No. 21-1454

In the

Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEPARTMENT, ET AL.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND LABORERS' INTERNATIONAL UNION OF NORTH AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 58 national and international labor organizations with a total membership of over 12.5 million working men and women.[1] Many of the AFL-CIO's affiliated unions represent employees of the federal government, including several that represent the civilian technicians at issue here. The Laborers' International Union of North America (LIUNA) is an international union representing roughly 500,000 members throughout the United States and Canada across multiple industries in the private sector, from construction to energy to manufacturing, and in the public sector. LIUNA represents approximately 5,000 National Guard technicians in 11 states and territories. *Amici* have a strong interest in ensuring that their members' collective bargaining rights are protected and enforceable against their employers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every court to consider the question has concluded that the Federal Labor Relations Authority (FLRA) has jurisdiction over Petitioners and their

[1] Counsel for Petitioners, counsel for Respondent, and counsel for Intervenor-Respondent have each consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

counterparts in other states.[2] That this unbroken line of cases exists is unsurprising. As set forth in the briefs of the Federal Labor Relations Authority and American Federation of Government Employees, Local 3970, AFL-CIO, the FLRA's jurisdiction over Petitioners follows directly from the statutory scheme governing the employment of dual-status technicians. This conclusion is only bolstered by the additional points *amici* make below.

First, contrary to Petitioners' ahistorical presentation, the Federal Service Labor-Management Relations Statute (FSLMRS) was not enacted in a vacuum. Rather, the definition of the very term at issue in this case—the term "agency" in 5 U.S.C. § 7105(g)—was lifted verbatim from Executive Order No. 11491. In enacting the FSLMRS, Congress—which was well aware that many of the dual-status technicians at issue in this case were represented in collective bargaining with state national guards and adjutants general under the Executive Order—not

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[2] *See, e.g.*, Pet. App. at 14a; *FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171, 174 (6th Cir. 2017); *Lipscomb v. FLRA*, 333 F.3d 611, 613 (5th Cir. 2003); *State of Neb., Military Dep't, Office of Adjutant Gen. v. FLRA*, 705 F.2d 945, 952-53 (8th Cir. 1983); *Ind. Air Nat'l Guard, Hulman Field, Terre Haute, Ind. v. FLRA*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 286 (3d Cir. 1982); *see also Gilliam v. Miller*, 973 F.2d 760, 762 (9th Cir. 1992) ("[Oregon Adjutant General's] personnel actions as supervisor over the federal civilian technicians are taken in the capacity of a federal agency."); *Chaudoin v. Atkinson*, 494 F.2d 1323, 1329 (3d Cir. 1974) (adjutant general was federal "agency or agent" for purpose of mandamus statute because "32 U.S.C. § 709 charges the adjutant generals with employment and administration of the civilian technicians who are federal employees").

only incorporated the same definition of "agency," but also expressly codified in the text of the statute the pre-existing state of labor law for federal employees. That pre-existing law clearly vested jurisdiction over state national guards and adjutants general in the federal entities charged with enforcing the federal labor rights enjoyed by dual-status technicians. Second, under the detailed statutory scheme governing state national guards, these entities are components of a federal agency, the Department of Defense, that is undoubtedly covered by the FSLMRS. This Court should therefore affirm the judgment below.

ARGUMENT

I. Congress Provided the FLRA Jurisdiction Over Petitioners Through Its Express Codification of Pre-FSLMRS Jurisprudence

The Federal Service Labor-Management Relations Statute (FSLMRS), which is part of the Civil Service Reform Act of 1978, was not written on a clean slate. Before the statute's enactment, federal employees, including dual-status technicians, had been granted collective bargaining rights by executive order. Dual-status technicians made frequent use of these rights, and by 1978 it was well-settled that state adjutants general and state national guards could be ordered by the relevant federal bodies to respect these rights. In 1978, Congress, acting against this backdrop, expressly codified that state of affairs. This codification dooms Petitioners' arguments—all the more so because, as contemporaneous evidence of congressional intent shows, in endorsing the practice under the executive order, Congress was acting with

full knowledge of the unionization of dual-status technicians and the fact that state adjutants general and state national guards were their counterparts in bargaining and unfair labor practice proceedings.

A. The 1968 Technicians Act Gave Dual-Status Technicians Collective Bargaining Rights Enforceable Against State National Guards and State Adjutants General Under Pre-FSLMRS Executive Orders

The class of workers at issue in this case—dual-status technicians—has existed in some form for over a century. *See Maryland ex rel. Levin v. United States*, 381 U.S. 41, *reh'g granted, judgment vacated on other grounds*, 382 U.S. 159 (1965). Their status today, however, turns largely on a 1968 federal law, the National Guard Technicians Act of 1968 (Technicians Act), Pub. L. No. 90-486.

