ORAL ARGUMENT NOT YET SCHEDULED

No. 18-5289

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO, et al.

Plaintiffs-Appellees

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.

Defendants-Appellants

ON APPEAL FROM A DECISION OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNION-APPELLEES

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The underlying district court action involved four separate lawsuits that were consolidated by the district court. The plaintiffs in district court and appellees here are: American Federation of Government Employees, AFL-CIO; National Treasury Employees Union; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers' Beneficial Association/National Maritime Union, No. 1 PCD, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of Teachers, AFL-CIO.

The defendants in district court and appellants here are: Donald J. Trump, in his official capacity as President of the United States; the U.S. Office of Personnel Management; and Margaret Weichert, in her official capacity as Acting Director of the Office of Personnel Management.

Amici in the district court were: Representatives Elijah E. Cummings, Peter T. King, William Clay, Sr. and Jim Leach; and Governor Tom Wolf. They have also indicated their intent to participate as amici in this appeal. Additional amici in this appeal are: National Nurses Organizing Committee/National Nurses United; International Brotherhood of Electrical Workers, AFL-CIO; International Union of Operating Engineers, AFL-CIO; and American Federation of Labor & Congress of Industrial Organizations, AFL-CIO.

(B) Rulings Under Review

This appeal arises from four actions consolidated into a single proceeding in the district court: No. 18-cv-1261 (D.D.C.); No. 18-cv-1348 (D.D.C.); 18-cv-1395 (D.D.C.); and 18-cv-1444 (D.D.C.). On August 24, 2018, the Honorable Ketanji Brown Jackson issued a final order in the consolidated action. ECF No. 57, No. 18-cv-1261 (D.D.C.). An

accompanying opinion was issued on August 25, 2018. ECF No. 58, No. 18-cv-1261 (D.D.C.), published at 318 F. Supp. 3d 370 (D.D.C. 2018). Defendants appealed the final order on September 25, 2018.

(C) Related Cases

This case was not previously before this Court or any other court. A related case is pending in this Court: American Federation of Government Employees, AFL-CIO v. Trump, No. 19-5006 (D.C. Cir.). Counsel for appellees are aware of no other related cases currently pending in this Court or any other court.

Respectfully submitted,

/s/ Paras N. Shah

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February 19, 2019 On behalf of Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, the undersigned counsel hereby certifies as follows:

Appellees American Federation of Government Employees, AFL-CIO; National Treasury Employees Union; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers' Beneficial Association/National Maritime Union, No. 1 PCD, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of Teachers, AFL-CIO, are all non-profit membership organizations. Each serves as the exclusive bargaining representative of units of

employees of the federal government pursuant to 5 U.S.C. §§ 7101-7135. None of the Appellees has a parent company. No publicly held company has any ownership interest in any of the Appellees.

Respectfully submitted,

/s/ Paras N. Shah

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February 19, 2019

On behalf of Appellees

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GLOSSARY

Authority or FLRA	Federal Labor Relations Authority
CSRA	Civil Service Reform Act
JA	Joint Appendix
MSPB	Merit Systems Protection Board
OPM	Office of Personnel Management
PIP	Performance Improvement Period
Statute	Federal Service Labor-Management Relations Statute
ULP	Unfair Labor Practice
Unions	Appellees American Federation of Government Employees, AFL-CIO; National Treasury Employees Union; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National

Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers' Beneficial Association/National Maritime Union, No. 1 PCD, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of Teachers, AFL-CIO

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over the legal claims brought by Plaintiffs-Appellees below. 28 U.S.C. § 1331. The district court's decision, issued on August 24, 2018, with the opinion issued on August 25, 2018, was a final judgment. JA40-164. Defendants-Appellants timely appealed on September 25, 2018. JA165-68. This Court has jurisdiction over the Defendants-Appellants' appeal of the district court's decision. 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly exercised jurisdiction over the Unions' claims because they are not the type of claims that Congress intended to channel through the administrative scheme provided by the Federal Service Labor-Management Relations Statute (Statute).

2. Whether the district court correctly ruled that the enjoined provisions of the challenged Executive Orders are invalid because they are collectively and individually contrary to Congress's carefully constructed collective bargaining scheme.

PERTINENT STATUTES AND REGULATIONS

The relevant statutory, regulatory, and Executive Order provisions are set forth in the addendum to this brief.

STATEMENT OF THE CASE

I. The Statutory Scheme.

Congress passed the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111 et seq., to "comprehensively overhaul[] the civil service system." Lindahl v. OPM, 470 U.S. 768, 773 (1985). Through the CSRA, Congress "unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest." Bureau of Alcohol, Tobacco, & Firearms v. FLRA, 464 U.S. 89, 107 (1983) (BATF).

The Statute, codified at Chapter 71 of Title 5, was thus a central piece of the CSRA. Congress enacted the Statute based upon its findings 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 . . . safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. § 7101(a)(1). The related findings in Section 7101(a) "constitute the 'public policy of the statute.'" AFGE v.

FLRA, 785 F.2d 333, 338 (D.C. Cir. 1986). In light of its policy determinations, Congress assigned labor organizations the task of "act[ing] for" and "negotiat[ing] collective bargaining agreements covering" the bargaining-unit employees they represent, and it required them to represent those employees fairly, without regard to union membership. 5 U.S.C. § 7114(a).

Congress defined "collective bargaining" in Section 7103(a)(12) as "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees." It also specified the circumstances under which these prescribed good-faith negotiations over the "personnel policies, practices, and matters . . . affecting working conditions" must, may, or may not occur. JA124 (quoting 5 U.S.C. § 7103(a)(14) and citing §§ 7103(a)(12), 7106, 7117).

A. Congress's Decision to Expand Official Time.

In Section 7131 of the Statute, Congress dramatically expanded the "official time" concept contained in prior Executive Orders that had governed labor-management relations before the Statute's enactment.

Section 7131 not only allowed for greater amounts of official time than the prior regime, but also marked a clear shift by Congress to a new official time system that, through Section 7131(d), deferred to the will, experience, and expertise of the negotiating parties.

Congress understood the significance of its decision to expand access to official time. An early bill proposed in the Senate, for example, would have retained then-existing restrictions on the authorization of official time. See BATF, 464 U.S. at 101-02 (citing S. Rep. No. 95-969, at 112 (1978)). But Congress, instead, adopted Section 7131 "in its present form." Id. at 102. Representative Clay, who co-introduced the bill that became the enacted legislation, stated emphatically that union negotiators "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." Id. (quoting 124 Cong. Rec. 29188 (1978) (remarks of Rep. Clay) and citing H.R. Conf. Rep. No. 95-1717, at 111 (1978)).

Congress provided, in Section 7131, for official time in three circumstances. In the first two circumstances—negotiations over collective bargaining agreements and participation in Federal Labor

Relations Authority (Authority) proceedings—Congress provided for official time without any limits on the amount of time that can be used. 5 U.S.C. § 7131(a), (c). This alone was a major departure from Executive Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969), as amended by Executive Order No. 11,616, 36 Fed. Reg. 17,319 (Aug. 28, 1971), which allowed agencies to limit official time to either 40 hours or 50% of the total time spent in bargaining.

Congress further provided for additional amounts of official time in a third circumstance, while simultaneously broadening the types of activities for which official time could be used. Congress purposefully left it to labor organizations and agencies to bargain in good faith and reach agreement over additional amounts of official time that are "reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d). Congress declared that once the union and agency agree on an amount, that amount of official time "shall be granted." Id. Congress specified, moreover, that this official time could be used by any employee representing the union or by any bargaining-unit employee "in connection with any other matter covered by" the Statute. Id. The Statute thus allows official time to be used for any representational

work performed by a labor organization or any other matter related to Chapter 71, unless it relates to the union's "internal business." 5 U.S.C. § 7131(b).

B. The Expansive Negotiated Grievance Procedure that Congress Mandated for Covered Matters.

Congress required that each collective bargaining agreement include a broad negotiated grievance procedure culminating in binding arbitration over agency actions within its scope. 5 U.S.C. § 7121(a), (b). Congress directed that the negotiated grievance procedure include "any complaint" by an employee or labor organization concerning "any matter relating to the employment of any employee" or alleged violations of "any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9).

Congress excluded only five matters from that procedure, none of which is implicated here. 5 U.S.C. § 7121(c). Except for topics the parties may agree to exclude, all other matters fitting within the Statute's expansive definition of "grievance" are subject to the negotiated grievance procedure. 5 U.S.C. § 7121(a)(2).

C. Congress's Treatment of Removals for Performance.

The CSRA charges federal agencies with establishing processes for periodically evaluating employee performance and procedures for addressing unacceptable performance. 5 U.S.C. § 4302. The results of these periodic appraisals are used as a basis for training, reassignments, adverse personnel actions, promotions, and incentive pay. Id.

Congress specified that reassignments, reductions in grade, or removals for unacceptable performance would be permitted "only after an opportunity to demonstrate acceptable performance." 5 U.S.C. § 4302(c)(6). This mandatory "opportunity to demonstrate acceptable performance" is commonly known as a "performance improvement period" (PIP).

Congress chose not to define the length of a PIP. Agencies and unions have long bargained over how long employees will have to "demonstrate acceptable performance" before being sanctioned for unacceptable performance. JA25.

II. The Challenged Executive Orders.

On May 25, 2018, the President issued Executive Order Nos. 13,836 (Collective Bargaining Order), 13,837 (Official Time Order), and 13,839 (Removal Procedures Order). These Orders target federal-sector labor organizations and the employees they represent. Each of the Orders undermines employee and union rights that Congress has provided in either the Statute or the CSRA. Among other things, the Orders seek to dramatically restrict official time, limit unions' access to office space and resources, substantially curtail which grievances can be subject to negotiated procedures, and fundamentally alter the duration and mechanics of collective bargaining. Most of the Orders' provisions took effect within 45 days, which was July 9, 2018. See, e.g., Official Time Order §§ 4(c)(i), 8; Removal Procedures Order § 7.

III. The District Court Proceeding.

Four lawsuits challenging aspects of the Orders were filed by a total of seventeen labor unions (collectively, the Unions). The district court issued a single Order and Opinion. JA40-164.

The district court rejected the government's argument that the Statute divested federal courts of jurisdiction over claims that the

challenged Executive Order provisions facially conflicted with the Statute. JA78-104. It then invalidated nine Executive Order provisions that removed negotiable topics from the scope of bargaining. JA133-44 (invalidating Official Time Order, Sections 4(a), (b); Removal Procedures Order, Sections 4(a), (c); and Collective Bargaining Order, Section 6)).[1] It invalidated an additional four provisions that impeded the good-faith negotiations mandated by Congress. JA145-50 (invalidating Official Time Order, Section 3(a); Removal Procedures Order, Section 3; and Collective Bargaining Order, Sections 5(a), (e)).

The district court dismissed the government's contention that 5 U.S.C. § 7117 gives the President the authority to override the collective bargaining rights that are at the heart of the Statute. JA150-56. It further rejected the government's argument that some of the Executive Order provisions "merely provide goals" and therefore could not violate the Statute. JA156. The district court held that these provisions

[1] Section 4(a) of the Official Time Order has five substantive subsections, which is why the district court's Order lists nine invalidated sections, but the Opinion addresses and invalidates thirteen substantive topics.

conflict with the statutory mandate that agencies bargain in good faith. JA156-58.

IV. Rulings Presented for Review.

The Defendants-Appellants appeal from the Honorable Ketanji Brown Jackson's Order and Memorandum Opinion issued on August 24 and 25, 2018, in AFGE v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018), reproduced at JA40-42 (August 24 Order) and JA43-164 (August 25 Opinion).

SUMMARY OF THE ARGUMENT

The district court correctly enjoined provisions of three Executive Orders that would have drastically disrupted the Statute's collective bargaining regime. The enjoined provisions took critical topics off the bargaining table and thwarted the good-faith negotiations that the Statute requires.

Individually and collectively, these provisions were contrary to the Statute. They collided with the painstakingly crafted labor-relations system that Congress created based upon its policy determination that federal-sector collective bargaining promotes the public interest and the effective conduct of public business. The district court correctly ruled

that the enjoined provisions were in no way true to the Statute or to core principles of federal-sector collective bargaining recognized by this Court in NTEU v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006).

Indeed, the enjoined provisions were clearly aimed at nullifying rights that the Statute guarantees to employees and unions. The Official Time Order blatantly undercut the ability of union representatives to lobby Congress concerning basic conditions of employment. Union representatives would have been required to assist employees in the processing of grievances entirely on their own time, while their management counterparts remained in a paid duty status. The Order also substantially impaired bargaining over the amount of time that union representatives and other employees can spend on official time to engage in activities plainly authorized by the Statute. Managers would have been given control over when and how union representatives were permitted to use the limited official time that the Order made available to them. The Order also imposed crippling reductions in union access to office space and other resources for which unions have long negotiated and which are an integral part of collective bargaining.

Enjoined provisions in the Removal Procedures Order subtracted a range of subjects from the statutorily mandated negotiated grievance procedure. Those subjects included vital matters such as incentive pay, performance improvement periods, and removals. These provisions were clearly meant to reduce the ability of employees to challenge employer decisions made for unfair, or even illegal, reasons. They were also part of a coordinated effort to suppress the impact of unions in the workplace by devaluing collective bargaining and negotiated grievance procedures.

The Collective Bargaining Order was a pivotal part of the multi-pronged attack on collective bargaining rights. It would have stripped unions of their statutory right to seek negotiations over "permissive" topics of bargaining. It also aimed to unilaterally and unlawfully impose arbitrary bargaining parameters limiting the duration of bargaining and confining bargaining to a mechanical process of exchanging papers.

As part of its rejection of the President's unlawful attempt to re-write the Statute, the district court declined the invitation to relinquish jurisdiction over the Unions' claims. The district court's careful

application of jurisdictional principles, established by the Supreme Court and this Court, led it to the well-grounded conclusion that the Statute's review process, which provides for court-of-appeals review of certain final decisions of the Authority, does not preclude district court jurisdiction over the Unions' claims because those claims are not the type of claims that Congress intended to channel through that process.

