate whether to continue to allow the unionization of civilian technicians spanned much of 1978 in both houses of Congress and was resolved in favor of preserving civilian technicians' right to bargain with the adjutants general and the state national guards.

D. *Congress incorporated the civilian technician bargaining scheme and coverage of the adjutants general into the FSLMRS.* Contemporaneous with Congress's consideration of the prohibition on military unions was Congress's debate over and drafting of the Civil Service Reform Act of 1978 ("CSRA"), of which the FSLMRS is a part. The purpose of the FSLMRS was to strengthen unions and broaden the collective bargaining rights of federal employees. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983) ("In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions[.]"); *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1184 (D.C. Cir. 1983) (the FSLMRS "was meant to implement the principle that 'the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them with full regard for the public interest and the conduct of public business, should be specifically recognized in statute'") quoting Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 3(10), 92 Stat. 1113; *see also Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983) ("Congress intended [for] the bargaining obligation" under the FSLMRS "to be construed broadly.") ("*Library of Congress*").

The CSRA, and concomitantly the FSLMRS, enshrined the federal sector labor-management relations program in statute. The FSLMRS, for example, established the FLRA and gave it essentially the same

remit as that of the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations under Executive Order 11491, inasmuch as the FSLMRS gave the FLRA the power to: (a) carry out the purpose of the FSLMRS; (b) determine appropriate units and supervise elections for an exclusive representative, i.e., union; (c) resolve negotiability disputes; (d) resolve exceptions to arbitration awards; and (e) resolve unfair labor practice complaints. 5 U.S.C. § 7105(a)(2). Similar to the authority previously held by the Assistant Secretary, Congress gave the FLRA the power to require an agency or a labor organization to cease and desist from violating any provision of the FSLMRS and to require an agency or a union to take any appropriate remedial action. 5 U.S.C. § 7105(g)(3). Congress also retained the Federal Service Impasses Panel to resolve bargaining impasses. 5 U.S.C. § 7119.

Congress likewise adopted analogous definitions of "employee" and "agency." Where Executive Order 11491 defined an "employee," in relevant part, as an employee of an agency, the FSLMRS defined an "employee" as an individual employed in an agency. *Compare* Exec. Order 11491, § 2(b) *with* 5 U.S.C. § 7103(a)(2). Where the order defined an "agency" as, *inter alia*, "an executive department," the FSLMRS defined an "agency" as "an Executive agency" with a specific list of exclusions that does not include an adjutant general or a state national guard. *Compare* Exec. Order 11491, § 2(a) *with* 5 U.S.C. § 7103(a)(3).

This statutory omission of adjutants general and state national guards from the list of entities excluded from the definition of agency is exceptionally significant because, as we have shown in detail above, Congress was not writing on a blank slate when it enacted

the FSLMRS. Congress was aware of the desire among the state adjutants general to eliminate collective bargaining rights for civilian technicians. While the eventual passage of the prohibition on military unions occurred right after passage of the FSLMRS, the hearings on S. 274 did not. Congress also was aware that under the closely analogous definitions contained in Executive Order 11491, adjutants general were required to bargain with labor organizations representing civilian technicians and, with respect to that bargaining, were subject to the remedial authority of the Assistant Secretary and the FLRC. Yet, Congress made the deliberate choice not to sweep them into the prohibition on military unions and to carry forward the order's definition of "agency" into the FSLMRS.

Moreover, mere months after its subcommittee's hearings on S. 274, the House Committee on Post Office and Civil Service held hearings over what was to become the Civil Service Reform Act. These hearings had members of Congress and witnesses in common with the earlier hearings on S. 274. House Members William Clay and William Ford, key figures in the passage of both laws, participated in both sets of hearings. *See generally Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960, 969 (D.C. Cir. 1989) ("*Overseas*") (Clay)*; Library of Congress*, 699 F.2d at 1285, n. 27 (Ford). Vincent Paterno, the President of the Association of Civilian Technicians who had testified before the subcommittee concerning civilian technician unions vis-à-vis S. 274, also testified before the full committee with respect to civil service reform. His testimony as to the CSRA again referenced the genesis of collective bargaining between civilian technicians and the adjutants general and state national guards. *See Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Office and Civil Serv.*, 95th Cong. 185-

193 (Mar.-May 1978) (statement of Vincent J. Paterno) ("[W]hen we formed our organization, we were not Federal employees. We became Federal employees under Public Law 90-486, the National Guard Technician Act of 1968."). The CSRA ultimately was enacted on October 13, 1978.

Consequently, the only reasonable conclusions to be drawn from the above text, history, and evident Congressional purpose, is that: (a) when Congress defined "agency" in Section 7103 of the FSLMRS it understood and intended that term to include an adjutant general and a state national guard with respect to the civilian aspects of technician employment; and (b) when Congress granted the FLRA, in Section 7105(g) of the FSLMRS, the power to order an agency to cease and desist from violating the statute and to take any remedial action the FLRA considered appropriate, Congress understood and intended for that power to extend to the adjutants general and the state national guards.