Before the enactment of the Technicians Act, dual-status technicians—though they were "paid with federal funds"—"were state employees." *Dyer v. Dep't of the Air Force*, 971 F.3d 1377, 1380 (Fed. Cir. 2020). That changed with the enactment of the Technicians Act. Under the Technicians Act, these technicians were expressly classified as federal employees. *See id.*; *see also* H.R. Rep. No. 90-1823 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3318, 3324 ("[A]ll technicians on the effective date of the Act and those to be employed in the future will become Federal employees as a matter of law."). Technicians are employed by the Department of the Army or the Department of the Air Force, but are, either way, "employee[s] of the United States." 32 U.S.C. § 709(e); *see also Babcock v.*

Kijakazi, 142 S. Ct. 641, 643 (2022) (describing dual-status technicians as "federal civilian employee[s]").

By becoming federal employees, technicians gained collective bargaining rights. At the time of the Technicians Act, those rights were granted to federal employees by Executive Order No. 10988, which provided that "[e]mployees of the Federal Government shall have . . . the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization," Exec. Order No. 10988, § 1(a), 27 Fed. Reg. 551 (Jan. 17, 1962), which the order defined as "any lawful association, labor organization, federation, council, or brotherhood having as a primary purpose the improvement of working conditions among Federal employees, or any craft, trade or industrial union whose membership includes both Federal employees and employees of private organizations," *id.* § 2.

Less than two years after dual-status technicians became federal employees, President Nixon issued Executive Order No. 11491 (EO 11491), replacing Executive Order No. 10988, *see* Exec. Order No. 11491, § 26, 34 Fed. Reg. 17605 (Oct. 29, 1969), and "establish[ing] a labor-management relations system for federal employment which is remarkably similar to the scheme of the National Labor Relations Act," *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273-74 (1974). Similar to its predecessor, EO 11491 granted "[e]ach employee of the executive branch of the Federal Government . . . the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such

activity," and guaranteed that "each employee shall be protected in the exercise of this right." EO 11491, § 1(a). This order went further, however, and also created a set of procedures and remedies to effectuate and protect that right. It defined a set of unfair labor practices that agencies and labor organizations were prohibited from committing, *see id.* § 19(a)-(b), and required agencies to grant exclusive recognition to labor organizations when those organizations were elected as representatives of "appropriate unit[s]" of agency employees, *id.* § 10(a).

EO 11491 also provided a mechanism for resolving disputes relating to these employees' exercise of their collective bargaining rights. It provided that the Assistant Secretary of Labor for Labor-Management Relations would "decide complaints of alleged unfair labor practices and alleged violations of the standards of conduct for labor organizations" and "decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration." *Id.* § 6(a)(1),(4). It further provided that in such cases, "the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order." *Id.* § 6(b). Notably, "agency" was defined by the Order as "an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office." *Id.* § 2(a).

The newly-federalized technicians did not wait long to avail themselves of the Executive Order's protections and procedures. During the first year following the activation of EO 11491's dispute-resolution mechanisms, dual-status technicians in at least ten states—including Ohio—brought cases before the Assistant Secretary.[3] Nor were the

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[3] *See Penn. Nat'l Guard*, A/SLMR No. 9, Case No. 21-1876 (Jan. 25, 1971) (directing representation election in statewide unit of Pennsylvania National Guard); *Minn. Army Nat'l Guard,* A/SLMR No. 14, Case No. 51-1243 (Feb. 22, 1971) (directing representation election in statewide unit of Minnesota National Guard); *Dep't of Def., Nat'l Guard Bureau, Fla. Army Nat'l Guard, and Fla. Air Nat'l Guard*, A/SLMR No. 37, Case No. 42-1244 (May 11, 1971) (directing separate representation elections in Florida Air and Army National Guards); *Adjutant Gen. Dep't, State of Ohio, Air Nat'l Guard,* A/SLMR No. 44, Case No. 53-2974 (May 20, 1971) (directing representation election in statewide unit of Ohio Air National Guard); *Cal. Army Nat'l Guard 1st Battalion, 250th Artillery Air Def.,* A/SLMR No. 47, Case No. 70-1532 (June 1, 1971) (dismissing ULP charges stemming from alleged anti-union activities within the California Army National Guard); *Dep't of Def., Ark. Nat'l Guard,* A/SLMR No. 53, Case No. 64-1136 (CA) (June 8, 1971) (finding that Arkansas National Guard had committed ULP by disparaging employee who had initiated grievance, and ordering adjutant general to sign and post notice of such); *Ala. Air Nat'l Guard,* A/SLMR No. 67, Case No. 40-1943 (June 30, 1971) (finding inappropriate proposed bargaining unit including only certain technicians employed by the Alabama Air National Guard and dismissing election petition); *Va. Nat'l Guard Headquarters, 4th Battalion, 111th Artillery,* A/SLMR No. 69, Case No. 46-1611 (June 30, 1971) (resolving questions of scope of bargaining unit and ordering election among Virginia National Guard technicians); *Dep't of Def., Nat'l Guard Bureau, Adjutant Gen., State of Ga.,* A/SLMR No. 74, Case No. 40-1994 (July 12, 1971) (directing elections among Georgia Air and Army National Guards). The Assistant Secretary of Labor's decisions can be found on the

jurisdictional questions that Petitioners raise before this Court ignored or overlooked during this period. In fact, in only the third case involving dual-status technicians decided by the Assistant Secretary, the Mississippi National Guard claimed that the federal institutions empowered by EO 11491 to resolve labor disputes lacked jurisdiction to issue orders enforcing its provisions in relation to dual-status technicians, raising arguments that are nearly identical to those that Petitioners press before this Court.[4] The Assistant Secretary rejected these arguments and ruled that state National Guard units and their adjutants general each constituted an "agency" under the definitions of EO 11491. *See Miss. Nat'l Guard, 172 Military Airlift Grp. (Thompson Field) and Int'l Union of Elec., Radio, and Mach. Workers, AFL-CIO ("Thompson Field"),* Case No. 41-1723, A/SLMR No. 20 (April 2, 1971). Rejecting the proposition that he lacked jurisdiction to enforce orders under EO 11491