The district court also firmly rejected the government's contention that Section 7117 of the Statute excused several of the President's violations of the Statute because the offending provisions were cast as "government-wide rules." As the district court recognized, Congress could not have meant Section 7117 to serve as a vehicle for the President to eviscerate Congress's carefully designed labor-relations program.

ARGUMENT

I. The District Court Correctly Determined that the Unions' Claims Are Not the Type that Congress Intended to Channel Through the Statute's Administrative Scheme.

The core question when analyzing whether an otherwise comprehensive statutory scheme precludes district court jurisdiction over a claim is whether the claim at issue is one that falls within the

scheme's purview, i.e., is the claim "of the type Congress intended to be reviewed within [the] statutory structure." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212 (1994).[2]

The factors for determining whether a claim falls within a statutory scheme are three-fold: (1) whether administrative channeling of the claim would foreclose meaningful judicial review; (2) whether the claim is wholly collateral to the statute's review provisions; and (3) whether the claim lies within the expertise of the agency to which the scheme applies. Jarkesy v. SEC, 803 F.3d 9, 17 (D.C. Cir. 2015). Claims falling outside a scheme's purview are not subject to channeling.

Here, the district court correctly found that channeling the Unions' claims to the Authority would foreclose meaningful judicial review, that the Unions' claims are wholly collateral to the Statute's review scheme, and that the Authority's expertise would not assist in resolving the Unions' claims.

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[2] The authority of the judiciary to review claims of ultra vires Executive action is firmly established. Clinton v. Jones, 520 U.S. 681, 703 (1997); U.S. Chamber of Commerce v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996). See generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The government does not contest this principle but asserts, incorrectly, that the Statute bars the Unions' claims.

A. The District Court Correctly Determined that the Statute Does Not Provide for Meaningful Judicial Review of the Unions' Claims.

It is indisputable that the Authority may not review the underlying validity of a government-wide regulation or Executive Order. See, e.g., NTEU and Dep't of Treasury, IRS, 60 F.L.R.A. 782, 783 (2005); Fort Bragg Ass'n of Educators, NEA and Dep't of Army, Fort Bragg Sch., 31 F.L.R.A. 70, 71 (1988) (Fort Bragg). The district court's conclusion that nothing in the Statute "even remotely" authorizes the Authority to adjudicate the validity of an Executive Order is thus well founded. JA85-86.

The district court carefully surveyed the powers and duties that the Statute gives the Authority. JA84. The district court correctly found that, while the Authority may play a primary role in administering the Statute, there is no evidence that Congress intended to empower the Authority to resolve the types of legal challenges the Unions raise. Id.; see 5 U.S.C. § 7105; § 7118(a)(1), (7) (limiting Authority review of unfair labor practice (ULP) charges); § 7117(c)(6) (limiting Authority review in negotiability petitions).

The district court also correctly determined, after parsing Section 7123 of the Statute, that judicial review of an Authority decision would be similarly circumscribed on appeal. JA87-88. Indeed, as the district court noted, the Authority itself has interpreted the scope of its jurisdiction to require that challenges to a government-wide rule "be brought in the 'district court.'" JA85 (quoting AFGE, Local 4052 and U.S. Dep't of Justice, Federal Bureau of Prisons, 56 F.L.R.A. 414, 416 (2000) (Local 4052)).

The government's argument that Section 7123 forecloses the district court's review of the Unions' claims is without merit. Section 7123(c) limits the scope of judicial review to "the proceeding" before the Authority and the "question determined therein." Because the Authority may not hear challenges to the validity of an Executive Order to begin with, an order's validity cannot be a question "determined therein." As the district court recognized, there is nothing in the Statute "that would authorize the court of appeals to hear matters that are beyond the scope of the FLRA's jurisdiction." JA88. And as this Court has acknowledged, the Authority's inability to resolve the legality of a government-wide rule prevents the issue from reaching the court of

appeals via the Statute's review mechanism. NFFE v. Weinberger, 818 F.2d 935, 940 n.7 (D.C. Cir. 1987).

The government's attempt to analogize the judicial review provisions at issue in Thunder Basin and Sturm Ruger & Co. v. Chao, 300 F.3d 867 (D.C. Cir. 2002), to Section 7123 is thus unpersuasive. See Gov't Br. 26-28. Regardless of any similarity in the language of those judicial review provisions, the administrative review bodies in Thunder Basin and Sturm Ruger had previously addressed the same types of claims that the plaintiffs in those cases had raised. Thunder Basin, 510 U.S. at 215; Sturm Ruger, 300 F.3d at 874.[3] Because those administrative bodies had previously addressed the same types of claims that those plaintiffs raised, the "question determined" language that the government cites (Gov't Br. 27-28) had no bearing on the availability of judicial review in those cases, nor did those courts have occasion to consider whether the language rendered the court's jurisdiction derivative. The gravamen of the claims in Thunder Basin and Sturm Ruger, moreover, fell within the pertinent statutory

[3] The statutory language at issue in Jarkesy is not similar to Section 7123. 803 F.3d at 16 (listing applicable judicial review statutes).

enforcement structures. Thunder Basin, 510 U.S. at 214-15; Sturm Ruger, 300 F.3d at 875.

The government's reliance on Elgin v. Department of the Treasury is also misplaced. 567 U.S. 1 (2012). Gov't Br. 26-28. Elgin was premised on two factors that are not present in this case. First, Elgin's claim was exactly the type of claim that Congress intended to channel through the CSRA's provisions governing review of adverse employment actions. Elgin, 567 U.S. at 10. Elgin was a CSRA-covered employee who appealed an agency action covered by the CSRA's review scheme, i.e., Treasury's decision to terminate his employment.

Second, because Elgin's removal fell squarely within the CSRA, the court found it significant that Section 7703 of the CSRA, which lacks the limiting language of Section 7123, gave him a dedicated avenue to contest that precise action before the Merit Systems Protection Board (MSPB). 567 U.S. at 22. And the Court found it important that, through that avenue, Elgin could obtain meaningful review of his constitutional claim by the Federal Circuit, which had "never held, in an appeal from agency action within the MSPB's jurisdiction, that its authority to decide particular legal questions is

derivative of the MSPB's authority." Id. at 18. Consequently, Elgin does not apply here.

The Unions' claims are fundamentally not the type of claims that Congress envisioned being resolved by the Authority, nor may they be meaningfully reviewed within the Statute's scheme. Review of an Executive Order's validity belongs in district court. See U.S. Dep't of the Air Force v. FLRA, 952 F.2d 446, 453 (D.C. Cir. 1991); AFGE v. FLRA, 794 F.2d 1013, 1015 (5th Cir. 1986); Fort Bragg, 31 F.L.R.A. at 71.

The government's reliance on AFSCME, Local 3097 and Department of Justice, 31 F.L.R.A. 322 (1988) (Local 3097), is likewise misplaced.[4] The government cites Local 3097 for the dubious proposition that while the Authority may not review the legality of some government-wide rules, it may review the legality of others as long as the union alleges a violation of the Statute. Gov't Br. 26. Not only does this proposition lack any limiting principle, as a negotiability

[4] 5 C.F.R. § 2427.5 is inapposite. See Gov't Br. 23. The Unions do not seek a general statement of policy or guidance, nor may the Authority render advisory opinions. 5 C.F.R. § 2429.10.

petition or ULP charge is easily enough framed in terms of a violation of the Statute, the government is wrong for two additional reasons.

First, this Court rejected the rationale of Local 3097 upon which the government relies. IRS v. FLRA, 996 F.2d 1246, 1252 (D.C. Cir. 1993). Second, the government misreads Local 3097. The Authority did not find the union's proposal there to be inconsistent with the government-wide rule at issue, OMB Circular No. A-76. See Local 3097, 31 F.L.R.A. at 346. Nor did the Authority view itself as passing on the legality of a government-wide rule. Id. at 347. Thus, any discussion by the Authority of the interplay between a government-wide rule and an alleged violation of the Statute was dicta, which the Authority abandoned in later cases. See, e.g., Local 4052, 56 F.L.R.A. at 416. Local 3097 therefore provides no support for the proposition that the legality of an Executive Order may be challenged before the Authority.

As the district court recognized, this case is more like National Mining Association v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002), and AFGE, Local 446 v. Nicholson, 475 F.3d 341 (D.C. Cir. 2007). For example, while Nicholson may have involved a statute and not an

Executive Order, Nicholson turned on the facts that (a) Local 446's claims fell outside the Statute's purview; and (b) the Statute did not provide for meaningful review of Local 446's claims. See 475 F.3d at 348. It is irrelevant to the scheme's coverage that what put Local 446's claims outside the Statute was a separate statute. The pertinent factor is that, in both cases, the unions' claims lay outside the Statute and would not be subject to meaningful review within it: in Nicholson by operation of 38 U.S.C. § 7422, and here because the Authority lacks the power to rule on the legality of an Executive Order.

The government's jurisdictional argument is also circular. On the one hand, the government says the Unions' claims could receive meaningful review through the ULP or negotiability appeal process. Gov't Br. 29. On the other, the government asserts that the Orders set forth government-wide rules that are exempt from bargaining. Gov't Br. 49. Leaving aside the government's misapplication of Section 7117(a) and misunderstanding of the ULP and negotiability processes, the government's argument sets up exactly the type of catch-22

situation that would deprive the Unions of meaningful review of their challenges to the legality of the Orders.[5]

The Authority may apply Executive Orders. It may, in determining whether a specific bargaining proposal is negotiable or whether a ULP has been committed, weigh a bargaining proposal or agency action against the provisions of an Order. But the Authority may not deviate from the plain language or meaning of an Order when doing so, nor may it declare an Order invalid or enjoin its provisions. IRS, 996 F.2d at 1250. Relegating the Unions' claims to the Authority would thus foreclose meaningful judicial review.

This conclusion also makes sense because it would be incongruous and pose its own constitutional concerns to suggest that an agency may pass on the lawfulness of an Executive Order. Congress could not have intended such a lopsided result. Consequently, the district court correctly determined that the Statute's scheme does not provide for meaningful judicial review of the Unions' claims.

[5] Leedom v. Kyne provides an alternative basis for district court jurisdiction for the same reasons. 358 U.S. 184, 190 (1958).

B. The District Court Correctly Determined that the Unions' Claims Are Wholly Collateral to the Statute's Review Provisions.

The Unions' claims are wholly collateral to the Statute's review provisions because they fall outside the Statute's administrative scheme. See Jarkesy, 803 F.3d at 23. Neither the Statute's plain text, nor a holistic reading of the Statute, nor case law applying the Statute render the question of an Executive Order's validity one to which the Statute's scheme applies. The Statute takes Executive Orders as it finds them and looks only to their effect within the scheme, not to the propriety of their issuance.

Put another way, the Unions' claims are wholly collateral because they do not seek the same relief that could be sought within the Statute's scheme, nor do they arise from agency actions covered by the Statute's scheme. Id. Nothing in Elgin, for example, extends to claims that do not involve employees covered by the applicable administrative scheme appealing agency actions covered by that scheme. 567 U.S. at 12-13. As the Unions explained above, the sine qua non of Elgin was that a covered employee's appeal of a covered action is precisely the type of claim that Congress intended to be reviewed within the CSRA's

scheme, and "reinstatement, backpay, and attorney's fees are precisely the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide." Id. at 22.

The Unions' claims, however, are not of the same type. The Unions contest the lawfulness of the challenged Orders. The Unions do not raise ordinary labor-relations questions, nor do they seek to do an end run around an ongoing administrative proceeding. The Unions' claims, in other words, are not "inextricably intertwined" with a proceeding arising under the Statute, nor do they seek relief within the Statute's purview. JA95; Jarkesy, 803 F.3d at 23.

Accordingly, AFGE, Local 1709 v. Secretary of the Air Force also fails to bar the Unions' claims. 716 F.3d 633 (D.C. Cir. 2013).[6] The policy challenged in Secretary of the Air Force was not an Executive Order or a government-wide rule or regulation. It was an agency action covered by the Statute's administrative review scheme. And this Court found it significant that the Statute provided three avenues through

[6] Cases such as Fornaro v. James, 416 F.3d 63 (D.C. Cir. 2005), and AFGE v. Loy, 367 F.3d 932 (D.C. Cir. 2004), fare no better. Each of those cases involved a covered action by a covered agency. Fornaro, 416 F.3d at 68 (OPM retiree benefit determinations); Loy, 367 F.3d at 935-36 (refusal to order an election pursuant to 5 U.S.C. § 7111).

which Local 1709's challenge could be meaningfully reviewed: the negotiated grievance procedure, the negotiability appeal process, or ULP proceedings. Id. at 637-38. But these three avenues cannot generate the relief the Unions seek. Consequently, because none of the factors this Court found determinative in Secretary of the Air Force is present here, that case cannot bar the Unions' claims. JA98-101.

The government likewise distorts Arch Coal, Inc. v. Acosta, 888 F.3d 493 (D.C. Cir. 2018). The government asserts that the Unions' challenges are the same type of intra-scheme complaints that led this Court to find that Arch Coal had jumped the proverbial gun. Gov't Br. 31. But, as the district court understood, Arch Coal centered on a challenge to an agency action, not a Presidential action, that arose directly from the Department of Labor's enforcement of the Black Lung Benefits Act (BLBA). JA95-97.

The Department of Labor commenced administrative proceedings against Arch Coal. Arch Coal sought to contest its liability under the BLBA—the very issue that those administrative proceedings were intended to decide. 888 F.3d at 500. Because Arch Coal's claims fell squarely within the ambit of the BLBA's administrative scheme, this

Court found Arch Coal's challenge foreclosed by the BLBA. In so holding, this Court again recognized that whether an "exclusive" statutory scheme bars district court jurisdiction hinges on whether the claim is one to which the scheme applies. Id. at 498 (quoting Jarkesy, 803 F.3d at 15).

The Statute's scheme does not apply to the Unions' claims. The Unions have not protested a personnel action under the Statute, nor have they challenged an action taken by an agency pursuant to the Statute. See 5 U.S.C. §§ 2302(a)(2)(A), 7103(a)(3). The Unions, as the district court observed, have also not sought relief for an individual employee. The Unions have sought review of whether the President may issue Executive Orders that nullify rights specifically guaranteed under the Statute and that would render the Statute's entire conceptual basis, good-faith bargaining, unrecognizable. Cf. Chertoff, 452 F.3d at 861.