Further, when Congress passed the prohibition on military unions one month after passage of the CSRA and that prohibition did not include civilian technicians, Congress understood precisely the bargaining relationship and statutory coverage it was preserving. *Cf. N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 541-42 (1979) (examining the legislative history of the Social Security Act when interpreting the National Labor Relations Act because Congress considered the laws simultaneously and enacted them at nearly the same time).

It had been the subject of ongoing debate across both houses, a debate that simply got resolved in the employees' favor. If Congress had, for example, intended to alter or exclude civilian technicians, adjutants general, or state national guards from the cover-

age of the FSLMRS, it could have added them to the list of express exceptions contained in Section 7103 of the FSLMRS or it could have passed S. 274 without the protective amendment that removed civilian technicians from the scope of the prohibition on military unions. Congress did neither. Congress instead maintained what it understood to be the status quo with respect to civilian technicians.

Petitioners are thus an "agency" under the FSLMRS as concerns civilian technicians. It would indeed defy credulity to believe that Congress, including key sponsors of the CSRA who also were instrumental in excluding civilian technicians form the ban on military unions, such as Members Clay and Ford, intended *sub silentio* to shield the adjutants general or state national guards from coverage under the FSLMRS when Congress made no such provision in the text of the FSLMRS and simultaneously amended the ban on military unions with the express purpose of protecting the right of civilian technicians to organize and, through their unions, bargain with their respective adjutants general and state national guards. *See generally Public Citizen v. Dep't of Justice*, 491 U.S. 440, 455 (1990) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention[.]"); *see also Overseas*, 876 F.2d at 968, n. 41 (examining legislative history of the CSRA in conjunction with its text).

While the above analysis on its own renders Petitioners' coverage under the FSLMRS inescapable, the final nail in the textual coffin for Petitioners may be found in the savings clause of the FSLMRS, 5 U.S.C. § 7135(b) ("Section 7135"). This clause provides as follows:

> Policies, regulations, and procedures established under and **decisions issued under Executive Orders 11491**, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

(emphasis added). Section 7135 "in the clearest terms kept alive *en toto* the pre-CSRA regime" unless specifically superseded by the FSLMRS, subsequent decisions or regulations issued by the FLRA, or certain Presidential actions. *See Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424, 1426 (D.C. Cir. 1985) ("*Federal Coalition*"); *see also* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 902(a), 92 Stat. 1111, 1223 (separately providing that, unless modified by the act, "all executive orders, rules, and regulations affecting the Federal service shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed" by the FLRA as to matters within its jurisdiction).

In other words, the status quo prior to the passage of the FSLMRS, including decisions of the Assistant Secretary of Labor for Labor-Management Relations, remained in effect unless superseded by "specific" statutory provisions or subsequent actions by the FLRA or the President. *Federal Coalition*, 751 F.2d at 1426 (explaining that the FSLMRS "expressly mandates that the pre-CSRA slate was not to be wiped clean"). Among the decisions of the Assistant Secretary that were imported whole into the regime of the FSLMRS was *Thompson Field*, in which the Assistant Secretary found adjutants general and state national

guards to be an "agency" with respect to their employment of civilian technicians. The vitality of the Assistant Secretary's finding, moreover, was not undone in any way by the FSLMRS because in all respects relevant to civilian technicians, adjutants general, and state guards, the definition of agency and the powers of the FLRA were functionally the same. It would have made no sense for Congress to grapple with the union rights of civilian technicians and preserve them from the ban on military unions if this were not the case.

Lastly, any lingering doubt as to the application of the FSLMRS to Petitioners is erased by the decisions of the FLRA, and the Federal Service Impasses Panel, that followed soon after passage of the FSLMRS. Rather than supersede *Thompson Field*'s holding, the FLRA ratified it by continuing to adjudicate disputes between civilian technician unions and the adjutants general and state national guards and by continuing to issue remedial orders. *See, e.g.*, *ACT New Hampshire*, 7 F.L.R.A. at 241-42 (ordering adjutant general to negotiate over union bargaining proposal); *Wis. Army Nat'l Guard, Office of the Adjutant Gen., and Wis. Chapter, Ass'n of Civilian Technicians*, 83 FSIP 56 (1983) (resolving negotiation dispute and ordering the parties to adopt the employer's bargaining proposal). The civilian technician bargaining scheme and its coverage of the adjutants general and state national guards was therefore incorporated into the FSLMRS and Petitioners remain, to this day, subject to the FSLMRS as regards civilian technicians' conditions of employment.

E. *Application of the FSLMRS to Petitioners preserves the federal employee rights of civilian technicians as Congress intended*. Civilian technicians, as we have shown, are indisputably federal employees covered by the FSLMRS. *See* 32 U.S.C. § 709(e) (a

technician "is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States"); 10 U.S.C. § 10216(a)(1) ("For the purpose of this section **and any other provision of law [e.g., the FSLMRS]**, a military technician (dual status) is a Federal civilian employee[.]") (emphasis added); *see also* 5 U.S.C. § 7103(a)(2).