FLRA's website at https://www.flra.gov/system/files/webfm/Authority/Archival%20Decisions%20&%20Leg%20Hist/ASLLMR%20Decisions%20&%20Reports%20on%20Rulings%20VOL%201.pdf.

[4] Specifically, the Mississippi National Guard contended that (1) "the Executive Order is neither binding upon nor applicable to employees of the state of Mississippi"; (2) the Technicians Act "was, in fact, enacted solely for the purpose of granting retirement benefits and protection under the [FTCA] to excepted National Guard technicians"; (3) EO 11491 was "not binding upon nor applicable to the sovereign state of Mississippi"; and (4) Mississippi law did "not grant the Adjutant General any authority to negotiate or enter into contracts with labor organizations." *Miss. Nat'l Guard, 172 Military Airlift Grp. (Thompson Field) & Int'l Union of Elec., Radio, and Mach. Workers, AFL-CIO ("Thompson Field"),* Case No. 41-1723, A/SLMR No. 20 (April 2, 1971).

"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," the Assistant Secretary held that the state adjutant general was "acting as an agent of the Secretaries of the Army and the Air Force" and that "the provisions of the Executive Order are applicable to the [Mississippi National Guard]." *Id.* at 2, 7.

This authoritative decision paved the way for a decade of union representation of dual-status technicians, during which the technicians made heavy use of EO 11491's dispute-resolution mechanisms. Time and again, the Assistant Secretary asserted jurisdiction over state National Guard organizations and their adjutants general to delineate appropriate bargaining units and supervise elections, order the certification of exclusive bargaining representatives, and remedy unfair labor practices. Two other bodies created by EO 11491, the Federal Labor Relations Council and the Federal Service Impasses Panel, resolved various appeals of the Assistant Secretary's decisions and addressed numerous impasses in collective bargaining, respectively.

B. Congress Expressly Codified This Pre-Existing Jurisprudence in the FSLMRS

Thus, when Congress enacted the FSLMRS, it was settled law that state national guards and state adjutants general were covered by EO 11491's definition of "agency." That definition specifically provided that an "agency" included "an executive department, a Government corporation, and an independent establishment as defined in section 104

of title 5, United States Code, except the General Accounting Office." EO 11491, § 2(a). And Congress, in enacting the FSLMRS and delineating the FLRA's authority, adopted *precisely this same definition*: it gave the FLRA authority to require affirmative action by "agenc[ies]," 5 U.S.C. § 7105(g), which it defined, as relevant here, as "an Executive agency," *id.* § 7103(a)(3)—a term which, at that time and today, means "an Executive department, a Government corporation, and an independent establishment," *id.* § 105; *see also* 5 U.S.C. § 105 (1976).

This Court has repeatedly stated that it is appropriate "to assume that our elected representatives . . . know the law." *Albernaz v. United States*, 450 U.S. 333, 341 (1981) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979)). Accordingly, when Congress enacts into law a phrase that has "acquired a settled judicial and administrative interpretation," it "presumptively [i]s aware" of this settled interpretation and, in construing the statute including that phrase, "it is proper to accept the already settled meaning" of that phrase. *Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *see also, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992 (2005) ("Congress passed the definitions in the Communications Act against the background of this regulatory history, and we may assume that the parallel terms 'telecommunications service' and 'information service' substantially incorporated their meaning . . . ."). Applying this longstanding principle here, it is clear that the term "agency" in the FSLMRS was to have the same meaning and scope as that term was used in

EO 11491. And there is no question that the term "agency" under EO 11491 included state national guards and adjutants general.

This alone should resolve this case. But even if there remained any doubt as to the meaning of the term "agency" in the FSLMRS, Congress went further in the text of the statute and expressly incorporated pre-existing decisions under EO 11491, including *Thompson Field*, into the statute. That decision, which held that entities such as Petitioners were covered agencies under EO 11491, was adopted by Congress, further confirming the proper interpretation of the same term in the FSLMRS.

In the FSLMRS, Congress replaced the adjudicatory bodies designated in EO 11491 with the Federal Labor Relations Authority. *See* 5 U.S.C. §§ 7104, 7105; *see also Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983). But far from wiping out the jurisprudence that had accumulated under EO 11491, Congress expressly provided that

> [p]olicies, 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.

5 U.S.C. § 7135(b); *see Fed./Postal/Retiree Coal., Am. Fed'n of Gov't Emps. v. Devine*, 751 F.2d 1424, 1426 (D.C. Cir. 1985) (holding that § 7135(b) "in the clearest of terms kept alive *en toto* the pre-CSRA regime").