These claims are nothing like the run-of-the-mill determinations found to be foreclosed in Arch Coal or Elgin or Jarkesy. The question of whether the President is empowered by either the Constitution or the Statute to remake the rules of the road that Congress saw fit to enact is

different in kind from the types of routine enforcement and liability questions addressed in those cases. Cf. NTEU v. Devine, 577 F. Supp. 738, 745 (D.D.C. 1983).

The government's reliance on Nyunt v. Chairman, Broadcasting Board of Governors, 589 F.3d 445 (D.C. Cir. 2009), and Sturm Ruger is similarly misplaced. Unlike the Unions' challenges to the Orders' wholesale rejection of the Statute in this case, Nyunt began with a covered personnel action: a covered agency's non-selection of an employee for promotion. 589 F.3d at 447. Nyunt, a U.S. citizen, challenged the agency's basis for his non-selection: the agency's policy interpreting the phrase "suitably qualified" to permit his non-selection in favor of a non-U.S.-citizen. Id. at 448-49. Nyunt's claim was thus one that arose as the direct result of a covered action that fit comfortably in the CSRA's review scheme.

In Sturm Ruger, the Occupational Health and Safety Administration (OSHA) cited Sturm Ruger for health and safety violations discovered during an inspection. 300 F.3d at 869. The company argued the citations were invalid because there was no OSHA regulation authorizing OSHA to collect the data upon which the

inspection had been based. Id. at 870. This Court found that claim to be inextricably intertwined with the company's claim that it was not liable in the ongoing enforcement action arising from OSHA's citations. Id. at 874. Both claims could be resolved through the statutory process. Id.

Because Sturm Ruger challenged an agency enforcement policy and not the validity of a formal regulation, this Court also found its earlier decision in National Mining to be both factually and legally distinct. Id. at 875. The claim in National Mining fell outside the scope of the statute there, while the claim in Sturm Ruger fell within the enforcement and review apparatus of the statute in that case. Id. (quoting National Mining, 292 F.3d at 858).

The district court was therefore on entirely sure footing when it determined that the Union's claims do not fall within the Statute's scope and are distinguishable from the claims at issue in the Elgin and Jarkesy line of cases. JA90-92. The district court was equally right to find that because the Unions' claims are not the type of claims that Congress intended to relegate to the Authority, they are not subject to the Statute's administrative channeling. JA99. As in Free Enterprise

Fund v. Public Company Accounting Oversight Board, the Unions' claims are outside the Authority's "competence and expertise." 561 U.S. 477, 491 (2010). And, as in Free Enterprise, the Unions should not be required to "manufacture a dispute or provoke a sanction" to challenge the Orders' existence as ultra vires. Jarkesy, 803 F.3d at 20 (citing Free Enterprise, 561 U.S. at 490).

The government ultimately misconstrues the jurisdictional inquiry. The relevant point is not that Congress created a statutory scheme. Nor is it that Congress may have intended that scheme to govern matters within its scope. The relevant point is that the Unions' claims do not fall within the Statute's purview. To find otherwise would truncate the analytical framework of Thunder Basin, Elgin, and their progeny down to a single factor: the mere existence of a statutory scheme would foreclose all district court review in every case.

But this is not the rule set by those cases. If it were, then Jarkesy could not coexist with Free Enterprise, both of which arose under the same statute. Jarkesy, 803 F.3d at 20. The key is instead whether the Unions' claims are the type of claims that Congress intended to be reviewed within the Statute's scheme. Because they are not, the

district court correctly determined that the Union's claims are wholly collateral to the Statute's review provisions.

C. The District Court Correctly Determined that the Unions' Claims Are Outside the Authority's Expertise.

The Authority has no specialized experience adjudicating the Unions' challenges to the enjoined Executive Order provisions as ultra vires and invalid. JA101-03. The Authority is in fact unable to adjudicate the heart of the Unions' strictly legal challenges at all. As the district court recognized, the Authority's expertise would thus be of "limited utility" in determining whether the President acted unlawfully—a determination that, by contrast, is "the proverbial bread and butter of the Judicial Branch." JA102-03. Deferring to the Statute's administrative scheme for agency expertise would be unavailing.

Put differently, the Unions raise an entirely different class of claims from those contemplated by the Statute; claims which are independent of any particular set of facts and need only be resolved once. The Unions claim that the Orders are unlawful and challenge their attempt to redefine collective bargaining under the Statute. See National Mining, 292 F.3d at 858. Whatever expertise the Authority

may be said to possess over ULPs and negotiability appeals is beside the point. This is not a claim that may be fairly characterized as a ULP or a negotiability appeal, nor is it a claim that may be parceled out piecemeal into a scheme that lacks the power and expertise to review it in the first place.

Consequently, for all the reasons above, the Unions' claims are not the type of claims that Congress intended to channel through the Statute's administrative scheme.

II. The District Court Correctly Held that the Invalidated Provisions Conflict with Statutory Collective Bargaining Rights.

The undisguised goal of the challenged Executive Orders was to obstruct collective bargaining in the federal sector. The enjoined provisions, individually and collectively, are contrary to the Statute and are aimed at upending the Statute's collective bargaining process by: (1) precluding agencies from negotiating over topics within the statutory duty to bargain; and (2) impeding good-faith bargaining over negotiable topics.

This Court has ruled, however, that unilateral alterations of the Statute's bargaining obligations are impermissible. See Chertoff, 452 F.3d at 860-64. In so holding, this Court set forth three bedrock

principles to determine whether Executive conduct impermissibly alters the Statute. These principles guided the district court's analysis and should likewise inform this Court's review.

First, "the linchpin" of identifying conduct that impermissibly undermines the right to bargain is whether the conduct "strike[s] at the 'core element[s]' of collective bargaining as defined by statute." JA130 (quoting Chertoff, 452 F.3d at 861). Second, the Statute can be contravened by reducing the number of matters that the Statute otherwise makes negotiable. JA130 (citing Chertoff, 452 F.3d at 844, 861-62). Third, an attempt to limit or eliminate the negotiability of the Statute's "permissive" topics of bargaining "eviscerates the statutory right of employees to have an opportunity to discuss certain matters." JA130-31 (citing Chertoff, 452 F.3d at 862).

All three of Chertoff's principles weigh heavily against the enjoined provisions. The "mutual obligation" at the heart of the Statute's definition of collective bargaining would be illusory if matters falling within the statutory duty to bargain were declared by fiat to be off-limits. Chertoff, 452 F.3d at 857. As this Court has cautioned, if the executive branch is permitted to dictate the boundaries of what may be

bargained, it would be positioned to "whittle the scope of bargaining so drastically as to render collective bargaining meaningless." Id. at 861.

Moreover, as this Court has explained, "[a] core element of collective bargaining is a requirement that labor and management bargain in good faith over conditions of employment for purposes of reaching an agreement." Id. True collective bargaining only occurs when "each side's evolving bargaining position[s] . . . reflect a series of trade-offs that move the parties toward a mutually satisfactory end point." Id. at 860. The primary purpose of the Statute is to "protect[] . . . the right of federal workers to have a say with respect to their terms and conditions under which they will be working," and the duty to negotiate in good faith is "fundamental" to the exercise of that right. JA124-25 (emphasis in original).

Thus, this Court has instructed that, for good-faith bargaining, "parties must 'enter into discussions with an open mind and a sincere intention to reach an agreement consistent with the respective rights of the parties.'" United Steelworkers of Am. v. NLRB, 983 F.2d 240, 245 (D.C. Cir. 1993) (quoting Sign & Pictorial Union v. NLRB, 419 F.2d 726,

731 (D.C. Cir. 1969)).[7] In other words, "'[g]ood faith' means more than merely going through the motions of negotiating; it is inconsistent with a predetermined resolve not to budge from an initial position." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (Frankfurter, Clark, and Harlan, JJ., concurring in part and dissenting in part). Hence, the prejudging of negotiable issues precludes true negotiations from taking place. See, e.g., AFGE, Council of Prison Locals 33 and Fed. Bureau of Prisons, 64 F.L.R.A. 288, 290 (2009).

The district court thus correctly determined that the enjoined provisions are contrary to the Statute's text and violate the Statute's core elements of the statutory duty to bargain and the corresponding statutory duty to negotiate in good faith on bargainable topics. JA124-25 (citing Chertoff, 452 F.3d at 861).

A. The District Court Correctly Invalidated Nine Provisions that Violated the Statutory Duty to Bargain by Unilaterally Taking Negotiable Matters off the Bargaining Table.

The Statute contains "a three-tier approach that delineates the boundaries of the parties' statutory duty 'to bargain.'" JA125. It

[7] It is "appropriate" to consider National Labor Relations Act precedent in interpreting the Statute. Turgeon v. FLRA, 677 F.2d 937, 939-40 (D.C. Cir. 1982).

creates mandatory topics of bargaining, establishing a presumptive requirement that agencies and unions must bargain over any "condition of employment." JA125 (citing 5 U.S.C. § 7103(a)(12), (14), and cases). It also identifies "permissive" topics over which a union may seek and an agency may "elect[]" to bargain. JA125 (quoting 5 U.S.C. § 7106(b)(1)). Last, the Statute places some topics off-limits for bargaining. JA126 (noting 5 U.S.C. §§ 7106(a), 7117(a)(1)). The duty to bargain thus encompasses all mandatory topics of bargaining and discussions over the prospect of negotiating permissive topics. JA126.

As discussed below, the district court properly enjoined the Executive Order provisions that conflict with the Statute and contravene Congress's collective bargaining scheme by taking a variety of vital and long-negotiable mandatory and permissive topics off the bargaining table. Chertoff, 452 F.3d at 861. The government does not even dispute that these provisions operate in this manner. Its only retort is its specious argument that Section 7117(a) allows the President to gut the statutory duty to bargain, which the Unions refute in Section III.

1. Official Time Order Section 4(a)(i) Impermissibly Conflicts with Sections 7102(1) and 7131(d) of the Statute.

Section 7102(1) of the Statute guarantees employees the right to act as a representative of a labor organization and "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." Section 7131(d) similarly requires that official time be granted to union representatives and bargaining-unit employees in amounts to which agencies and unions mutually agree. See AFGE Council 214 v. FLRA, 798 F.2d 1525, 1530 (D.C. Cir. 1986) (Council 214).

Direct representational lobbying while on official time is thus permissible under the Statute. See, e.g., U.S. Dep't of the Army, Corps of Engineers and NFFE, Local 259, 52 F.L.R.A. 920, 932 (1997); see also Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives, 29 Op. O.L.C. 179, 181 (2005) (Sections 7102 and 7131(d) give "'express authorization' under 18 U.S.C. § 1913 for union representatives to lobby Members of Congress on representational issues"). As the district court understood, "the right to 'communicate

with Congress is essential . . . because so many fundamental working conditions are directly determined by Congress through legislation.'" JA139 (quoting GSA and NFFE, Local 1705, 9 F.L.R.A. 213, 223 (1982)).

In stark contrast, Section 4(a)(i) of the Official Time Order would absolutely prohibit union representatives from using official time to engage in any lobbying activities, including the direct lobbying of Congress. Thus, without any statutory imprimatur, Section 4(a)(i) would unilaterally remove a statutorily negotiable subject from the collective bargaining table in violation of the duty to bargain.

Given its unilateral imposition, Section 4(a)(i) of the Official Time Order conflicts with the plain language of Sections 7102(1) and 7131(d) of the Statute. Section 4(a)(i) also cannot be squared with Congress's deliberate decision to use the Statute as a vehicle to expand, not diminish, official time. See BATF, 464 U.S. at 101-02.

2. Official Time Order Section 4(a)(ii) Conflicts with Section 7131(d) of the Statute.

Section 4(a)(ii) of the Official Time Order artificially caps the amount of official time that an employee may use at 25% of his or her paid time each fiscal year, even though Congress deliberately omitted any such quantitative cap from Section 7131. See BATF, 464 U.S. at

101-02 (contrasting earlier civil service legislative proposals, which contained limitations on official time, with the enacted legislation, which contains no cap).[8] This 25% cap on official time thus flatly conflicts with Section 7131(d), which, in addition to lacking any cap, mandates that official time shall be granted in mutually agreed-upon amounts.

As the district court recognized, the amount of permissible official time that union representatives may use is no minor matter. With an imposed cap, "the Unions' right to bargain for the official time . . . that contributes to parity in collective bargaining negotiations is significantly diminished," which, "in turn, exacerbates management's advantages over labor and hampers unions' ability to engage effectively in future collective bargaining, contrary to the clearly articulated goals of the [Statute]." JA140.

This Court has recognized as well that, under the Statute, "Congress has provided that the agency and the union together should determine the amount of official time." Council 214, 798 F.2d at 1530

[8] As the government concedes, union representatives could end up with less than 25% in some years because of the extra-statutory calculation imposed by Section 4(a)(ii) of the Order. Gov't Br. 13.

(emphasis added). An imposed cap on official time is unlawful because it prevents the good-faith bargaining that the Statute and Chertoff, 452 F.2d at 861, require.

3. Official Time Order Section 4(a)(iii) Violates the Statute Because Agencies and Unions Must Bargain over Access to Office Space and Other Resources.

Section 4(a)(iii) of the Official Time Order unilaterally takes union access to no-cost or discounted use of government office space or other resources off the bargaining table. Under the Order, such access is prohibited, unless it is generally available to other groups for non-agency business.

This prohibition is inconsistent with the Statute because union access to agency property and other resources has long been a mandatory topic of bargaining. NTEU and IRS, Denver Dist., 24 F.L.R.A. 249, 252 (1986). Union access to worksite space and agency resources allows unions to effectively provide services to the employees the Statute requires them to represent. Such access effectuates the goals and public policy of the Statute: that collective bargaining safeguards the public interest and therefore should be aided. NFFE and GSA, 24 F.L.R.A. 430, 432-33 (1986). In that vein, Section 4(a)(iii)'s

denial of such resources "not generally available for non-agency business" ignores that federal-sector unions are unlike other groups. See 24 F.L.R.A. at 432. Congress granted federal labor organizations special status and broad responsibilities to represent all employees in their bargaining units, not just dues-paying members. 5 U.S.C. § 7114(a).