As we also have shown, it is plain that Congress understood at the time of its enactment that civilian technicians were employees within the meaning of the FSLMRS. *See* 22-29, *supra*. And Congress just as surely understood that adjutants general and state national guards were "agencies" subject to the FSLMRS when it came to the civilian aspects of technician employment. *See* 5 U.S.C. § 7135(b); *see also* 5 U.S.C. § 7103(a)(3) (defining agency as an executive agency); 5 U.S.C. § 105 (also defining executive agency as an executive department); 10 U.S.C. § 111(a) (providing that the Department of Defense is an executive department); 10 U.S.C. §§ 111(b)(6), (b)(8), (b)(10), (b)(11) (providing, respectively, that the Department of Defense is composed of: the Department of the Army; the Department of the Air Force; "[s]uch other offices, agencies, activities, and commands as may be established or designated by law or by the President"; and "[a]ll offices, agencies, activities, and commands under the control or supervision of any element named in paragraphs (1) through (10)."); 32 U.S.C. § 314(d) (requiring state adjutants general to make reports and returns to the Secretary of the Army or the Air Force or their designee); 32 U.S.C. § 709(a) (civilian technicians may be employed under regulations prescribed by the Secretaries concerned). Congress considered and amended the prohibition on military unions to ensure technicians' continued abil-

ity to unionize and bargain collectively with these very same adjutants general contemporaneous with its enactment of the FSLMRS. There is thus no construction under which civilian technicians are not covered by the FSLMRS. Petitioners, by the same token, are covered as well.

Indeed, while Petitioners argued before the court of appeals that civilian technicians were not covered by the FSLMRS, Petitioners appear to have abandoned that argument, as they must, in this Court. *See* Pet. Reply 6-7 (arguing that the question is "not whether technicians are federal employees"). Given that Petitioners also appear not to dispute that the "adjutants general must comply with federal laws regarding dual-status technicians," (Pet. Reply 7) and the FSLMRS is just such a law regarding civilian technicians because they are covered federal employees, the entire matter ought to be treated as conceded.

Even so, because civilian technicians are federal employees, they are guaranteed a host of labor and employee rights under the FSLMRS. Under section 7102 of the FSLMRS, for example, civilian technicians have the right to form, join, or assist a labor organization. 5 U.S.C. § 7102.[7] They have the right to file unfair labor practice charges against "an activity, agen-

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[7] Section 7102 also protects a federal employee's right not to join a labor organization. The federal sector is an open shop. *Janus v. AFSCME*, 138 S. Ct. 2448, 2466 (2018) ("The federal employment experience is illustrative."). Not one federal employee is required to join his or her union as a condition of employment. Each federal employee who chooses to join a union, moreover, makes a deliberate choice to enter into a voluntary membership agreement via informed consent. *See* SF-1187 (informing employees: (a) that "completing this form is voluntary;" and (b) how to cancel their dues deductions), https://www.opm.gov/forms/pdf_fill/sf1187.pdf (last visited December 3, 2022).

cy, or labor organization" for, *inter alia*, engaging in conduct that interferes with or restrains their exercise of any right under the FSLMRS or constitutes reprisal for having exercised such right. 5 C.F.R. § 2423.3(a); 5 U.S.C. § 7116(a) (listing unfair labor practices).

They similarly have the right to act as representatives of a labor organization; to present the views of the labor organization to agency heads and officials, Congress, and "other appropriate authorities;" and "to engage in collective bargaining with respect to conditions of employment through representatives" of their choosing. 5 U.S.C. §§ 7102(1)-(2). A labor organization representing civilian technicians, in turn, has the right to petition the FLRA for exclusive recognition. 5 U.S.C. § 7111. And a labor organization that is the exclusive representative of the civilian technicians it represents, such as Intervenor-Respondent, "is entitled to act for, and negotiate collective bargaining agreements covering, all the employees in the unit." 5 U.S.C. § 7114(a)(1); *see also* 5 U.S.C. §§ 7114(a)(4), (b)(2) (a recognized labor organization is entitled to negotiate with duly authorized employer representatives for the purpose of arriving at a collective bargaining agreement); 5 U.S.C. § 7116(a)(5) (a labor organization may enforce its right to bargain through the unfair labor practice process).

These rights do not exist in isolation. All of them are rendered meaningful by Petitioners' coverage under the FSLMRS because it allows civilian technicians to exercise their rights vis-à-vis the federal designee with day-to-day responsibility for technicians' employment: the adjutants general. Put another way, it makes sense that Congress intended for the FSLMRS to cover Petitioners because that is the organizational level at which, and the conditions of employment un-

der which, technicians perform their federal, civilian work in support of the National Guard.