Thompson Field is a "decision[] issued under Executive Order[] 11491." *See* EO 11491 § 6(a)(2) (granting Assistant Secretary authority to "decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration"); *id.* § 6(b) (granting Assistant Secretary authority to "require an agency . . . to take such affirmative action as he considers appropriate to effectuate the policies of this Order").[5] By expressly providing in § 7135(b) that existing decisions such as *Thompson Field*, which specifically rejected the interpretation of "agency" that Petitioners seek here,

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[5] *Thompson Field* has never been "revised or revoked by the President," nor has it been "superseded by . . . regulations or decisions issued pursuant to this chapter [by the FLRA]." 5 U.S.C. § 7135(b). Indeed, the newly-constituted FLRA continued exercising jurisdiction over state national guards and adjutants general promptly upon its formation. *See, e.g.*, *Ark. Army Nat'l Guard & Nat'l Fed'n of Fed. Emps., Loc. 1671*, 1 FLRA 876, 878 (Aug. 15, 1979); *Penn. Army & Air Nat'l Guard & Ass'n of Civilian Technicians*, 1 FLRA 310, 312 (May 9, 1979); *see also Bellotti v. Baird*, 428 U.S. 132, 143 (1976) (noting that statutory interpretation by "the officials charged with enforcement of the statute" is "of some importance and merits attention"). The FLRA has since repeatedly and consistently reaffirmed the Assistant Secretary's jurisdictional holding. *See* Pet. App. 17a-167a (FLRA decision in this case); *Miss. Army Nat'l Guard Jackson, Miss.*, 57 FLRA 337, 339 (2001) ("When the state National Guards administer the technicians program, they act in their federal capacity."), *aff'd sub nom. Lipscomb v. FLRA*, 333 F.3d 611 (5th Cir. 2003).

were to be carried forward under the FSLMRS, there is no doubt that the term "agency" in the FSLMRS includes, and was intended to include, the state National Guards and adjutants general.

C. Congress' Contemporaneous Rejection of Proposals to Strip Technicians of the Right to Collectively Bargain and to Render the Right Unenforceable Further Confirms that "Agency" in the FSLMRS Includes State National Guards and Adjutants General

The foregoing establishes that, under the text of the FSLMRS, Petitioners are subject to the authority of the FLRA. The contemporaneous legislative history surrounding the passage of the FSLMRS further confirms this interpretation. At the moment it adopted the FSLMRS, Congress was not only *aware* that state National Guard organizations were covered by EO 11491, and that decisions of the governing agencies had confirmed this coverage, but Congress also expressly *approved* of this coverage by rejecting proposals that sought to strip the technicians of the right to organize and divest the federal government of authority to enforce technicians' collective bargaining rights.

1. Congress Was Aware that State National Guards Were Covered by Executive Order 11491 and Rejected a Proposal to Strip Their Dual-Status Technicians of the Right to Organize

In 1978, a month after enacting the FSLMRS as part of the Civil Service Reform Act of 1978,

Congress made it "unlawful for a member of the armed forces, knowing of the activities or objectives of a particular military labor organization," to engage in any union activities, including to "join or maintain membership" or "attempt to enroll any other member of the armed forces" in such an organization. Pub. L. No. 95-610, § 2 (1978), codified as amended at 10 U.S.C. § 976(b)(1)-(2). Congress limited its definition of the term "member of the armed forces" to "(A) a member of the armed forces who is serving on active duty, or (B) a member of a Reserve component while performing inactive-duty training," *id.*, codified as amended at 10 U.S.C. § 976(a)(1), thereby excluding dual-status technicians from the scope of its prohibition.[6]

Excluding technicians from the scope of § 976 was a conscious decision reached after more than a year of congressional debate. In fact, the original version of the bill passed by the Senate expressly barred dual-status technicians from unionizing. *See* S. 274, 95th Cong. § 2(a) (as passed by Senate), 95 Cong. Rec. S15,061 (daily ed. Sept. 16, 1977) (making it unlawful for any "member of the armed forces" to "join or to maintain membership in [a labor] organization" and including "any person employed as a civilian technician by a Reserve component and who is also a member of a Reserve component" as a member of the armed forces for purposes of the act); *see also* S. Rep.

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[6] Section 976's current inclusion of "a member of the National Guard who is serving on full-time National Guard duty," which itself does not cover dual-status technicians *qua* dual-status technicians, was not added until 1984. Pub. L. No. 98-525, § 414(a)(6) (1984); *see Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195, 197-98 (D.C. Cir. 2004).

No. 95-411, at 7 (1977) (Senate bill contained "a provision which would specifically include within its coverage civilian technicians employed by Reserve and Guard units who are also military members of these units," with an intent to "prohibit such employees from being represented whether in their military or their civilian capacities"). The Senate Committee on Armed Services recognized that this amendment would require "effectively withdrawing [civilian technicians] from the coverage of the current Executive order regulating labor relations in the Federal sector." *Id.* Indeed, the Senate rejected an amendment to this original version that would have expressly excluded technicians from its scope. *See* 95 Cong. Rec. S15,067, S15,084-85 (daily ed. Sept. 16, 1977).