Because Section 4(a)(iii) takes a "significant matter[]" (JA51) that falls within the statutory duty to bargain off the bargaining table, it illegally contradicts that statutory scheme. JA137. The President lacks the authority to forbid bargaining over critical resources that help unions serve the employees they represent. See Chertoff, 452 F.3d at 860-64.

4. Official Time Order Section 4(a)(iv) Illegally Precludes Bargaining over Reimbursement of Expenses.

Section 4(a)(iv) of the Official Time Order provides, "employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation." However, both the Supreme Court and this Court have agreed that reimbursement of employees' expenses incurred while bargaining on official time falls within the statutory duty to bargain. BATF, 464 U.S.

at 107 n.17; Dep't of Treasury v. FLRA, 836 F.2d 1381, 1385 (D.C. Cir. 1988). The district court thus properly enjoined Section 4(a)(iv), which takes this topic off the bargaining table, in conflict with the statutory duty to bargain. JA68, 140. See Chertoff, 452 F.3d at 860-64.

5. Official Time Order Section 4(a)(v) Impermissibly Conflicts with Section 7131(d) of the Statute.

As explained above, Section 7131(d) requires that official time be granted to union representatives and bargaining-unit employees in amounts that agencies and unions agree to be "reasonable, necessary, and in the public interest." See Council 214, 798 F.2d at 1530 (emphasis omitted) (quoting § 7131(d)). On top of this requirement, the Statute gives certain rights to employees and places certain obligations on their unions, all of which give context and meaning to Section 7131(d)'s guarantee of official time. For example, Section 7102 expressly protects, inter alia, the right of an employee: (a) "to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal"; (b) to act as a representative of a labor organization; and (c) to engage in collective bargaining over conditions of employment through representatives of their choosing.

Section 7114 similarly places a duty on unions to fairly represent all bargaining-unit employees, and requires that unions be given the opportunity to be present at: (a) formal discussions between any agency representative and one or more bargaining-unit employees concerning, inter alia, any grievance; and (b) any investigative examination of a bargaining-unit employee if the employee reasonably believes the interview may result in discipline and the employee requests representation. 5 U.S.C. § 7114(a)(1), (2).

The above provisions thus not only guarantee union representatives official time in mutually agreed-upon amounts, they work together to give effect to the rights and obligations the Statute creates. The Statute balances the duty of fair representation with the availability of official time to give meaning to an employee's right to act as a union representative and to advance the union's representational role; it is through official time that union representatives accomplish their representation of bargaining-unit employees.

In another departure from the Statute's text, structure and purpose, however, Section 4(a)(v) of the Official Time Order would categorically prohibit any employee from using official time to: (a)

prepare or pursue a grievance brought on behalf of a labor organization itself or brought to vindicate a labor organization's institutional interests; or (b) represent another employee. In so doing, Section 4(a)(v) of the Official Time Order is contrary to the plain text of Section 7131(d), which requires that amounts of official time be determined by mutual agreement of unions and agencies.[9]

Put differently, like its Section 4 counterparts, Section 4(a)(v) fails because it would again unilaterally remove a statutorily negotiable subject from the bargaining table. See Chertoff, 452 F.3d at 860-64. By establishing the interdependent statutory rights and obligations above, Congress limited the President's ability to unilaterally restrict official time or change the rights and duties established by the Statute.

[9] Section 4(a)(v) also cannot be saved by subsection 4(a)(v)(1), which provides in pertinent part that official time may not be used for grievances "except where such use is otherwise authorized by law or regulation." To the extent this proviso was meant to refer to official time made available under other authorities, e.g., 5 C.F.R. § 531.410(a)(3) or 29 C.F.R. § 1614.605(b), it does not eliminate Section 4(a)(v)'s conflict with Section 7131(d) of the Statute.

6. Official Time Order Section 4(b) Contravenes the Statute.

Section 4(b) of the Official Time Order requires that employees obtain "advance written authorization from their agency" before they may use official time. But the Statute contains no such preapproval requirement. Instead, in keeping with Section 7131(d)'s plain text, the scheduling of official time is a mandatory subject of bargaining. NTEU and U.S. Dep't of Commerce, Patent and Trademark Office, 52 F.L.R.A. 1265, 1284-86 (1997). In the Authority's view, allowing an agency unilateral control over official time scheduling would amount to allowing the agency to dictate the union's choice of representative, which the Statute does not permit. Id. at 1286.

The district court fully appreciated the significance of Section 4(b), viewing it as the "singular provision . . . that does the most damage to the statutory right to bargain that the [Statute] establishes." JA141. As the district court recognized, "requiring preapproval [of official time] effectively confers upon management the discretion to dictate when, if ever, union employees may use paid time to engage in union activities." Id.

Section 4(b)'s unilateral establishment of a pre-authorization requirement is thus inconsistent with Section 7131(d) and impermissibly prevents agencies and unions from bargaining over a topic that the Statute makes negotiable. See Chertoff, 452 F.3d at 860-64.

7. Removal Procedures Order Section 4(a)'s Restrictions on Grievances Conflict with Congress's Collective Bargaining Scheme.

Section 4(a) of the Removal Procedures Order provides that no agency shall "subject to grievance procedures or binding arbitration disputes concerning: (i) the assignment of ratings of record; or (ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments."

Grievance procedures "exist to 'safeguard the participation rights of individual employees and [] unions[.]'" JA142. Reducing the range of negotiations over the scope of grievance procedures undercuts what Congress intended. See JA142 (quoting AFGE Locals 225, 1504, & 3723 v. FLRA, 712 F.2d 640, 641 (D.C. Cir. 1983)). As this Court has explained, Congress fully embraced a meaningful collective bargaining system that requires both parties to the collective bargaining

relationship to adhere to their "mutual obligation" to engage in real bargaining regarding negotiable conditions of employment. See Chertoff, 452 F.3d at 860-64.

Congress plainly meant for agencies and unions to have discretion to include such topics as challenges to employee ratings and incentive pay in their negotiated grievance procedures. See 5 U.S.C. § 7121(a)(2) (allowing negotiating parties to shape negotiated grievance procedure within bounds provided by Congress). Such challenges fall within Section 7103(a)(9)'s broad definition of "grievance," and they are not among the five matters that Congress has expressly excluded from the negotiated grievance procedure in Section 7121(c).

The district court appropriately recognized the "outsized significance" of the Order's provisions aiming to exclude matters such as performance ratings and incentive pay from negotiated grievance procedures. JA142. These are indeed critically important areas for employees and their unions, who have a strong interest in correcting erroneous or illegal determinations in these spheres. See JA22-23.

For example, an employee's unfavorable assessment could "materially diminish his chances for advancement." Smith v. Sec'y of

Navy, 659 F.2d 1113, 1120 (D.C. Cir. 1981). Additionally, in a reduction in force, agencies must take performance ratings into account when determining which employees are retained. 5 C.F.R. Part 351. Further, being able to challenge ratings or awards "facilitat[es] the protection of other statutory rights," such as fighting discrimination. JA142.

It is thus critical that negotiated grievance procedures in collective bargaining agreements allow for challenges to ratings and incentive awards. JA22-23. The district court properly concluded that taking the inclusion of these matters in a negotiated grievance procedure off the bargaining table violates the statutory duty to bargain. See Chertoff, 452 F.3d at 860-64.

8. Removal Procedures Order Section 4(c) Dictates an Impermissible and Arbitrary Limit on the Length of Performance Improvement Periods.

Section 4(c) of the Removal Procedures Order provides that "no agency shall . . . generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6)" unless "the agency determines in its sole and exclusive discretion that a longer period is necessary."

This section is invalid because it precludes bargaining over a topic—the length of PIPs—that falls within the statutory duty to bargain. See Chertoff, 452 F.3d at 860-64. Indeed, Unions frequently negotiate minimum lengths of PIPs that are longer than 30 days. See, e.g., Patent Office Prof'l Ass'n and PTO, 29 F.L.R.A. 1389, 1403 (1987) (holding that agency must negotiate over union proposal for an improvement period of up to seven pay periods). The proper length of a PIP varies with the nature of an employee's duties (JA25), which is why Congress contemplated that agencies and unions would discuss and negotiate over the appropriate length of a PIP.

The district court appropriately recognized that having a reasonable opportunity to improve is "one of the most important rights" relating to performance-based employment actions. JA143 (quoting Sandland v. GSA, 23 M.S.P.R. 583, 590 (1984)). As it noted, the government has failed to explain "how shutting down any such discussions" on this topic "comports with the [Statute's] requirement that federal workers get a 'say' with respect to their conditions of employment." JA143.

Section 4(c) of the Order suffers from another deficiency: it is contrary to Section 4302(c)(6) of Title 5, which contains no temporal limitation on PIPs. Instead, Section 4302(c)(6) requires that an employee receive "an opportunity to demonstrate acceptable performance" prior to an agency action based upon unsuccessful performance. Office of Personnel Management (OPM) regulations require that this opportunity to improve be a "reasonable" one. 5 C.F.R. § 432.104. Neither Section 4302(c)(6) of Title 5 nor OPM regulations vest agencies with "sole and exclusive discretion," as Section 4(c) of the Order does, to determine the lengths of PIPs. See JA136. Section 4(c) of the Removal Procedures Order thus violates not only the statutory duty to bargain, but also Section 4302(c)(6).

9. Section 6 of the Collective Bargaining Order Improperly Constricts the Scope of Subjects over Which the Statute Allows Bargaining.

Section 6 of the Collective Bargaining Order prohibits agencies from negotiating "over the substance of the subjects set forth" in 5 U.S.C. § 7106(b)(1). This prohibition conflicts with Congress's specific designation of these subjects as permissive topics over which agencies

may choose to bargain. See Dep't of Treasury, IRS and NTEU, 56 F.L.R.A. 393, 395 (2000).

The district court recognized that Section 7106(b)(1)'s designation of permissive subjects of bargaining ensures that federal agencies and unions are "free to approach each other and discuss the prospect of bargaining over" these specified subjects. JA126. Thus, Section 6's prohibition "is not merely an innocuous exercise of management prerogatives," but is instead an evisceration of the "statutory right of employees to have an opportunity to discuss certain matters." JA131. Relying on Chertoff, the district court understood that Section 6 improperly constricts the scope of subjects over which the Statute allows bargaining. Id.

The government mischaracterizes the district court's ruling. At no point did the court declare that the Statute requires some unspecified amount of bargaining over permissive subjects. Gov't Br. 43-44. Instead, the district court, relying on Chertoff, invalidated Section 6 because it eliminates even the "potential" to discuss permissive matters. JA138. As the district court held, Congress intended these subjects to be in one category—subjects over which parties may bargain—whereas

Section 6 moves them into another category—subjects that are non-negotiable. JA152. Neither did the district court misread Chertoff, as the government claims. Gov't Br. 44-45. Faithful to Chertoff's teachings, the district court observed that "[e]ven with respect to one carveout" for permissive bargaining, "the scope of the right to bargain can be 'critical[ly]' restricted." JA144 (quoting Chertoff, 452 F.3d at 862).

The government's reliance on NAGE v. FLRA, 179 F.3d 946 (D.C. Cir. 1999), is misplaced. NAGE involved an Executive Order directing agencies to negotiate over Section 7106(b)(1) subjects. Id. at 948. It did not involve a challenge to the validity of the Executive Order itself. NAGE held only that agencies refusing to obey the Executive Order were not answerable to unions through the Statute's ULP proceedings. Id. That is an entirely different issue than the one decided by the district court. NAGE in no way suggested that the President may "pick off . . . permissive topics of negotiation . . . and put it into the management rights (non-negotiable) bundle." JA152.

The government's attempt to inject a formulaic element into the district court's Chertoff analysis also fails. Gov't Br. 46. The district

court correctly understood that by ordering federal agencies to refuse to bargain over statutorily enumerated permissive subjects, the Collective Bargaining Order impermissibly interferes with the bargaining framework Congress established through the Statute. It makes no difference, as the government claims, that the attempt to preclude permissive bargaining in Chertoff was accompanied by four other categories of illegal provisions. Id. But, even if it did, Section 6 does not stand alone here. It is among thirteen provisions that separately and collectively undermine the statutory bargaining scheme.

As the district court noted, Section 6 contributed to this "whittling down" that Chertoff condemns because it effectively turns permissive subjects into prohibited subjects. JA152. That conclusion echoes Chertoff's reasoning, which held that the Statute "must inform the substantive meaning of collective bargaining," 452 F.3d at 863, and that the challenged rule's transformation of permissive subjects into non-negotiable ones was "critical" in finding that the rule reflected a "flagrant departure from the norms of collective bargaining," id. at 862.

The district court thus correctly determined that Section 6 unlawfully shrinks the scope of bargaining under the Statute by making permissive subjects categorically off-limits.

B. The District Court Correctly Invalidated Four Provisions that Impede the Prospect of Good-Faith Negotiations.

The district court properly invalidated four Executive Order provisions that struck at another "core element" of collective bargaining: the statutory duty of an agency to bargain in "good faith" over negotiable topics. JA125. Through these provisions, the President directs agencies on the bargaining positions that they must "ordinarily" take on critical issues. JA145-47.

For each such provision, the President "announces the endpoint that the agency must strive to achieve." JA146. He then commands that "'[a]gencies shall commit the time and resources necessary' to achieve these objectives." JA146 (citing Collective Bargaining Order § 5(a); Official Time Order § 3(a); Removal Procedures Order § 3). Then, lest the writing on the wall be unclear, the Executive Orders require that if one of the President's specified endpoints is not achieved, the agency must explain its failure to the President. JA146-47 (citing Official Time Order § 3(b); Removal Procedures Order § 3).