By contrast, technicians' statutory rights would be stymied were Petitioners' view to prevail because it would restrict technicians' rights "to organize, bargain collectively, and participate through labor organizations in decisions which affect them[.]" Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 3(10), 92 Stat. 1113. Were civilian technicians unable to reach an enforceable collective bargaining agreement with a state adjutant general, for example, they would be deprived of a statutory right that they clearly are guaranteed. It also would lead to confusion and disparate rights as between civilian technicians and the other Title 5 federal employees within state national guards because they occupy combined bargaining units and are otherwise subject to the same collective bargaining agreement. Further, were the adjutants general and state national guards excluded from the FSLMRS and their obligation to bargain collectively with civilian technician unions, their ability to oversee the day-to-day operations of civilian technicians would be diminished. This is because civilian technicians are guaranteed the right to bargain collectively under the FSLMRS. They would retain their rights regardless of whether bargaining occurred at a different level of recognition.

Ultimately, when Petitioners seek, wrongly, to frame this case as concerning the labor practices of state militias, what they seek is to return civilian technicians to their former status as state employees. But this is not the scheme that Congress established. Congress made civilian technicians federal employees and provided for them to bargain collectively with the state adjutants general and state national guards un-

der the FSLMRS. This carefully balanced reading is the only one that gives effect to all of the statutes governing technician employment and is compelled by the purpose, structure, text, and history of the FSLMRS.

F. *Application of the FSLMRS to Petitioners is consistent with the regulations of the Secretaries concerned and other laws governing Petitioners' employment of civilian technicians.* A primary way in which the Secretaries concerned regulate Petitioners' use of civilian technicians is through the National Guard Bureau ("NGB"). The NGB acts as the channel of communications between the federal Secretaries and the states "on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States[.]" 10 U.S.C. § 10501(b); *see also* 32 U.S.C. §§ 101(3), (4), (6) (defining "National Guard" as including the Army National Guard and Air National Guard, as distinguished from the Army National Guard of the United States and the Air National Guard of the United States).

Among its functions, the NGB establishes "policies and programs for the employment and use of National Guard Technicians under section 709 of title 32." 10 U.S.C. § 10503(9). The NGB has promulgated numerous issuances and instructions that support application of the FSLMRS to Petitioners.[8] For example, the

[8] Petitioners attempt to limit the NGB's role to mere "influence" and "indirect" regulation. Pet. Br. 33-34. But Petitioners' attempt, while conceding a role for the NGB as they must, does not capture the full extent of the NGB's role nor is it consistent with the plain language of 10 U.S.C. § 10503(9) or 32 U.S.C. § 709(a), which grants the Secretaries concerned power not merely with respect to the roles in which technicians may serve but to prescribe regulations under which technicians may be employed.

NGB's Office of Technician Personnel publishes a "National Guard Technician Handbook." This handbook, which Petitioners themselves make available, provides in pertinent part that:

> In the National Guard Technician Program, the bargaining unit, consist of all technicians who are not supervisors, confidential management assistants, auditors, and in some cases, personnelists and national security employees. If you are a bargaining unit employee, you have the legal right to form, join or assist any labor organization or to refrain from such activity. Technicians may represent the labor union and present its views to management or Congress without penalty or reprisal.
>
> The Adjutant General and the labor union(s) have a collective bargaining agreement (contracts) which are available through your HRO or labor union representatives. A list of labor union stewards should be posted on bulletin boards at each work location. You can obtain applications to join the labor union from any steward or labor union official. Nothing requires a technician to become or remain a member.

National Guard Technician Handbook, Chapter 25, at 25, https://hr.ong.ohio.gov/Portals/0/technicians/regulations-and-policies/4_Technician%20Handbook_2017.pdf (last visited December 4, 2022). So, it should be no surprise that, although they struggle against it here, Petitioners elsewhere appear to acknowledge that "[t]he American Federation of Government Employees (AFGE) Local 3970, is the exclusive representative of the bargaining unit technicians and employees of the Ohio National Guard and is entitled to act for, and negotiate collective bargaining agreements, covering, all bargaining technicians and employees in the unit." Memorandum by Col. Clarence

K. Maynus, Dir. Of Human Resources, State of Ohio Adjutant General's Department, Regarding Weingarten Rights (August 31, 2022), https://hr.ong.ohio.gov/Portals/0/technicians/regulations-and-policies/Winegarten%20Rights%2031%20Aug%202022.pdf?ver=VQrRuNqpcWrgGUgHDqPisQ%3d%3d (last visited December 4, 2022).

The Chief of the National Guard Bureau, moreover, has issued numerous instructions applicable to civilian technicians which are consistent with Petitioners' coverage under the FSLMRS and with the Department of Defense's overall policy that it "[a]dheres to Chapter 71 of Title 5, U.S.C., to resolve disputes that may arise in labor-management relationships." *See* Dep't of Def. Civilian Personnel Management System: Labor-Management Relations, Dep't of Def. Instruction ("DoDI") 1400.25, Vol. 711, Section 1.2(a), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/140025/140025_vol711.PDF?ver=oP8J4CV2lbTxQwTFQytapA%3d%3d (last visited December 4, 2022). For example, the Chief of the NGB has issued an instruction (a "CNGBI") that sets forth a voluntary and non-disciplinary actions program for civilian technicians. This CNGBI acknowledges the role of labor organizations throughout and provides, in pertinent part, that for matters falling within its scope, the adjutants general will be "considered the head of the agency in any administrative action." *See* National Guard Technician and Civilian Personnel Voluntary and Non-Disciplinary Actions Program, CNGBI 1400.25, Vol. 715, Encl. A, Section 3(d), https://hr.ong.ohio.gov/Portals/0/technicians/regulations-and-policies/CNGBI%201400_25%20vol%20715_20210915.pdf?ver=E_jW6uURSDbLUe5PBbNK4A%3d%3d (last visited December 4, 2022); *see also* National Guard Technician and Civilian Personnel Discipline and Adverse