Supporters of the Senate bill justified the inclusion of dual-status technicians within the scope of the bill by arguing specifically that these technicians' use of EO 11491's dispute-resolution mechanisms was burdening the state officials overseeing them. On the Senate floor, the bill's sponsor asserted that "[o]ver 40 unfair labor practice charges [involving dual-status technician unions] have been filed [with the Assistant Secretary] so far this year" while "[a] number of these complaints have reached the Federal Services Impasses Panel," and "hundreds of thousands of man-hours [have been] expended . . . in union matters [rather than] mission accomplishment." 95 Cong. Rec. S15,071 (daily ed. Sept. 16, 1977) (statement of Sen. Thurmond). Opponents of the bill shared the understanding that dual-status technicians could seek enforceable remedies under EO 11491, but disagreed that this was

a problem in need of fixing. *See, e.g.*, *id.* at S15,068 (statement of Sen. Williams) (opposing the bill and objecting that "[c]ivilian technicians were made Federal employees by an act of Congress in 1968" and had "enjoyed collective bargaining rights under the Federal employees labor relations program" since that time). No Senator, whether supporting or opposing the proposed bill, opined that state National Guard organizations were not covered by EO 11491's definition of "agency," or that the Assistant Secretary had erred in concluding as much.

The same was true in the House Committees that analyzed the bill following its approval in the Senate. The Investigations Subcommittee of the House Committee on Armed Services entered into the record the Assistant Secretary's *Thompson Field* decision holding that state adjutants general and National Guard organizations were "agencies" for the purposes of EO 11491. *Unionization of Military Personnel: Hearing on S. 274 Before the Investigations Subcomm. of the H. Comm. on Armed Servs.*, 95th Cong. 148-53 (1977) (materials entered into the record following statement of Kenneth T. Blaylock, National President, American Federation of Government Employees) (hereinafter, "*House Investigations Subcommittee Hearing*"). The Subcommittee then heard detailed testimony about the impact of the unionization of the technicians on the state national guards. For example, the Executive Vice President of the National Guard Association of the United States ("NGA"), which opposed technicians' unionization, testified that under EO 11491 "[t]he processes of collective bargaining and negotiation consume untold thousands of hours of the limited time available to

State military authorities and National Guard technicians." *Id.* at 83; *see also id.* ("The almost continuous involvement in labor relations matters seriously diverts State military authorities from their principal task of producing the readiness required by national war plans."). He stated his view clearly: "If National Guard Technicians were excluded from Executive Order 11491, the requirement for collective bargaining and negotiation would be eliminated." *Id.* at 89.[7]

During these hearings, no Member of Congress or testifying witness opined that the federal entities charged with administering EO 11491 lacked jurisdiction to enforce their orders against National Guard organizations and their adjutants general, or that the Assistant Secretary had erred in determining as much. Instead, all proceeded from the premise that the state National Guards and adjutants general were covered agencies under EO 11491, and debated vigorously whether their responsibilities under that Order should be eliminated by the criminalization of dual-status technician unionization.

Ultimately, both House Committees that addressed the bill removed the provisions that would have eliminated dual-status technicians' collective

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[7] The NGA's executive vice president provided similar testimony to the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service. *Prohibition on Union Organization of the Armed Forces: Hearing on S. 274 Before the H. Subcomm. On Civil Serv. Of the H. Comm. On Post Office and Civil Serv.*, 95th Cong. 71-72 (1978) (statement of Major Gen. Francis S. Greenlief) (hereinafter "*House Civil Service Subcommittee Hearing*").

bargaining rights under EO 11491. The House Committee on Armed Services concluded that the bill "should not be burdened with the civilian technician provisions, particularly since that language could possibly endanger the entire bill" on constitutional grounds as an infringement on freedom of association. *See* H.R. Rep. No. 95-894(I), at 5 (1978). The House Committee on Post Office and Civil Service, for its part, deemed it inappropriate to "deny to civilian technicians the right to representation in collective bargaining," which "has been available to such employees since 1968 under Executive Order 11491." H.R. Rep. No. 95-894(II), at 6 (1978).

This was no ministerial change. The bill's sponsor in the House declared that the provision's deletion was "the principal distinction between [the bill] as amended and the bill passed by the Senate a year ago." 95 Cong. Rec. H10,709 (daily ed. Sept. 26, 1978) (statement of Rep. Stratton). Following passage of the amended bill in the House, the Senate acceded to the amendment, despite the misgivings of some. *See* 95 Cong. Rec. S19,034 (daily ed. Oct. 14, 1978) (statement of Sen. Stennis) ("[T]he House has made it clear that a bill that includes these technicians will not be acceptable to them, and I feel we have no choice but to accede to this position."). The bill leaving dual-status technicians' union rights unaffected was signed into law by President Carter the following month. *See* Pub. L. No. 95-610, 92 Stat. 3085 (Nov. 8, 1978).

Accordingly, the legislative history of Public Law No. 95-610 clearly demonstrates that the 95th Congress was fully aware that, under EO 11491, the federal government had jurisdiction to enforce its

orders against state national guards and adjutants general. While the Senate initially resolved to strip the federal government of this authority, the House rejected this proposal and the law that ultimately passed maintained the bargaining rights of technicians as Congress understood them.