1. Good-Faith Bargaining Requires an Open Mind.

a. Provisions through which the President simultaneously tells agencies what positions they should "ordinarily" take, while mandating that they "shall" put in the "time and resources necessary" to achieve his bargaining objectives (JA146-47)— indisputably distort the mindset of agencies and their negotiators. They preclude the "open mind" required for good-faith negotiations. JA147. Indeed, the record shows that, during the brief period in which these now-invalidated provisions were in effect, agencies hurried to make proposals in line with the President's Orders—often for the first time in their bargaining history with a particular union. JA17-18, 21.

The Executive Order provisions that were invalidated because they impeded good-faith negotiations (discussed below) simply codified the President's impermissible prejudgments and served to "effectively remove full negotiation authority from agency officials" in several critical areas that are negotiable under the Statute. JA147. These prejudgments prevent agencies from negotiating with the open mind the Statute requires for good-faith collective bargaining.

b. Instead of challenging the district court's determination that several provisions impeded good-faith negotiations (JA145-50)—the government relies on boilerplate language in the Executive Orders that generically instructs agency negotiators to "bargain in good faith." Gov't Br. 39-40. In the government's view, despite the clear effect of the specific, unlawful provisions, the Executive Orders' pro forma reminder to agencies cures any legal defect that the Orders possess. Id.

These broad "bargain in good faith" clauses must, however, be "read in their context, and they cannot be given effect" when doing so "would override clear and specific language." City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1239-40 (9th Cir. 2018) (citing Shomberg v. United States, 348 U.S. 540, 547-48 (1955)) (rejecting argument that Executive Order language requiring government to act "consistent with law" insulated Order from facial illegality).

As the Ninth Circuit recognized, this Circuit's decision in Building & Construction Trades Department v. Allbaugh, 295 F.3d 28 (D.C. Cir. 2002), on which the government relies (Gov't Br. 39-40), is inapplicable when an Executive Order "unambiguously commands action." Trump, 897 F.3d at 1239-40. A purported savings clause must not be allowed to

"override" the meaning of more specific, offending provisions. Id. To conclude otherwise would "preclud[e] resolution of the critical legal issues" presented by the more specific provisions, rendering judicial review "a meaningless exercise." Id. at 1240.

Thus, the district court was correct to rule that the general Executive Order provisions reminding agencies to "bargain in good faith" did not "abate the conflict" created by the more specific Executive Order provisions "prescribing specified goals and suggesting fixed outcomes while simultaneously flashing the coercive implement of mandatory reporting requirements." JA157. Those more specific provisions—which target, for example, official time and the ability to challenge removals through a negotiated grievance procedure—"wreak[] a kind of damage" on negotiations that a "generalized 'follow the law' directive simply can't undo." Id.

c. The government's other arguments regarding the district court's "good-faith" bargaining rulings miss the point. First, the government argues that the district court's conclusions were erroneous because one must assess the "totality of the circumstances" to determine whether a party has failed to bargain in good faith. Gov't Br.

37-38. That argument misunderstands the nature of the district court's rulings. The district court was not presupposing that all agency negotiators would in fact choose individually to engage in bad-faith bargaining. The court's rulings, instead, were aimed at correcting the President's impermissible disruption of the statutory bargaining relationship between unions and agencies. JA145-50.

Second, the government argues that the district court's rulings were incorrect because "[a]damant insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith . . . . if the insistence is genuinely and sincerely held." Gov't Br. 38 (quoting Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 726 (D.C. Cir. 1990)). But surface bargaining is not good-faith bargaining. JA157.

Moreover, insistence on a bargaining position cannot be "genuinely and sincerely held" if such insistence is based solely on an indiscriminate, broadly targeted mandate that fails to take into account the individualized bargaining-unit needs and context that drive the give-and-take of true negotiation. As the district court held, the sincerity of bargaining positions is not what Congress was primarily concerned with when enacting the Statute. JA129. Rather, the

sincerity in readiness to listen to and consider the other party's proposals "with an open mind and with every intention of coming to a mutually acceptable result" is paramount and protected from interference by Executive Order or any other government directive. Id.

2. Official Time Order Section 3(a) Impedes Good-Faith Bargaining on Official Time.

Section 3(a) of the Official Time Order instructs agencies not to agree to an amount of official time in excess of one hour per bargaining-unit employee covered by the collective bargaining agreement per year. The President directs agencies that anything more than the one-hour rate "should . . . ordinarily not be considered reasonable, necessary or in the public interest," and agencies are told to devote "the time and resources necessary" to achieve the President's desired cap on official time.

This provision is at odds with the Statute because it impedes good-faith bargaining by requiring agency negotiators to "enter into the negotiating arena wielding predetermined goals." JA147. The Executive Orders' "norm-setting provisions"—like Section 3(a)—in reality, put agency negotiators in a "straightjacket." JA146. The agency must take all measures to convince "the union into accepting the

stated term," or else explain to the President "why the agency . . . failed to achieve the goal." JA146-47.[10]

The government erroneously labels mandates like this one as "presumptively reasonable." Gov't Br. 37. That label is based upon nothing more than the government's own public policy misconceptions. As the district court recognized, "preconceived notions of . . . the standard amount of official time to be authorized, are unwarranted, and ultimately unduly restrictive, because there is no such thing as a typical collective bargaining agreement with respect to each of these terms." JA145-46.

In short, Congress did not envision a one-size-fits-all approach to official time. Rather, Congress mandated that such time be negotiated—in good faith, with an open mind—by agencies and unions.

[10] This Court has seen through labels such as "goal setting" or "guidance." See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (concluding agency's so-called "guidance" was instead a final agency decision because it "read like a ukase": "[i]t commands, it requires, it orders, it dictates"). The provisions at issue here have the same effect.

3. Removal Procedures Order Section 3 Illegally Precludes Good-Faith Bargaining over What Can Be Grieved.

Section 3 of the Removal Procedures Order directs agencies to exclude removals from negotiated grievance procedures. Section 3 provides that agency heads "shall" pursue exclusion of removals from negotiated grievance procedures and that "[e]ach agency shall commit the time and resources necessary to achieve this goal." Because this provision "remove[s] full negotiation authority from agency officials" and does not allow for an "open mind" during negotiations, it violates the Statute's requirement of good-faith bargaining. JA147.

A fair negotiated grievance process is fundamental to the civil service scheme. As the district court recognized, Congress "devoted an entire section of the [Statute] to negotiated grievance procedures, 5 U.S.C. § 7121, explicitly granting federal workers (through their representatives) an open-ended right to bargain with management about them." JA139. The Statute explicitly contemplates that such negotiated grievance procedures will allow for challenges to removals. 5 U.S.C. § 7121(e) (employee may challenge a removal through MSPB proceeding or through negotiated grievance procedure). Congress would

not have enshrined an employee's election of remedies in Section 7121(e) only to have the President eliminate an employee's opportunity to make such an election.

The President's edict is incompatible with the broad scope of the grievance procedure that Congress envisioned and Congress's decision to leave it to each agency and union to negotiate, in good faith, the precise parameters of that procedure.

4. Section 5(a) of the Collective Bargaining Order Violates the Statutory Duty to Negotiate in Good Faith.

Section 5(a) of the Collective Bargaining Order imposes arbitrary timelines for bargaining over "ground rules." It also forces agencies to take steps to preclude all but one bargaining approach, thereby contravening the statutory requirement that agencies and unions determine mutually acceptable negotiation techniques.

To approach ground rules bargaining with an entrenched plan to impose a set of rules unilaterally is to violate the duty to bargain in good faith. U.S. Dep't of Justice Exec. Office for Immigration Review and AFGE, Local 286, 61 F.L.R.A. 460, 465 (2006) (holding that an employer's insistence that negotiations take place over e-mail violated the statutory duty to negotiate in good faith). Section 5(a) of the

Collective Bargaining Order nonetheless instructs agencies to limit negotiations over ground rules to six weeks or less, and negotiations over substantive issues to a period between four to six months—despite the fact that the Statute specifically does not set a time limit on negotiations. U.S. Dep't of Transp. and FAA, 48 F.L.R.A. 1211, 1215 (1993). See FAA Nw. Mountain Region Renton, Wash. and NATCA, 51 F.L.R.A. 35, 37 (1995) (noting the difficulty of imposing time limits on federal-sector collective bargaining).

These unilaterally chosen and subjective timelines directly contradict Sections 7114(b)(1) and (b)(3) of the Statute, which require agencies to meet at reasonable times and in convenient places as frequently as may be necessary. By prematurely cutting off bargaining, the government artificially and prematurely creates an environment of impasse. If, however, both parties are still modifying their positions impasse may not be declared. See, e.g., U.S. Dep't of Air Force Space Sys. Div. Los Angeles Air Force Base, Cal. and AFGE, 38 F.L.R.A. 1485, 1502-03 (1991).

As purported support for its claim that these "goals" are "presumptively reasonable," the Government cites In re OPM and

AFGE, Local 32, No. 18 F.S.I.P. 036, 2018 WL 3830148, at *8. (Aug. 3, 2018) (Local 32). Gov't Br. 36. Local 32 is, however, no help to the government. Although the Federal Service Impasses Panel (Panel) in that case imposed a six-month bargaining timeframe, the Panel did not state that such a window would be presumptively reasonable for all agencies in all situations. Instead, the Panel considered the underlying circumstances and found that, in that particular instance, the union's cited scheduling conflict was an insufficient reason to accept the union's proposed timeframe. Id. That fact-specific finding is far different than the rigid approach that the Order would impose. As the district court noted, "there is no such thing as a typical collective bargaining agreement." JA146 (emphasis added).

Nor can Section 5(a)'s timeframes be justified as purely "aspirational." See JA106. Section 5(a)'s plain text commands that agencies "shall" set "reasonable time limits for good-faith negotiations" and defines these "reasonable" time limits as six weeks for ground rules and four to six months for substantive negotiations. Section 5(a) also instructs agencies to "commit the time and resources necessary to achieve these temporal objectives." It further dictates that "any

negotiations to establish ground rules that do not conclude after a reasonable period" (such period being defined by the Order as six weeks in all cases) be advanced to mediation and the Panel "as necessary."

Section 5(a)'s enforcement mechanism, moreover, makes its true, mandatory nature unmistakable. Section 5(b) directs agencies to notify the President of any negotiations that have lasted nine months without submission of an impasse for resolution by the Panel. This reporting requirement can only mean that the words "as necessary" in Section 5(a) must be taken to mean that, in all cases of nine months or greater, submission to the Panel will always be necessary.

The government argues, essentially, that this enforcement mechanism would not result in bad faith because agencies could still negotiate for longer periods—if they explain themselves to the President—though it blithely characterizes that requirement as playing little to no role in an agency negotiator's mindset during bargaining. See Gov't Br. 37. The district court correctly understood that an enforcement mechanism like this one would put agency negotiators in "an impermeable straightjacket." JA146.

The intended and obvious effect of Section 5(a) is to set an arbitrary and mandatory baseline for negotiations for all agencies, rather than allowing agency negotiators to approach the bargaining table with an open mind and a willingness to agree on a timeframe that best suits the particular parties, agencies, and issues involved. This approach is the very definition of bad faith and violates the Statute.

5. Section 5(e) of the Collective Bargaining Order Violates the Statutory Duty to Negotiate in Good Faith and the Duty to Bargain.

Section 5(e) of the Collective Bargaining Order mandates that agencies negotiate only through the robotic exchange of written proposals. This provision violates the duty to bargain because it expressly seeks to eliminate the right of employee representatives to meet and confer and otherwise bargain over a mandatory subject of bargaining. See 5 U.S.C. § 7114(a)(4); AFGE Local 12 and U.S. Dep't of Labor, 60 F.L.R.A. 533, 539 (2004).

The Government characterizes Section 5(e) of the Collective Bargaining Order as a mere statement of a "preference" that unions and agencies exchange written proposals while bargaining—a preference that, it contends, does not undermine the duty to bargain. Gov't Br. 11,

40-42. This characterization is misleading. While the Order states that the agencies "shall request the exchange of written proposals," it also states that "to the extent that an agency's [collective bargaining agreements], ground rules, or other agreements contain requirements for a bargaining approach other than the exchange of written proposals . . . the agency should, at the soonest opportunity, take steps to eliminate them" (emphases added). The impact of this command—which is phrased to compel the elimination of all forms of negotiation save the exchange of written proposals—remains the same.

The government defends Section 5(e) on the basis that it does not mean what it says—that it should be interpreted to mean only that agencies should eliminate rules that would require another bargaining approach. Gov't Br. 40-41. But given a plain reading, the provision is a prime example of encouraging bad-faith bargaining because, much like Section 5(a), it requires agencies to rigidly push for a ground rule that waives the statutory right to meet and confer. See 5 U.S.C. § 7114(b)(3).

Even if this provision were merely a request, the district court was correct in its observation that "even a mere 'request' to conduct

collective bargaining negotiations entirely on paper . . . suggests that the kind of direct and personal contact that has to occur when negotiators are seated around a metaphorical table, discussing workplace conditions, is not welcomed." JA148-49. Such a request thereby discourages what the Statute demands: that negotiators must "meet at reasonable times and convenient places as frequently as may be necessary." JA128-29; 5 U.S.C. § 7114(b)(3).

The government contends that the Authority's decisions support its argument that the district court erred on this point. Gov't Br. 41-42. Yet the only Authority case cited in support of its argument, AFGE Local 12, 60 F.L.R.A. at 541, did not involve a proposal that written proposals be the only form of negotiation, and indeed provided for in-person negotiation sessions between the parties.

III. The District Court Correctly Held that Section 7117 Does Not Authorize the Invalidated Executive Order Provisions.

The district court declared invalid and enjoined certain provisions in the Executive Orders that the government characterizes as "government-wide rules." Gov't Br. 47. On appeal, the government erroneously invokes Section 7117, which states that the duty to bargain

does not extend to topics that are the subject of a government-wide rule or regulation. Gov't Br. 48.