Action Program, CNGBI 1400.25, Vol. 752, Encl. A, Section 4 (same), https://hr.ong.ohio.gov/Portals/0/technicians/regulations-and-policies/CNGBI%201400_25%20vol%20752_20211108.pdf?ver=z6JOb8nw3C3hFNKQZ00Ynw%3d%3d (last visited December 4, 2022). Still another CNGBI contemplates the granting of union official time pursuant to section 7131 of the FSLMRS, with explicit reference to "local collective bargaining agreements." *See* National Guard Technician and Civilian Personnel Absence and Leave Program, CNGBI 1400.25, Vol 630, Encl. K, Section 8, https://hr.ong.ohio.gov/Portals/0/technicians/regulations-and-policies/CNGBI%201400_25%20vol%20630_20210423.pdf?ver=khiyT3F21ljoV8IQZANgtg%3d%3d (last visited December 4, 2022).

Further, Congress has since acted to expand the rights of civilian technicians, not contract them. Congress's consistent purpose from passage of the Technicians Act in 1968 through its enactment of the National Defense Authorization Act for Fiscal Year 2017 ("2017 NDAA"), Pub. L. No. 114-328, 130 Stat. 2000 (Dec. 23 2016), has been to preserve and broaden the rights of civilian technicians. The 2017 NDAA, for example, amended 32 U.S.C. § 709(f)(4) to "clarify" that civilian technicians "under certain conditions, may appeal adverse employment actions to the Merit Systems Protection Board and Equal Employment Opportunity Commission." H.R. Rep. No. 114-840, at 1016-17 (2016) (Conf. Rep.); *see also Dyer v. Dep't of Air Force*, 971 F.3d 1377, 1381 (D.C. Cir. 2020) ("*Dyer*"). Prior to the amendments, 32 U.S.C. §709(f)(4) provided that the right of appeal "shall not extend beyond the adjutant general of the jurisdiction concerned" and civilian technicians were excluded from the definition of "employee" in 5 U.S.C. § 7511, concerning the appeal of adverse actions. 32 U.S.C. § 709(f)(4) (2015); 5 U.S.C. § 7511(b)(5) (2015).

The 2017 NDAA thus expanded the rights of civilian technicians by narrowing the limitation in Section 709(f)(4) to only those situations involving "fitness for duty in the reserve components" or conduct "occurring while the member is in a military pay status." *See* 2017 NDAA, § 512 (codified as amended at 32 U.S.C. § 709(f)(4)); *see also Dyer*, 971 F.3d at 1381. The 2017 NDAA also added a new paragraph mandating the application of 5 U.S.C. §§ 7511, 7512, 7513 and section 717 of the Civil Rights Act of 1991 to appeals concerning any activity not covered by 32 U.S.C. § 709(f)(4). *See* 32 U.S.C. § 709(f)(5). Consequently, aside from being compelled by the purpose, history, and text of the FSLMRS, application of the FSLMRS to Petitioners is consistent with the regulations of the Secretaries concerned and Congress's overall treatment of civilian technicians.

Petitioners' reliance, in this regard, on *Singleton v. Merit Systems Protection Board*, 244 F.3d 1331 (Fed. Cir. 2001) ("*Singleton*"), and its progeny is sorely misplaced for two reasons. *See* Pet. Br. 27. One, *Singleton* did not involve the FSLMRS. *Singleton* involved different chapters of the CSRA, chapters 12, 75, and 77, with different contexts and histories. Among other differences, these chapters contain no analog to Section 7135(b) of the FSLMRS which preserved decisions under prior executive orders. But even if they did, Congress could not have incorporated Petitioners' coverage under the FSLMRS in the same fashion. Two, this is because, unlike with respect to collective bargaining, Congress expressly excluded civilian technicians from the adverse action appellate procedures applicable to other federal employees when it passed the Technicians Act by providing that the "right of appeal" for disciplinary actions "shall not extend beyond the adjutant general[.]" 32 U.S.C. § 709(f)(4) (2015).