One month earlier, this same Congress had passed the FSLMRS, with its crucial provision maintaining in place all "[p]olicies, regulations, and procedures established under and decisions issued under Executive Order[] 11491." 5 U.S.C. § 7135(b). Given that Congress clearly understood that the federal agencies enforcing federal-sector labor relations policy had jurisdiction over state National Guards, as described above, the conclusion that Congress intended the FLRA to maintain the same authority is inescapable. *See, e.g.*, *N.Y. Tel. Co. v. N.Y. State Dep't of Lab.*, 440 U.S. 519, 541 (1979) (finding legislative history of Social Security Act decisive in interpreting National Labor Relations Act where the "two statutes were considered in Congress simultaneously and enacted into law within five weeks of one another"); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410 (1968) (interpreting Termination Act of 1954 in light of separate law that was passed by "the same Congress" and "amended . . . only two months after the Termination Act became law"); *United States v. Stewart*, 311 U.S. 60, 64 (1940) (finding it plain that two acts enacted "by the same Congress and at the same session" should be interpreted *in pari materia*).

2. Congress Specifically Rejected a Proposal to Exclude State National Guards and their Adjutants General from Federal Labor Authorities' Jurisdiction

If Congress' awareness of EO 11491's provision of jurisdiction over state National Guard organizations coupled with its adoption of EO 11491's policies and decisions in § 7135(b) were not sufficient to affirm the Court of Appeals in this case, the same Congress that enacted § 7135(b) as part of the FSLMRS also rejected a proposal that would have done exactly what Petitioners seek to do in this case: leave technicians with the theoretical right to organize but strip them of the means of enforcing their rights against their day-to-day employers.

When considering the aforementioned Senate bill criminalizing technician unionization, a subcommittee of the House Committee on Armed Services heard testimony from former Solicitor General Erwin Griswold that the proposed ban on technician unionization "present[ed] very serious constitutional problems." *House Investigations Subcommittee Hearing* at 230. He testified that "the courts would have great difficulty in sustaining" against constitutional challenge a statute like that passed by the Senate criminalizing someone "belong[ing] to a union which represents him in his civilian capacity and . . . makes no effort . . . to represent him with respect to the terms and conditions of his military employment." *Id.* at 231; *see also id.* at 230 (opining that courts would likely "hold it was invalid as applied to the membership in a

civilian union which does not undertake to bargain or to represent in any way with respect to the military").

Following Griswold's testimony, opponents of dual-status technician unions changed their position before the Civil Service Subcommittee of the House Committee on Post Office and Civil Service. Responding to the subcommittee's concern about the constitutionality of the bill as applied to technicians, the Executive Vice President of the NGA testified that he now believed that the original ban "probably is unconstitutional" and should be deleted from the bill. *House Civil Service Subcommittee Hearing* at 87 (statement of Major Gen. Francis S. Greenlief). Instead, NGA proposed that technicians "should be treated as a unique group—as are the members of the FBI, the CIA, and the Tennessee Valley Authority and other agencies excluded from Executive Order 11491, who are permitted to belong to unions and participate in union activities, but not to be represented by them in matters relating to the conditions of employment." *Id.* at 69-70.[8] NGA noted that they were "asking for legislation that would, in effect, remove the National Guard technicians from the Executive Order," adding that "we have asked that administratively within the

[8] Specifically, NGA proposed that the Technicians Act be amended to prohibit any "civilian officer or employee of the Department of Defense, adjutant general designated under [the Act], or member of the armed forces" from entering into CBAs or according recognition to any technicians' union. *House Civil Service Subcommittee Hearing* at 73 (statement of Major Gen. Francis S. Greenlief). It should be noted that, while this would have *prohibited* rather than *required* bargaining, even that formulation was premised on the federal Government's authority to regulate the actions of state adjutants general.

administration [and] it has not been provided." *Id.* at 74.

As noted above, Congress did not adopt this proposal either. Instead, the House Committee concluded that "it was in the national interest for these dual-status employee to enjoy representation in their civilian capacities." H.R. Rep. No. 95-894(II), at 6 (1978). Given that Congress expressly refused to alter federal jurisdiction over state National Guards under EO 11491 when directly requested to do so, it is wholly implausible that the same Congress intended to do so *sub silentio* in the contemporaneously-passed FSLMRS, especially when it carried forward the *very same* definition of "agency" that existed under the Executive Order. *See Carey v. Donohue*, 240 U.S. 430, 437 (1916) ("[W]e are not at liberty to supply by construction what Congress has clearly shown its intention to omit.").

II. Under the Relevant Statutory Framework, Petitioners Constitute Executive Agencies as Defined in the FSLMRS

As the foregoing makes clear, Congress' express incorporation in the FSLMRS of EO 11491's definition of agency and the pre-existing decisional authority interpreting that term is sufficient to end this case. But even if one were to take Petitioners' approach and assume Congress was writing on a blank slate when enacting the FSLMRS, their contention that they are not covered agencies under § 7105 would still be erroneous.