The government points to Section 7117 to justify six "government-wide" rules found in Sections 4(a) and 4(b) of the Official Time Order. Gov't Br. 47. Those provisions take direct aim at the Statute's collective bargaining scheme and, among other things, seek to: unilaterally impose a cap on the use of official time; deny official time for grievance handling; sharply curtail bargaining regarding such things as union office space; and bar the use of official time for lobbying regarding conditions of employment. Also undermining the effectiveness of collective bargaining are other purported government-wide rules found in Sections 4(a) and 4(c) of the Removal Procedures Order. Those rules undermine the effectiveness of collective bargaining by barring access to the grievance procedure for critical issues such as performance ratings and incentive pay.

1. The district court understood that the government's position is without merit. It is a classic exercise in overreach.

A contextual analysis requires an appreciation of the fundamental policies of the Statute as laid out in Section 7101(a)—a critical section

that the government neglects to mention. Section 7101 explains, in no uncertain terms, the "reverence" that Congress had for collective bargaining as reflected in its thoughtful design of the Statute. JA121. Section 7101(a)(1) declares Congress's determination that collective bargaining "safeguards the public interest . . . , contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes between employees and their employers."

Given these underlying policies, it is evident, as the district court observed, that Congress enacted the Statute "to protect and preserve collective bargaining rights" and not to create a statutory regime that would allow the President to unilaterally destroy such rights. JA152. Indeed, Congress undertook to statutorily codify collective bargaining rights because it wanted to override the then-existing state of affairs in which the President controlled those rights. Congress's explicit aim was to create a "statutory Federal labor-management program which cannot be universally altered by any President." 124 Cong. Rec. H9637

(daily ed. Sept. 13, 1978) (statement of Rep. Clay).[11] The government's position, which is founded on a belief in the President's power to act unilaterally, is thus incompatible with Congress's expressed intent.

In considering the reach of Section 7117, the district court asked the key question: why would Congress take such pains to carefully delineate a system of collective bargaining and then insert a provision that would allow the President carte blanche to "pick off" the subjects of bargaining that Congress wanted to enhance? JA152. As the district court pointed out, the government never even tried to answer this question below (JA152), and it now fails to do so on appeal.

2. Instead, the government seeks to dismiss the district court's "fears" by contending that the government's power "to displace collective bargaining" is "limited in important ways." Gov't Br. 55. In support of this assertion, the government says that the rules must be "authorized"; the rules must be promulgated "by an entity with the authority to do so"; the rules must have "general application"; and the

[11] This Court has relied on the statements of "major players in the legislation, such as Representative Clay." OPM v. FLRA, 864 F.2d 165, 169 (D.C. Cir. 1988).

"rules may not be enforced where they conflict with applicable, preexisting collective-bargaining agreements." Gov't Br. 55-56.

These alleged "limitations" are unhelpful to the government because they include no principle limiting the reach of a government-wide rule. The government, therefore, continues to fail to answer the salient question posed by the court below. To quote the district court, "there is no rational explanation for . . . [why] Congress would have intended for the President to have the power to act . . . at all" (JA153), as he has done in the Executive Orders at issue, regarding matters that are indisputably negotiable. "Quite frankly, it is hard to even imagine a rational statutory exception that is intentionally designed to swallow the rule." JA153.

When interpreting a statute, exceptions are to be construed narrowly. See, e.g., Comm'r v. Clark, 489 U.S. 726, 739 (1989); Bernal v. Fainter, 467 U.S. 216, 222 n.7 (1984). But under the interpretation of Section 7117(a)(1) that the government urges, the exception would swallow the rule—in this case, the statutory duty to collectively bargain in good faith on conditions of employment, 5 U.S.C. § 7103(a)(12). See JA155-56. There is simply no sound reason for embracing the

government's improbable view of the Statute—that Congress intended for the President to have a wide-ranging veto authority regarding matters it intended to place within the duty to bargain. JA155-56. This Court should thus reject the government's "[s]pecious" Section 7117(a)(1) argument. JA150.

3. The district court turned to two decisions of this Court to arrive at its interpretation of Section 7117. JA153. First, in OPM, this Court held narrowly that the government could not issue government-wide rules "that merely restate[] a statutorily guaranteed prerogative of management" for the purpose of "render[ing] a bargaining proposal nonnegotiable when the underlying statutory prerogative does not do so." 864 F.2d at 166. In the course of fashioning its decision, this Court made clear that, contrary to the government's position in the instant case, it cannot use Section 7117 to "circumvent" other portions of the Statute. Id. at 168. This Court underscored that Congress did not intend for Section 7117(a)(1) to carry an "expansive reading" or to act as "an omnipotent veto mechanism in the form of government-wide regulations." Id. at 169-70.

The Court's decision in IRS is also instructive regarding the correct application of Section 7117. There, the Court determined that OMB Circular A-76 constituted a government-wide rule. 996 F.2d at 1250. But that rule in no way purported to regulate, on its face or otherwise, collective bargaining or any aspect of the collective bargaining process. See id. at 1248.[12] The Court accordingly ruled that a union could not demand to bargain about a contracting out appeal process embodied in the rule in question based upon a general right to grieve under the Statute. Id. at 1251-52.

Importantly, as the district court explained, the government-wide rule—the Circular—had not been fashioned to "thwart collective bargaining rights"; it was directed instead at an agency contracting out appeal process. JA154-55. In other words, as the district court put it, the Circular had only an "incidental" effect on collective bargaining. JA154-55.

[12] While the government suggests that Council 214 stands for the proposition that it is for the Authority to resolve potential conflicts with Section 7117(a)(1) and Section 7131(d), Council 214 concerned the negotiability of bargaining proposals, not the underlying legality of a government-wide rule. See Council 214, 798 F.2d at 1526.

The instant case stands in contrast to IRS. The "government-wide rules" at issue here would alter and undermine, through direct regulation, fundamental elements of the Statute's collective bargaining regime.[13]

4. The government unsuccessfully tries to bolster its position by noting that certain other Executive Orders—like those that have addressed such things as drug testing and smoking—have been given the effect under Section 7117 of precluding bargaining regarding their subject matters. Gov't Br. 48-49. The nature of those Executive Orders is, of course, far different in character from those at issue in this case. Those Orders were not contrary to the Statute. Nor did they aim, in any way, to regulate unions and the collective bargaining process—let alone systematically overturn the Statute's entire collective bargaining regime, as the Orders at issue aim to do.

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[13] Similar to the Circular in IRS, the regulations at issue in the Authority decision on which the government relies (Gov't Br. 54) plainly were not aimed at restricting collective bargaining. See AFGE Local 3258 and Dep't of Hous. & Urban Dev., 53 F.L.R.A. 1320, 1321 (1998). They were financial disclosure regulations aimed at discerning potential conflicts of interest. Id. The Authority, moreover, concluded that the regulations did not foreclose application of the negotiated grievance procedure. Id. at 1330.

Even apart from the district court's proper categorizations of the government-wide rules at issue in OPM and IRS, the district court also correctly pointed out: "it cannot seriously be maintained that Congress has authorized the President to abrogate the right to 'bargain collectively' as the challenged provisions of the orders do here." JA155. As the district court stated, to permit the President to override the statutory right to bargain would erroneously elevate Section 7117 "far above sections 7101(a) and 7103(a)(12), in a manner that dwarfs Congress's clear efforts to guarantee this right." JA155.

Exemplifying this threat, provisions of the Official Time Order and the Removal Procedures Order would impermissibly "develop[] new management powers not granted by the [Statute]" by preventing bargaining on critical, negotiable topics. IRS, 996 F.2d at 1251. Section 4(c) of the Removal Procedures Order, for instance, would give management the power to determine, in its "sole and exclusive discretion," whether employees receive a PIP longer than 30 days—a determination encompassed by the statutory duty to bargain. Contrary to the government's assertion (Gov't Br. 58), this is one reason why Section 4(c) of the Removal Procedures Order, even if promulgated by

OPM after notice-and-comment rulemaking, could not lawfully eliminate the duty to bargain over PIP longer than 30 days.[14]

5. Finally, the government's implausible position regarding Section 7117 receives no fortification from 5 U.S.C. § 7301, which blandly states that the President may prescribe regulations related to employee conduct. Gov't Br. 50-51. Nor does its vague incantation of Article II (which it did not raise below) advance its cause. Id. at 51. The government points to the unremarkable fact that, prior to the Statute, the President relied on these authorities to issue an Executive Order creating a federal-sector collective bargaining regime. And it asserts that, notwithstanding Congress's commitment to a newly codified collective bargaining system, it nonetheless intended for the President to keep all of his "pre-existing authorities in this area." Gov't Br. 48 (citing Section 904 of the Statute, codified at 5 U.S.C. § 1101 note).

[14] Even if OPM proposed a rule similar to Section 4(c) for notice-and-comment rulemaking, it would be subject to public comment. If adopted as a final rule, it would be subject to challenge under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., as being inconsistent with both the Statute and 5 U.S.C. § 4302(c)(6).

These assertions hold no water. While the President may have once enjoyed wide berth in the area now occupied by the Statute, those days are gone. A contrary view disregards the very point of the Statute: Congress's enactment of a comprehensive federal-sector labor-relations regime. Courts have routinely refused to interpret savings clauses, such as the one codified in the note to 5 U.S.C. § 1101, as preserving authority that would "stand as an obstacle to the accomplishment of the [act's] objectives." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011). "In other words, the act cannot be held to destroy itself." Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

As the district court correctly underscored, the Statute is now in place and cannot be supplanted by executive fiat. JA121. To accept the government's limitless argument would be to conclude that, if the President wanted to issue an Executive Order overriding the Statute and returning federal-sector collective bargaining to the pre-Statute regime, he could do so based upon his undisturbed authority in this area. That cannot be correct.

Finally, the government failed to properly preserve its Article II argument. Gov't Br. 51. In the proceeding below, there was no

apparent "dispute that the President does not have the constitutional authority to override Congress's policy choice." JA77-78. Because the government did not advance its constitutional argument below, this Court should not consider it now. Salazar v. District of Columbia, 602 F.3d 431, 434 (D.C. Cir. 2010). In any event, the government's argument falls flat. It plainly amounts to an erroneous assertion that the President can "take[] measures incompatible with the expressed or implied will of Congress." Youngstown, 343 U.S. at 637 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, the Unions respectfully request that this Court affirm the district court's rulings below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the foregoing document complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font. I further certify that the foregoing document complies with this Court's order dated January 30, 2019, granting Appellees up to 14,500 words for their responsive brief, because it contains 14,462 words, excluding those words exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

/s/ Paras N. Shah

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February 19, 2019 On behalf of Appellees

CERTIFICATE OF SERVICE

I certify that, on February 19, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system. I further certify that the foregoing document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Paras N. Shah

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February 19, 2019 On behalf of Appellees

ADDENDUM

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5 U.S.C. § 4302. Establishment of Performance Appraisal Systems

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

. . . .

(c) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

. . . .

5 U.S.C. § 7101. 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 consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7102. 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.

5 U.S.C. § 7103. Definitions; Application

(a) For the purpose of this chapter --

. . . .

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Printing Office, and the Smithsonian Institution but does not include--

(A) the Government Accountability Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the United States Secret Service and the United States Secret Service Uniformed Division.

. . . .

(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

. . . .

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

. . . .

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise,

affecting working conditions, except that such term does not include policies, practices, and matters--

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

. . . .

5 U.S.C. § 7106. Management Rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7114. 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.

. . . .

5 U.S.C. § 7117. Duty to Bargain in Good Faith; Compelling Need; Duty to Consult

(a)

(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only

if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

. . . .

(c)

(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by--

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall--

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

. . . .

5 U.S.C. § 7121. Grievance Procedures

(a)

(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) (1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that--

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2) (A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

. . . .

(e)

(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

. . . .

5 U.S.C. § 7123. Judicial Review; Enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The

findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

. . . .

5 U.S.C. § 7131. Official Time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of

dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section--

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 C.F.R. § 432.104. Addressing Unacceptable Performance

At any time during the performance appraisal cycle that an employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency should also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance,

the agency shall offer assistance to the employee in improving unacceptable performance.

Presidential Documents

Executive Order 13836 of May 25, 2018

Developing Efficient, Effective, and Cost-Reducing Approaches To Federal Sector Collective Bargaining

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to assist executive departments and agencies (agencies) in developing efficient, effective, and cost-reducing collective bargaining agreements (CBAs), as described in chapter 71 of title 5, United States Code, it is hereby ordered as follows:

Section 1. *Policy*. (a) Section 7101(b) of title 5, United States Code, requires the Federal Service Labor-Management Relations Statute (the Statute) to be interpreted in a manner consistent with the requirement of an effective and efficient Government. Unfortunately, implementation of the Statute has fallen short of these goals. CBAs, and other agency agreements with collective bargaining representatives, often make it harder for agencies to reward high performers, hold low-performers accountable, or flexibly respond to operational needs. Many agencies and collective bargaining representatives spend years renegotiating CBAs, with taxpayers paying for both sides' negotiators. Agencies must also engage in prolonged negotiations before making even minor operational changes, like relocating office space.

(b) The Federal Government must do more to apply the Statute in a manner consistent with effective and efficient Government. To fulfill this obligation, agencies should secure CBAs that: promote an effective and efficient means of accomplishing agency missions; encourage the highest levels of employee performance and ethical conduct; ensure employees are accountable for their conduct and performance on the job; expand agency flexibility to address operational needs; reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not, by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United States Code (management rights). Further, agencies that form part of an effective and efficient Government should not take more than a year to renegotiate CBAs.

Sec. 2. *Definitions*. For purposes of this order:

(a) The phrase "term CBA" means a CBA of a fixed or indefinite duration reached through substantive bargaining, as opposed to (i) agreements reached through impact and implementation bargaining pursuant to sections 7106(b)(2) and 7106(b)(3) of title 5, United States Code, or (ii) mid-term agreements, negotiated while the basic comprehensive labor contract is in effect, about subjects not included in such contract.

(b) The phrase "taxpayer-funded union time" means time granted to a Federal employee to perform non-agency business during duty hours pursuant to section 7131 of title 5, United States Code.

Sec. 3. *Interagency Labor Relations Working Group*. (a) There is hereby established an Interagency Labor Relations Working Group (Labor Relations Group).