This is why the express purpose of the technician amendments in the 2017 NDAA was to ensure that "under certain conditions" civilian technicians "may appeal adverse employment actions to the Merit Systems Protection Board and Equal Employment Opportunity Commission." H.R. Rep. No. 114-840 at 1016-17. Congress granted them rights that they had not previously had. In furtherance of this purpose, and in addition to the changes to 32 U.S.C. § 709, Congress amended Section 10508 of Title 10 to, *inter alia*, clarify the roles of the Chief of the National Guard Bureau and adjutants general with respect to "administrative complaint[s] . . . arising from, or relating to, . . . a personnel action or condition of employment." 10 U.S.C. § 10508(b)(3). For example, section 10508 (b)(3)(A) provides that the "adjutant general of the jurisdiction concerned shall be considered the head of the agency and the National Guard of the jurisdiction concerned shall be considered the employing agency of the individual and the sole defendant or respondent in any administrative action." Section 10508 (b)(3)(B) provides that the "National Guard of the jurisdiction concerned" must defend against the administrative complaint and "shall promptly implement all aspects of any final administrative order, judgment, or decision." Put simply, *Singleton* and its progeny shed no light here because those decisions: (a) involve the interpretation of different chapters of the CSRA governing the authority of a separate and distinct administrative adjudicator, the MSPB; and (b) have been superseded by subsequent congressional amendments to the Technicians Act.[9]

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[9] Petitioners cite to the non-precedential decision of an MSPB administrative judge, *Bradley v. Dep't of the Air Force*, 2022 WL 4011898 (Aug. 31, 2022), in support of their claim that "the Board" lacks jurisdiction over adjutants general and state na-

All told, Petitioners' coverage under the FSLMRS is woven indelibly into their employment and administration of civilian technicians.

II. The Federalism Canon Does Not Limit Petitioners' Coverage Under the FSLMRS With Respect to Civilian Technicians.

Petitioners' reliance on the federalism canon is misplaced. Pet. Br. 28-33. The FLRA is not, as Petitioners contend, regulating "the labor practices of state militias." The FLRA is enforcing the rights and obligations of federal, civilian employees and the federal actors who oversee them. The FLRA's authority to issue orders to state national guards and adjutants general under the FSLMRS concerning the collective bargaining rights of federal civilian employees, therefore, does not implicate "the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (internal citations and quotations omitted).

Civilian technicians exist to advance important federal objectives and therefore fit comfortably within the powers of Congress to provide for the common defense, make rules for the government and regulation of the land and naval forces, and to enact such laws as are "necessary and proper" to execute its powers. *See generally Perpich*, 496 U.S. at 342-43, 349-50; U.S. Const., Art. I, § 8. The establishment and "federalization" of the hybrid National Guard was an exercise of

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tional guards. Pet. Br. 27. Not only is the MSPB's jurisdiction beside the point here, given the distinct purpose, history, and text of the FSLMRS, the administrative judge's decision has not been considered by the full MSPB or its reviewing court, the United States Court of Appeals for the Federal Circuit. It also is wrong, inasmuch as it ignores the text and purpose of the amendments to 32 U.S.C. § 709 and 10 U.S.C. § 10508.

Congress's power under the Militia Clauses that was intended, *inter alia*, to ensure the uniform and adequate training of National Guard personnel and the uniform and adequate maintenance of National Guard equipment. *See Perpich*, 496 U.S. at 340-42. Civilian technicians are a principal means by which Congress chose to achieve these objectives.

In making civilian technicians their vehicle of choice, Congress made the determination that they should be federal employees. This determination placed civilian technicians and Petitioners within the purview of the FSLMRS, just as they fell within the purview of Executive Order 11491 before it. Put another way, and even assuming *arguendo* that a "clear statement" was required to cement Petitioners' coverage under the FSLMRS, the purpose, structure, history, and text of the Technicians Act, the FSLMRS, and 10 U.S.C. § 976, all amply and clearly demonstrate the intent of Congress to extend coverage of the FSLMRS to Petitioners. *See* 26-30, *supra*.; *see also* 5 U.S.C. § 7135(b).

Moreover, any Federalism concerns that might persist are alleviated by the fact that civilian technicians are not state employees as a matter of law. Civilian technicians are federal employees whose salaries and benefits are paid for by the Federal government.[10] *See* 32 U.S.C. § 709(e); 10 U.S.C. § 10216(a); *see also* J.A. 33-35; *Redbook, LBO Analysis of Executive Budget Proposal*, Shaina Morris, Budget Analyst at 4 (Feb. 2021), https://www.lsc.ohio.gov/documents/budget/134/MainOperating/redbook/ADJ.PDF (last visited Decem-

[10] Applications for civilian technician positions with Petitioners are also processed through the USAJobs website. *See* https://hr.ong.ohio.gov/Job-Postings/Application-Process/Technician-Application-Process (last visited December 4, 2022).

ber 4, 2022) (for fiscal year 2018, 92.6% of operating expenses for the Ohio Army and Air National Guards was paid directly by the Department of Defense. The remaining 7.4% was mostly composed of federal grants awarded to the Adjutant General.). A state adjutant general's authority to "employ and administer" civilian technicians derives from federal law and only may be exercised "under regulations prescribed" by the Secretary concerned and on behalf of that Secretary. 32 U.S.C. §§ 709(a), (d); *see also* 10 U.S.C. § 10503(9) (providing that the National Guard Bureau shall be responsible for establishing policies and programs "for the employment and use of National Guard technicians under section 709 of title 32."). State adjutants general thus act as an agency of the federal government with respect to their supervision of civilian technicians and, therefore, are not exercising a "state power." For example, and with the cooperation of all sides, the Department of Defense has treated the Ohio Adjutant General as the head of a Department of Defense component when conducting agency head review, pursuant to 5 U.S.C. § 7114(c) of the FSLMRS, of collective bargaining agreements reached between Petitioners and Intervenor-Respondent. J.A. 44-46; *see also* DoDI 1400.25, Vol. 711, § 3.2 (providing agency head review process for Department of Defense components); 10 U.S.C. § 101(a)(6) (defining the term "department").