The FSLMRS defines "agency" as an "Executive agency," 5 U.S.C. § 7103(a)(3), which is elsewhere

itself defined as "an Executive department, a Government corporation, and an independent establishment," 5 U.S.C. § 105. "Executive department" comprises the fifteen departments listed in 5 U.S.C. § 101—including, as relevant here, the Department of Defense. According to Petitioners, because they are not themselves "among the fifteen departments identified in the definition of [Executive department]," they cannot be an "Executive agency" covered by the FSLMRS. Pet. Br. 23. But whatever superficial appeal this argument may have, it immediately collapses upon scrutiny.

The FLRA's jurisdiction over "Executive departments" necessarily extends to *all constituent parts* of those Executive departments, including any subordinate agencies or entities that compose them. To hold otherwise would fly in the face of this Court's prior FLRA decisions. In *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, for example, the Court reviewed the merits of an FLRA order directed at the Bureau of Alcohol, Tobacco & Firearms even though the Bureau is not listed in 5 U.S.C. § 101 but was instead "an agency within the Department of the Treasury." 464 U.S. 89, 93 (1983). And in *Fort Stewart Schools v. FLRA*, this Court reviewed the merits of an FLRA order directed to respondents even further removed from the list of agencies in 5 U.S.C. § 101—because they were schools "owned and operated by the United States Army," itself a component of the Department of Defense. 495 U.S. 641, 643 (1990).

Thus, contrary to Petitioners' contention, the FLRA need not prove that Petitioners *are* the Department of Defense any more than it need prove

that the National Park Service *is* the Department of the Interior,[9] U.S. Immigration and Customs Enforcement *is* the Department of Homeland Security,[10] or a prison under the Bureau of Prisons' authority *is* the Department of Justice.[11] The FLRA can assert and establish jurisdiction over Petitioners by showing that these entities constitute part of an agency listed in 5 U.S.C. § 105. Here, the statutes describing the structure of the Department of Defense and the state National Guard plainly establish that the Ohio National Guard—itself composed of the Ohio Army National Guard and Ohio Air National Guard, *see* Ohio Rev. Code Ann. § 5923.01(B)—is a constituent part of that Department.

The Department of Defense is composed of, *inter alia*, the Department of the Army and the Department of the Air Force. 10 U.S.C. § 111(b)(6), (8). The Department of the Army—through the intermediary of "the Army," *id.* § 7062(b)—consists of four parts: "the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States and the Army Reserve."[12] *Id.* § 7062(c)(1).

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[9] *See, e.g., Nat'l Park Serv.*, 73 FLRA 220 (2022).

[10] *See, e.g.*, *Immigr. & Customs Enforcement*, 70 FLRA 208 (2017).

[11] *See, e.g.*, *Fed. Corr. Complex, Yazoo City*, *Miss.*, 73 FLRA 114 (2022).

[12] The Army National Guard of the United States and the Army National Guard are "two overlapping but distinct organizations," organized by Congress in 1933 to resolve difficulties created by "[t]he draft of individual members of the National Guard into the

The second of these parts, the "Army National Guard of the United States," is "the reserve component of the Army that consists of -- federally recognized units and organizations of the Army National Guard." 10 U.S.C. § 10105. And the Army National Guard is defined as "that part of the *organized militia of the several States* and Territories, Puerto Rico, and the District of Columbia, active and inactive, that-- (A) is a land force; (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution; (C) is organized, armed, and equipped wholly or partly at Federal expense; and (D) is federally recognized." 32 U.S.C. § 101(4) (emphasis added).

The Ohio Army National Guard satisfies each of these prerequisites and is therefore a federally recognized "unit[or] organization[]" of the "Army National Guard," which in turn makes it part and parcel of the "Army National Guard of the United States," the Department of the Army, and ultimately the Department of Defense under 10 U.S.C. § 7062.[13]

Army during World War I." *Perpich v. Dep't of Defense*, 496 U.S. 334, 345 (1990) (internal quotation marks omitted). Since 1933, everyone who enlists in a state National Guard simultaneously enlists in the National Guard of the United States; when individuals are "ordered into federal service with the National Guard of the United States," they temporarily lose their status as members of the state militia "during their period of active duty" with the federal government. *Id.* at 347.

[13] The same analysis holds true for the Ohio Air National Guard as well. *See* 10 U.S.C. § 9062(d)(1) ("The Air Force consists of . . . "the Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve"); *id.* at § 10111 ("The Air

See In re Sealed Case, 551 F.3d 1047, 1051 (D.C. Cir. 2009) (noting the "continuous status" of the Army National Guard "as part of the Army National Guard of the United States"); *id* at 1055 n.* (Kavanaugh, J., concurring in judgment) ("Under the statutory scheme, a federally recognized unit or organization of the Army National Guard of the United States is always part of the Army National Guard of the United States.")[14]; *see also Nelson v. Geringer*, 295 F.3d 1082, 1093 (10th Cir. 2002) ("[T]he Wyoming Air and Army National Guard units remain reserve components of the United States Air Force and Army respectively."). Ohio law buttresses this conclusion, defining the Ohio

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National Guard of the United States" consists of "federally recognized units and organizations of the Air National Guard"); 32 U.S.C. § 101(6) (Air National Guard is defined as "that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that-- (A) is an air force; (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution; (C) is organized, armed, and equipped wholly or partly at Federal expense; and (D) is federally recognized").