(b) *Organization*. The Labor Relations Group shall consist of the Director of the Office of Personnel Management (OPM Director), representatives of participating agencies determined by their agency head in consultation with the OPM Director, and OPM staff assigned by the OPM Director. The OPM Director shall chair the Labor Relations Group and, subject to the availability

of appropriations and to the extent permitted by law, provide administrative support for the Labor Relations Group.

(c) *Agencies*. Agencies with at least 1,000 employees represented by a collective bargaining representative pursuant to chapter 71 of title 5, United States Code, shall participate in the Labor Relations Group. Agencies with a smaller number of employees represented by a collective bargaining representative may, at the election of their agency head and with the concurrence of the OPM Director, participate in the Labor Relations Group. Agencies participating in the Labor Relations Group shall provide assistance helpful in carrying out the responsibilities outlined in subsection (d) of this section. Such assistance shall include designating an agency employee to serve as a point of contact with OPM responsible for providing the Labor Relations Group with sample language for proposals and counter-proposals on significant matters proposed for inclusion in term CBAs, as well as for analyzing and discussing with OPM and the Labor Relations Group the effects of significant CBA provisions on agency effectiveness and efficiency. Participating agencies should provide other assistance as necessary to support the Labor Relations Group in its mission.

(d) *Responsibilities and Functions*. The Labor Relations Group shall assist the OPM Director on matters involving labor-management relations in the executive branch. To the extent permitted by law, its responsibilities shall include the following:

(i) Gathering information to support agency negotiating efforts, including the submissions required under section 8 of this order, and creating an inventory of language on significant subjects of bargaining that have relevance to more than one agency and that have been proposed for inclusion in at least one term CBA;

(ii) Developing model ground rules for negotiations that, if implemented, would minimize delay, set reasonable limits for good-faith negotiations, call for Federal Mediation and Conciliation Service (FMCS) to mediate disputed issues not resolved within a reasonable time, and, as appropriate, promptly bring remaining unresolved issues to the Federal Service Impasses Panel (the Panel) for resolution;

(iii) Analyzing provisions of term CBAs on subjects of bargaining that have relevance to more than one agency, particularly those that may infringe on, or otherwise affect, reserved management rights. Such analysis should include an assessment of term CBA provisions that cover comparable subjects, without infringing, or otherwise affecting, reserved management rights. The analysis should also assess the consequences of such CBA provisions on Federal effectiveness, efficiency, cost of operations, and employee accountability and performance. The analysis should take particular note of how certain provisions may impede the policies set forth in section 1 of this order or the orderly implementation of laws, rules, or regulations. The Labor Relations Group may examine general trends and commonalities across term CBAs, and their effects on bargaining-unit operations, but need not separately analyze every provision of each CBA in every Federal bargaining unit;

(iv) Sharing information and analysis, as appropriate and permitted by law, including significant proposals and counter-proposals offered in bargaining, in order to reduce duplication of efforts and encourage common approaches across agencies, as appropriate;

(v) Establishing ongoing communications among agencies engaging with the same labor organizations in order to facilitate common solutions to common bargaining initiatives; and

(vi) Assisting the OPM Director in developing, where appropriate, Government-wide approaches to bargaining issues that advance the policies set forth in section 1 of this order.

(e) Within 18 months of the first meeting of the Labor Relations Group, the OPM Director, as the Chair of the group, shall submit to the President,

through the Office of Management and Budget (OMB), a report proposing recommendations for meeting the goals set forth in section 1 of this order and for improving the organization, structure, and functioning of labor relations programs across agencies.

Sec. 4. *Collective Bargaining Objectives*. (a) The head of each agency that engages in collective bargaining under chapter 71 of title 5, United States Code, shall direct appropriate officials within each agency to prepare a report on all operative term CBAs at least 1 year before their expiration or renewal date. The report shall recommend new or revised CBA language the agency could seek to include in a renegotiated agreement that would better support the objectives of section 1 of this order. The officials preparing the report shall consider the analysis and advice of the Labor Relations Group in making recommendations for revisions. To the extent permitted by law, these reports shall be deemed guidance and advice for agency management related to collective bargaining under section 7114(b)(4)(C) of title 5, United States Code, and thus not subject to disclosure to the exclusive representative or its authorized representative.

(b) Consistent with the requirements and provisions of chapter 71 of title 5, United States Code, and other applicable laws and regulations, an agency, when negotiating with a collective bargaining representative, shall:

(i) establish collective bargaining objectives that advance the policies of section 1 of this order, with such objectives informed, as appropriate, by the reports required by subsection (a) of this section;

(ii) consider the analysis and advice of the Labor Relations Group in establishing these collective bargaining objectives and when evaluating collective bargaining representative proposals;

(iii) make every effort to secure a CBA that meets these objectives; and

(iv) ensure management and supervisor participation in the negotiating team representing the agency.

Sec. 5. *Collective Bargaining Procedures*. (a) To achieve the purposes of this order, agencies shall begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for FMCS mediation of disputed issues not resolved within those time limits, and, as appropriate, promptly bring remaining unresolved issues to the Panel for resolution. For collective bargaining negotiations, a negotiating period of 6 weeks or less to achieve ground rules, and a negotiating period of between 4 and 6 months for a term CBA under those ground rules, should ordinarily be considered reasonable and to satisfy the ''effective and efficient'' goal set forth in section 1 of this order. Agencies shall commit the time and resources necessary to satisfy these temporal objectives and to fulfill their obligation to bargain in good faith. Any negotiations to establish ground rules that do not conclude after a reasonable period should, to the extent permitted by law, be expeditiously advanced to mediation and, as necessary, to the Panel.

(b) During any collective bargaining negotiations under chapter 71 of title 5, United States Code, and consistent with section 7114(b) of that chapter, the agency shall negotiate in good faith to reach agreement on a term CBA, memorandum of understanding (MOU), or any other type of binding agreement that promotes the policies outlined in section 1 of this order. If such negotiations last longer than the period established by the CBA ground rules -- or, absent a pre-set deadline, a reasonable time -- the agency shall consider whether requesting assistance from the FMCS and, as appropriate, the Panel, would better promote effective and efficient Government than would continuing negotiations. Such consideration should evaluate the likelihood that continuing negotiations without FMCS assistance or referral to the Panel would produce an agreement consistent with the goals of section 1 of this order, as well as the cost to the public of continuing to pay for both agency and collective bargaining representative negotiating teams. Upon the conclusion of the sixth month of any negotiation, the agency head shall receive notice from appropriate agency staff and shall

receive monthly notifications thereafter regarding the status of negotiations until they are complete. The agency head shall notify the President through OPM of any negotiations that have lasted longer than 9 months, in which the assistance of the FMCS either has not been requested or, if requested, has not resulted in agreement or advancement to the Panel.

(c) If the commencement or any other stage of bargaining is delayed or impeded because of a collective bargaining representative's failure to comply with the duty to negotiate in good faith pursuant to section 7114(b) of title 5, United States Code, the agency shall, consistent with applicable law consider whether to:

(i) file an unfair labor practice (ULP) complaint under section 7118 of title 5, United States Code, after considering evidence of bad-faith negotiating, including refusal to meet to bargain, refusal to meet as frequently as necessary, refusal to submit proposals or counterproposals, undue delays in bargaining, undue delays in submission of proposals or counterproposals, inadequate preparation for bargaining, and other conduct that constitutes bad-faith negotiating; or

(ii) propose a new contract, memorandum, or other change in agency policy and implement that proposal if the collective bargaining representative does not offer counter-proposals in a timely manner.

(d) An agency's filing of a ULP complaint against a collective bargaining representative shall not further delay negotiations. Agencies shall negotiate in good faith or request assistance from the FMCS and, as appropriate, the Panel, while a ULP complaint is pending.

(e) In developing proposed ground rules, and during any negotiations, agency negotiators shall request the exchange of written proposals, so as to facilitate resolution of negotiability issues and assess the likely effect of specific proposals on agency operations and management rights. To the extent that an agency's CBAs, ground rules, or other agreements contain requirements for a bargaining approach other than the exchange of written proposals addressing specific issues, the agency should, at the soonest opportunity, take steps to eliminate them. If such requirements are based on now-revoked Executive Orders, including Executive Order 12871 of October 1, 1993 (Labor-Management Partnerships) and Executive Order 13522 of December 9, 2009 (Creating Labor-Management Forums to Improve Delivery of Government Services), agencies shall take action, consistent with applicable law, to rescind these requirements.

(f) Pursuant to section 7114(c)(2) of title 5, United States Code, the agency head shall review all binding agreements with collective bargaining representatives to ensure that all their provisions are consistent with all applicable laws, rules, and regulations. When conducting this review, the agency head shall ascertain whether the agreement contains any provisions concerning subjects that are non-negotiable, including provisions that violate Government-wide requirements set forth in any applicable Executive Order or any other applicable Presidential directive. If an agreement contains any such provisions, the agency head shall disapprove such provisions, consistent with applicable law. The agency head shall take all practicable steps to render the determinations required by this subsection within 30 days of the date the agreement is executed, in accordance with section 7114(c) of title 5, United States Code, so as not to permit any part of an agreement to become effective that is contrary to applicable law, rule, or regulation.

Sec. 6. *Permissive Bargaining*. The heads of agencies subject to the provisions of chapter 71 of title 5, United States Code, may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct subordinate officials that they may not negotiate over those same subjects.

Sec. 7. *Efficient Bargaining over Procedures and Appropriate Arrangements*. (a) Before beginning negotiations during a term CBA over matters addressed by sections 7106(b)(2) or 7106(b)(3) of title 5, United States Code, agencies shall evaluate whether or not such matters are already covered by the

term CBA and therefore are not subject to the duty to bargain. If such matters are already covered by a term CBA, the agency shall not bargain over such matters.

(b) Consistent with section 1 of this order, agencies that engage in bargaining over procedures pursuant to section 7106(b)(2) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute procedures associated with the exercise of management rights, which do not include measures that excessively interfere with the exercise of such rights. Likewise, consistent with section 1 of this order, agencies that engage in bargaining over appropriate arrangements pursuant to section 7106(b)(3) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute appropriate arrangements for employees adversely affected by the exercise of management rights. In such negotiations, agencies shall ensure that a resulting appropriate arrangement does not excessively interfere with the exercise of management rights.

Sec. 8. *Public Accessibility*. (a) Each agency subject to chapter 71 of title 5, United States Code, that engages in any negotiation with a collective bargaining representative, as defined therein, shall submit to the OPM Director each term CBA currently in effect and its expiration date. Such agency shall also submit any new term CBA and its expiration date to the OPM Director within 30 days of its effective date, and submit new arbitral awards to the OPM Director within 10 business days of receipt. The OPM Director shall make each term CBA publicly accessible on the Internet as soon as practicable.

(b) Within 90 days of the date of this order, the OPM Director shall prescribe a reporting format for submissions required by subsection (a) of this section. Within 30 days of the OPM Director's having prescribed the reporting format, agencies shall use this reporting format and make the submissions required under subsection (a) of this section.

Sec. 9. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the OMB Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Nothing in this order shall abrogate any CBA in effect on the date of this order.

(d) The failure to produce a report for the agency head prior to the termination or renewal of a CBA under section 4(a) of this order shall not prevent an agency from opening a CBA for renegotiation.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
May 25, 2018.

[FR Doc. 2018–11913
Filed 5–31–18; 8:45 am]
Billing code 3295–F8–P

Presidential Documents

Executive Order 13837 of May 25, 2018

Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and section 7301 of title 5, United States Code, and to ensure the effective functioning of the executive branch, it is hereby ordered as follows:

Section 1. *Purpose*. An effective and efficient government keeps careful track of how it spends the taxpayers' money and eliminates unnecessary, inefficient, or unreasonable expenditures. To advance this policy, executive branch employees should spend their duty hours performing the work of the Federal Government and serving the public.

Federal law allows Federal employees to represent labor organizations and perform other non-agency business while being paid by American taxpayers (taxpayer-funded union time). The Congress, however, has also instructed the executive branch to interpret the law in a manner consistent with the requirements of an effective and efficient government.

To that end, agencies should ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest. Federal employees should spend the clear majority of their duty hours working for the public. No agency should pay for Federal labor organizations' expenses, except where required by law. Agencies should eliminate unrestricted grants of taxpayer-funded union time and instead require employees to obtain specific authorization before using such time. Agencies should also monitor use of taxpayer-funded union time, ensure it is used only for authorized purposes, and make information regarding its use readily available to the public.

Sec. 2. *Definitions*. For purposes of this order, the following definitions shall apply:

(a) Except for purposes of section 4 of this order, ''agency'' has the meaning given the term in section 7103(a)(3) of title 5, United States Code, but includes only executive agencies. For purposes of section 4 of this order, ''agency'' has the meaning given to ''Executive agency'' in section 105 of title 5, United States Code, but excludes the Government Accountability Office.

(b) ''Agency business'' shall mean work performed by Federal employees, including detailees or assignees, on behalf of an agency, but does not include work performed on taxpayer-funded union time.

(c) ''Bargaining unit'' shall mean a group of employees represented by an exclusive representative in an appropriate unit for collective bargaining under subchapter II of chapter 71 of title 5, United States Code.

(d) ''Discounted use of government property'' means charging less to use government property than the value of the use of such property, as determined by the General Services Administration, where applicable, or otherwise by the generally prevailing commercial cost of using such property.

(e) ''Employee'' has the meaning given the term in section 7103(a)(2) of title 5, United States Code, except for purposes of section 4 of this order, in which case it means an individual employed in an ''Executive

agency,'' according to the meaning given that term in section 105 of title 5, United States Code, but excluding the Government Accountability Office.

(f) ''Grievance'' has the meaning given the term in section 7103(a)(9) of title 5, United States Code.

(g) ''Labor organization'' has the meaning given the term in section 7103(a)(4) of title 5, United States Code.

(h) ''Paid time'' shall mean time for which an employee is paid by the Federal Government, including both duty time, in which the employee performs agency business, and taxpayer-funded union time. It does not include time spent on paid or unpaid leave, or an employee's off-duty hours.

(i) ''Taxpayer-funded union time'' shall mean official time granted to an employee pursuant to section 7131 of title 5, United States Code.