Consequently, requiring Petitioners to adhere to the FSLMRS is consistent with the overall scheme of both the FSLMRS and the Technicians Act and does not intrude on state prerogatives. Petitioners do not appear to object to being designated to employ and administer federal employees in the first instance. Coverage under the FSLMRS, however, is part and parcel of the power-sharing nature of the National Guard and of the

states' use of this federal, and federally-funded, resource: civilian technicians. The federal government, for example, is not by the FLRA regulating states' conduct vis-à-vis their citizens *qua* citizens, or with respect to state employees, or with respect to military service members who are activated to state duty.

The states, moreover, still may assemble and maintain defense forces at their own expense without incurring the obligations that coincide with the employment of civilian technicians. 32 U.S.C. § 109(c); *Perpich*, 496 U.S. at 352. But coverage under the FSLMRS is a working part of the carefully balanced hybrid structure of the National Guard that comes with civilian technicians. Petitioners' real beef, which is not before the Court, is with the Technicians Act because Petitioners' coverage under the FSLMRS is a natural consequence of the act's conversion of civilian technicians to federal employees. Simply stated, if the hybrid structure of the National Guard is itself a permissible exercise of Congressional authority, which *Perpich* teaches us it is, then the federalism canon poses no barrier to the FLRA issuing an order to an adjutant general or a state national guard with respect to the civilian aspects of federal technicians' employment.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	Page
5 U.S.C. 7101	1a
5 U.S.C. 7102	2a
5 U.S.C. 7112	2a
5 U.S.C. 7114	4a
5 U.S.C. 7135	7a
10 U.S.C. 111	8a
10 U.S.C. 10216	9a
10 U.S.C. 10501	10a
10 U.S.C. 10503	11a
10 U.S.C. 10508	13a
32 U.S.C. 314	15a

1. 5 U.S.C. 7101 provides:

Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consis-

tent with the requirement of an effective and efficient Government.

2. 5 U.S.C. 7102 provides:

Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

3. 5 U.S.C. 7112 provides:

Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote

effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

4. 5 U.S.C. 7114 provides:

Representation rights and duties

(a)

(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)

(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

5. 5 U.S.C. 7135 provides:

Continuation of existing laws, recognitions, agreements, and procedures

(a) Nothing contained in this chapter shall preclude—

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of

such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

6. 10 U.S.C. 111 provides:

Executive department

(a) The Department of Defense is an executive department of the United States.

(b) The Department is composed of the following:

(1) The Office of the Secretary of Defense.

(2) The Joint Chiefs of Staff.

(3) The Joint Staff.

(4) The Defense Agencies.

(5) Department of Defense Field Activities.

(6) The Department of the Army.

(7) The Department of the Navy.

(8) The Department of the Air Force.

(9) The unified and specified combatant commands.

(10) Such other offices, agencies, activities, and commands as may be established or designated by law or by the President.

(11) All offices, agencies, activities, and commands under the control or supervision of any element named in paragraphs (1) through (10).

(c) If the President establishes or designates an office, agency, activity, or command in the Department of Defense of a kind other than those described in paragraphs (1) through (9) of subsection (b), the President shall notify Congress not later than 60 days thereafter.

7. 10 U.S.C. 10216 provides:

Military technicians (dual status)

(a) In General.—

(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve; and

(C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

(3) A military technician (dual status) who is employed under section 3101 of title 5 may perform the following additional duties to the extent that the performance of those duties does not interfere with the performance of the primary duties described in paragraph (1):

(A) Supporting operations or missions assigned in whole or in part to the technician's unit.

(B) Supporting operations or missions performed or to be performed by—

(i) a unit composed of elements from more than one component of the technician's armed force; or

(ii) a joint forces unit that includes—

(I) one or more units of the technician's component; or

(II) a member of the technician's component whose reserve component assignment is in a position in an element of the joint forces unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

* * * * *

8. 10 U.S.C. 10501 provides:

National Guard Bureau

(a) National Guard Bureau.—

There is in the Department of Defense the National Guard Bureau, which is a joint activity of the Department of Defense.

(b) Purposes.—

The National Guard Bureau is the channel of communications on all matters pertaining to the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between (1) the Department of the Army and Department of the Air Force, and (2) the several States.