[14] In his opinion concurring in the judgment, then-Judge Kavanaugh noted that depending on the circumstances of the state National Guard at issue, there may be "federal recognition of units and organizations within a state's Guard, but not of the entire state Guard as an entity." *Id.* In either case, the FLRA would have jurisdiction over each and every federally-recognized unit composing the Ohio National Guard, all of which are directed by Ohio's Adjutant General. *See* 32 U.S.C. § 101(4), (6) (requiring, as a matter of federal law, that a state National Guard be "federally recognized"); Ohio Rev. Code Ann. § 5919.01 (defining membership in Ohio National Guard as extending only to recognized units of the Army and Air National Guards of the United States). The only question would be whether the sub-unit or the larger Ohio National Guard would be the respondent to an FLRA complaint.

National Guard as consisting of "those organizations and units that are, under the laws of the United States and the regulations promulgated under them, prescribed as the portion of the army or air national guard *of the United States* located and organized within this state." Ohio Rev. Code Ann. § 5919.01(A) (emphasis added).

In their briefing, Petitioners contend that "[t]he Ohio National Guard is never a federal entity," claiming that only the Guard's "*members* switch from state to federal service when called into active duty." Pet. Br. 35 (citing *Perpich*, 496 U.S. at 347). Petitioners misread *Perpich*'s account of the structure of the National Guard of the United States. While *Perpich* indeed "stands for the proposition that federally activated guardsmen temporarily lose their State National Guard status," this does not "sever[] the continuous link between the Army National Guard of the United States and federally recognized units of the Army National Guard when not on active federal service." *In re Sealed Case*, 551 F.3d at 1052. Instead, as then-Judge Kavanaugh observed, federally recognized state National Guard units and organizations are "always part of the Army National Guard of the United States" regardless of whether they have been federally activated and, therefore, are *always* federal entities. *Id.* at 1055 n.* (Kavanaugh, J., concurring in the judgment).

The same conclusion applies to the Ohio Adjutant General as the head of the Ohio National Guard. *See* Ohio Rev. Code Ann. § 5913.01(A); *id.* § 5923.01(A)(1). This conclusion is bolstered by the fact that adjutants general occupy a special status under

federal law and are not purely state officials. Their very existence is mandated by federal law, and they must "make such returns and reports as the Secretary of the Army or Secretary of the Air Force may prescribe." 32 U.S.C. § 314(a), (d). They must also swear an oath to obey orders from the President. *Id.* § 312. As to Petitioners specifically, Ohio law provides that the Ohio Adjutant General must be "a federally recognized officer in the Ohio national guard" throughout his tenure. Ohio Rev. Code Ann. § 5913.021(A), (E). And, as most relevant here, in that federal role, they act on behalf of the Secretary of the Army (or Secretary of the Air Force as the case may be) as the "employ[er] and administ[rator]" of the dual-status technician federal employees at issue in this case. 32 U.S.C. § 709(d). So the FLRA's jurisdiction over the Ohio National Guard naturally extends over the Ohio Adjutant General and Adjutant General's Department as well. *See NeSmith v. Fulton*, 615 F.2d 196, 199 (5th Cir. 1980) ("The conclusion that an adjutant general is a federal agency as well as a state officer reflects the hybrid state-federal character of the National Guard and the role of adjutants general in administering it.").[15]

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[15] As set forth in the FLRA's brief, there is a separate and independent basis for jurisdiction over the Ohio Adjutant General because he exercises the authority of the Department of Defense when he acts as the statutorily-designated employer of dual-status technicians. *See* FLRA Br. 20-22, 27-32. Indeed, the language used in the statutory command that "the Secretary concerned shall designate the adjutants general … to employ and administer the technicians authorized by this section" connotes Congress' understanding that what it was requiring concerning the employment of technicians was an internal allocation of authority within the Departments. 32 U.S.C. § 709(d).

Under the relevant statutory framework, Petitioners are components of the National Guard of the United States, and thus ultimately components of the Department of Defense—one of the fifteen "Executive departments" over which the FLRA unquestionably has jurisdiction under the FSLMRS. As such, the FLRA's jurisdiction extends over Petitioners as well.[16]

[16] The federalism canon Petitioners invoke cannot alter the conclusion compelled by the plain text. As Petitioners acknowledge, this canon only applies in cases of statutory ambiguity. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 859 (2014) (invoking federalism canon "to resolve ambiguity in a federal statute"). The statutory scheme described here, while certainly complex, is not ambiguous. In any event, the conclusion that the statutory text compels—that state national guards and their directors are components of a federal agency—is entirely consistent with the constitutional plan. *See, e.g.*, *Perpich*, 496 U.S. at 351-52 (noting that, while "[t]he Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units," a state wishing to disentangle itself from the federal armed forces may eschew this arrangement and "may provide and maintain at its own expense a defense force") (citing 32 U.S.C. § 109(c)). Moreover, Petitioners' concession that the federal National Guard Bureau "can impose its view of union-management relations on the Ohio National Guard" itself undermines any possible federalism concerns regarding the FLRA's assertion of jurisdiction. Pet. Br. 33-34.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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