9. 10 U.S.C. 10503 provides:

Functions of National Guard Bureau: charter

The Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, the Secretary of the Army, and the Secretary of the Air Force, shall develop and prescribe a charter for the National Guard Bureau. The charter shall reflect the full scope of the duties and activities of the Bureau, including the following matters:

(1) Allocating unit structure, strength authorizations, and other resources to the Army National Guard of the United States and the Air National Guard of the United States.

(2) The role of the National Guard Bureau in support of the Secretary of the Army and the Secretary of the Air Force.

(3) Prescribing the training discipline and training requirements for the Army National Guard and the Air National Guard and the allocation of Federal funds for the training of the Army National Guard and the Air National Guard.

(4) Ensuring that units and members of the Army National Guard and the Air National Guard are trained by the States in accordance with approved

programs and policies of, and guidance from, the Chief, the Secretary of the Army, and the Secretary of the Air Force.

(5) Monitoring and assisting the States in the organization, maintenance, and operation of National Guard units so as to provide well-trained and well-equipped units capable of augmenting the active forces in time of war or national emergency.

(6) Planning and administering the budget for the Army National Guard of the United States and the Air National Guard of the United States.

(7) Supervising the acquisition and supply of, and accountability of the States for, Federal property issued to the National Guard through the property and fiscal officers designated, detailed, or appointed under section 708 of title 32.

(8) Granting and withdrawing, in accordance with applicable laws and regulations, Federal recognition of (A) National Guard units, and (B) officers of the National Guard.

(9) Establishing policies and programs for the employment and use of National Guard technicians under section 709 of title 32.

(10) Supervising and administering the Active Guard and Reserve program as it pertains to the National Guard.

(11) Issuing directives, regulations, and publications consistent with approved policies of the Army and Air Force, as appropriate.

(12) Facilitating and supporting the training of members and units of the National Guard to meet State requirements.

(13)

(A) Assisting the Secretary of Defense in facilitating and coordinating with the entities listed in subparagraph (B) the use of National Guard personnel and resources for operations conducted under title 32, or in support of State missions.

(B) The entities listed in this subparagraph for purposes of subparagraph (A) are the following:

(i) Other Federal agencies.

(ii) The Adjutants General of the States.

(iii) The combatant command the geographic area of responsibility of which includes the United States.

(14) Such other functions as the Secretary of Defense may prescribe.

10. 10 U.S.C. 10508 provides:

National Guard Bureau: general provisions

(a) MANPOWER REQUIREMENTS OF NATIONAL GUARD BUREAU.—

The manpower requirements of the National Guard Bureau as a joint activity of the Department of Defense shall be determined in accordance with regulations prescribed by the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff.

(b) PERSONNEL FOR FUNCTIONS OF NATIONAL GUARD BUREAU.—

(1) IN GENERAL.—

The Chief of the National Guard Bureau may program for, appoint, employ, administer, detail, and assign persons under sections 2102, 2103, 2105, and

3101 of title 5, subchapter IV of chapter 53 of title 5, or section 328 of title 32, within the National Guard Bureau and the National Guard of each State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands to execute the functions of the National Guard Bureau and the missions of the National Guard, and missions as assigned by the Chief of the National Guard Bureau.

(2) ADMINISTRATION THROUGH ADJUTANTS GENERAL.—The Chief of the National Guard Bureau may designate the adjutants general referred to in section 314 of title 32 to appoint, employ, and administer the National Guard employees authorized by this subsection.

(3) ADMINISTRATIVE ACTIONS.—Notwithstanding the Intergovernmental Personnel Act of 1970 (42 U.S.C. 4701 et seq.) and under regulations prescribed by the Chief of the National Guard Bureau, all personnel actions or conditions of employment, including adverse actions under title 5, pertaining to a person appointed, employed, or administered by an adjutant general under this subsection shall be accomplished by the adjutant general of the jurisdiction concerned. For purposes of any administrative complaint, grievance, claim, or action arising from, or relating to, such a personnel action or condition of employment:

(A) The adjutant general of the jurisdiction concerned shall be considered the head of the agency and the National Guard of the jurisdiction concerned shall be considered the employing agency of the individual and the sole defendant or respondent in any administrative action.

(B) The National Guard of the jurisdiction concerned shall defend any administrative complaint,

grievance, claim, or action, and shall promptly implement all aspects of any final administrative order, judgment, or decision.

(C) In any civil action or proceeding brought in any court arising from an action under this section, the United States shall be the sole defendant or respondent.

(D) The Attorney General of the United States shall defend the United States in actions arising under this section described in subparagraph (C).

(E) Any settlement, judgment, or costs arising from an action described in subparagraph (A) or (C) shall be paid from appropriated funds allocated to the National Guard of the jurisdiction concerned.

11. 32 U.S.C. 314 provides:

Adjutants general

(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.

(b) The President shall appoint the adjutant general of the District of Columbia and prescribe his grade and qualifications.

(c) The President may detail as adjutant general of the District of Columbia any retired commissioned officer of the Regular Army or the Regular Air Force recommended for that detail by the commanding general of the District of Columbia National Guard. An officer detailed under this subsection is entitled to the basic pay and allowances of his grade.

(d) The adjutant general of each State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him.