(j) ''Union time rate'' shall mean the total number of duty hours in the fiscal year that employees in a bargaining unit used for taxpayer-funded union time, divided by the number of employees in such bargaining unit.

Sec. 3. *Standards for Reasonable and Efficient Taxpayer-Funded Union Time Usage*. (a) No agency shall agree to authorize any amount of taxpayer-funded union time under section 7131(d) of title 5, United States Code, unless such time is reasonable, necessary, and in the public interest. Agreements authorizing taxpayer-funded union time under section 7131(d) of title 5, United States Code, that would cause the union time rate in a bargaining unit to exceed 1 hour should, taking into account the size of the bargaining unit, and the amount of taxpayer-funded union time anticipated to be granted under sections 7131(a) and 7131(c) of title 5, United States Code, ordinarily not be considered reasonable, necessary, and in the public interest, or to satisfy the ''effective and efficient'' goal set forth in section 1 of this order and section 7101(b) of title 5, United States Code. Agencies shall commit the time and resources necessary to strive for a negotiated union time rate of 1 hour or less, and to fulfill their obligation to bargain in good faith.

(b) (i) If an agency agrees to authorize amounts of taxpayer-funded union time under section 7131(d) of title 5, United States Code, that would cause the union time rate in a bargaining unit to exceed 1 hour (or proposes to the Federal Service Impasses Panel or an arbitrator engaging in interest arbitration an amount that would cause the union time rate in a bargaining unit to exceed 1 hour), the agency head shall report this agreement or proposal to the President through the Director of the Office of Personnel Management (OPM Director) within 15 days of such an agreement or proposal. Such report shall explain why such expenditures are reasonable, necessary, and in the public interest, describe the benefit (if any) the public will receive from the activities conducted by employees on such taxpayer-funded union time, and identify the total cost of such time to the agency. This reporting duty cannot be delegated.

(ii) Each agency head shall require relevant subordinate agency officials to inform the agency head 5 business days in advance of presenting or accepting a proposal that would result in a union time rate of greater than 1 hour for any bargaining unit, if the subordinate agency officials anticipate they will present or agree to such a provision.

(iii) The requirements of this subsection shall not apply to a union time rate established pursuant to an order of the Federal Service Impasses Panel or an arbitrator engaging in interest arbitration, provided that the agency had proposed that the Impasses Panel or arbitrator establish a union time rate of 1 hour or less.

(c) Nothing in this section shall be construed to prohibit any agency from authorizing taxpayer-funded union time as required under sections 7131(a) and 7131(c) of title 5, United States Code, or to direct an agency to negotiate to include in a collective bargaining agreement a term that precludes an agency from granting taxpayer-funded union time pursuant to those provisions.

Sec. 4. *Employee Conduct with Regard to Agency Time and Resources.* (a) To ensure that Federal resources are used effectively and efficiently and in a manner consistent with both the public interest and section 8 of this order, all employees shall adhere to the following requirements:

(i) Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee.

(ii) (1) Except as provided in subparagraph (2) of this subsection, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training (as required by their agency), in order to ensure that they develop and maintain the skills necessary to perform their agency duties efficiently and effectively.

(2) Employees who have spent one-quarter of their paid time in any fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by sections 7131(a) or 7131(c) of title 5, United States Code.

(3) Any time in excess of one-quarter of an employee's paid time used to perform non-agency business in a fiscal year shall count toward the limitation set forth in subparagraph (1) of this subsection in subsequent fiscal years.

(iii) No employee, when acting on behalf of a Federal labor organization, may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems.

(iv) Employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation.

(v) (1) Employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation.

(2) The prohibition in subparagraph (1) of this subsection does not apply to:

(A) an employee using taxpayer-funded union time to prepare for, confer with an exclusive representative regarding, or present a grievance brought on the employee's own behalf; or to appear as a witness in any grievance proceeding; or

(B) an employee using taxpayer-funded union time to challenge an adverse personnel action taken against the employee in retaliation for engaging in federally protected whistleblower activity, including for engaging in activity protected under section 2302(b)(8) of title 5, United States Code, under section 78u–6(h)(1) of title 15, United States Code, under section 3730(h) of title 31, United States Code, or under any other similar whistleblower law.

(b) Employees may not use taxpayer-funded union time without advance written authorization from their agency, except where obtaining prior approval is deemed impracticable under regulations or guidance adopted pursuant to subsection (c) of this section.

(c) (i) The requirements of this section shall become effective 45 days from the date of this order. The Office of Personnel Management (OPM) shall be responsible for administering the requirements of this section. Within 45 days of the date of this order, the OPM Director shall examine whether existing regulations are consistent with the rules set forth in this section. If the regulations are not, the OPM Director shall propose for notice and public comment, as soon as practicable, appropriate regulations to clarify

and assist agencies in implementing these rules, consistent with applicable law.

(ii) The head of each agency is responsible for ensuring compliance by employees within such agency with the requirements of this section, to the extent consistent with applicable law and existing collective bargaining agreements. Each agency head shall examine whether existing regulations, policies, and practices are consistent with the rules set forth in this section. If they are not, the agency head shall take all appropriate steps consistent with applicable law to bring them into compliance with this section as soon as practicable.

(e) Nothing in this order shall be construed to prohibit agencies from permitting employees to take unpaid leave to perform representational activities under chapter 71 of title 5, United States Code, including for purposes covered by section 7121(b)(1)(C) of title 5, United States Code.

Sec. 5. *Preventing Unlawful or Unauthorized Expenditures*. (a) Any employee who uses taxpayer-funded union time without advance written agency authorization required by section 4(b) of this order, or for purposes not specifically authorized by the agency, shall be considered absent without leave and subject to appropriate disciplinary action. Repeated misuse of taxpayer-funded union time may constitute serious misconduct that impairs the efficiency of the Federal service. In such instances, agencies shall take appropriate disciplinary action to address such misconduct.

(b) As soon as practicable, but not later than 180 days from the date of this order, to the extent permitted by law, each agency shall develop and implement a procedure governing the authorization of taxpayer-funded union time under section 4(b) of this order. Such procedure shall, at a minimum, require a requesting employee to specify the number of taxpayer-funded union time hours to be used and the specific purposes for which such time will be used, providing sufficient detail to identify the tasks the employee will undertake. That procedure shall also allow the authorizing official to assess whether it is reasonable and necessary to grant such amount of time to accomplish such tasks. For continuing or ongoing requests, each agency shall require requests for authorization renewals to be submitted not less than once per pay period. Each agency shall further require separate advance authorization for any use of taxpayer-funded union time in excess of previously authorized hours or for purposes for which such time was not previously authorized.

(c) As soon as practicable, but not later than 180 days from the date of this order, each agency shall develop and implement a system to monitor the use of taxpayer-funded union time to ensure that it is used only for authorized purposes, and that it is not used contrary to law or regulation. In developing these systems, each agency shall give special attention to ensuring taxpayer-funded union time is not used for:

(i) internal union business in violation of section 7131(b) of title 5, United States Code;

(ii) lobbying activities in violation of section 1913 of title 18, United States Code, or in violation of section 4(a)(i) of this order; or

(iii) political activities in violation of subchapter III of chapter 73 of title 5, United States Code.

Sec. 6. *Agency Reporting Requirements*. (a) To the extent permitted by law, each agency shall submit an annual report to OPM on the following:

(i) The purposes for which the agency has authorized the use of taxpayer-funded union time, and the amounts of time used for each such purpose;

(ii) The job title and total compensation of each employee who has used taxpayer-funded union time in the fiscal year, as well as the total number of hours each employee spent on these activities and the proportion of each employee's total paid hours that number represents;

(iii) If the agency has allowed labor organizations or individuals on taxpayer-funded union time the free or discounted use of government property, the total value of such free or discounted use;

(iv) Any expenses the agency paid for activities conducted on taxpayer-funded union time; and

(v) The amount of any reimbursement paid by the labor organizations for the use of government property.

(b) Agencies shall notify the OPM Labor Relations Group established pursuant to the Executive Order entitled ''Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining'' of May 25, 2018, if a bargaining unit's union time rate exceeds 1 hour.

(c) If an agency's aggregate union time rate (i.e., the average of the union time rates in each agency bargaining unit, weighted by the number of employees in each unit) has increased overall from the last fiscal year, the agency shall explain this increase in the report required under subsection (a) of this section.

(d) The OPM Director shall set a date by which agency submissions under this section are due.

Sec. 7. *Public Disclosure and Transparency*. (a) Within 180 days of the date of this order, the OPM Director shall publish a standardized form that each agency shall use in preparing the reports required by section 6 of this order.

(b) OPM shall analyze the agency submissions under section 6 of this order and produce an annual report detailing:

(i) for each agency and for agencies in the aggregate, the number of employees using taxpayer-funded union time, the number of employees using taxpayer-funded union time separately listed by intervals of the proportion of paid time spent on such activities, the number of hours spent on taxpayer-funded union time, the cost of taxpayer-funded union time (measured by the compensation of the employees involved), the aggregate union time rate, the number of bargaining unit employees, and the percentage change in each of these values from the previous fiscal year;

(ii) for each agency and in the aggregate, the value of the free or discounted use of any government property the agency has provided to labor organizations, and any expenses, such as travel or per diems, the agency paid for activities conducted on taxpayer-funded union time, as well as the amount of any reimbursement paid for such use of government property, and the percentage change in each of these values from the previous fiscal year;

(iii) the purposes for which taxpayer-funded union time was granted; and

(iv) the information required by section 6(a)(ii) of this order for employees using taxpayer-funded union time, sufficiently aggregated that such disclosure would not unduly risk disclosing information protected by law, including personally identifiable information.

(c) The OPM Director shall publish the annual report required by this section by June 30 of each year. The first report shall cover fiscal year 2019 and shall be published by June 30, 2020.

(d) The OPM Director shall, after consulting with the Chief Human Capital Officers designated under chapter 14 of title 5, United States Code, promulgate any additional guidance that may be necessary or appropriate to assist the heads of agencies in complying with the requirements of this order.

Sec. 8. *Implementation and Renegotiation of Collective Bargaining Agreements*. (a) Each agency shall implement the requirements of this order within 45 days of the date of this order, except for subsection 4(b) of this order, which shall be effective for employees at an agency when such agency implements the procedure required by section 5(b) of this order, to the

extent permitted by law and consistent with their obligations under collective bargaining agreements in force on the date of this order. The head of each agency shall designate an official within the agency tasked with ensuring implementation of this order, and shall report the identity of such official to OPM within 30 days of the date of this order.

(b) Each agency shall consult with employee labor representatives about the implementation of this order. On the earliest date permitted by law, and to effectuate the terms of this order, any agency that is party to a collective bargaining agreement that has at least one provision that is inconsistent with any part of this order shall give any contractually required notice of its intent to alter the terms of such agreement and either reopen negotiations and negotiate to obtain provisions consistent with this order, or subsequently terminate such provision and implement the requirements of this order, as applicable under law.

Sec. 9. *General Provisions*. (a) Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.

(b) Nothing in this order shall be construed to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under chapter 71 of title 5, United States Code, or encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

(c) Nothing in this order shall be construed to impair or otherwise affect the authority granted by law to an executive department or agency, or the head thereof.

(d) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(f) If any provision of this order, including any of its applications, is held to be invalid, the remainder of this order and all of its other applications shall not be affected thereby.

THE WHITE HOUSE,
May 25, 2018.

[FR Doc. 2018–11916
Filed 5–31–18; 8:45 am]
Billing code 3295–F8–P

Presidential Documents

Executive Order 13839 of May 25, 2018

Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 1104(a)(1), 3301, and 7301 of title 5, United States Code, and section 301 of title 3, United States Code, and to ensure the effective functioning of the executive branch, it is hereby ordered as follows:

Section 1. *Purpose*. Merit system principles call for holding Federal employees accountable for performance and conduct. They state that employees should maintain high standards of integrity, conduct, and concern for the public interest, and that the Federal workforce should be used efficiently and effectively. They further state that employees should be retained based on the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards. Unfortunately, implementation of America's civil service laws has fallen far short of these ideals. The Federal Employee Viewpoint Survey has consistently found that less than one-third of Federal employees believe that the Government deals with poor performers effectively. Failure to address unacceptable performance and misconduct undermines morale, burdens good performers with subpar colleagues, and inhibits the ability of executive agencies (as defined in section 105 of title 5, United States Code, but excluding the Government Accountability Office) (agencies) to accomplish their missions. This order advances the ability of supervisors in agencies to promote civil servant accountability consistent with merit system principles while simultaneously recognizing employees' procedural rights and protections.

Sec. 2. *Principles for Accountability in the Federal Workforce*. (a) Removing unacceptable performers should be a straightforward process that minimizes the burden on supervisors. Agencies should limit opportunity periods to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, to the amount of time that provides sufficient opportunity to demonstrate acceptable performance.

(b) Supervisors and deciding officials should not be required to use progressive discipline. The penalty for an instance of misconduct should be tailored to the facts and circumstances.

(c) Each employee's work performance and disciplinary history is unique, and disciplinary action should be calibrated to the specific facts and circumstances of each individual employee's situation. Conduct that justifies discipline of one employee at one time does not necessarily justify similar discipline of a different employee at a different time -- particularly where the employees are in different work units or chains of supervision -- and agencies are not prohibited from removing an employee simply because they did not remove a different employee for comparable conduct. Nonetheless, employees should be treated equitably, so agencies should consider appropriate comparators as they evaluate potential disciplinary actions.

(d) Suspension should not be a substitute for removal in circumstances in which removal would be appropriate. Agencies should not require suspension of an employee before proposing to remove that employee, except as may be appropriate under applicable facts.

(e) When taking disciplinary action, agencies should have discretion to take into account an employee's disciplinary record and past work record, including all past misconduct -- not only similar past misconduct. Agencies should provide an employee with appropriate notice when taking a disciplinary action.

(f) To the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75 of title 5, United States Code, within 15 business days of the end of the employee reply period following a notice of proposed removal.

(g) To the extent practicable, agencies should limit the written notice of adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code.

(h) The removal procedures set forth in chapter 75 of title 5, United States Code (Chapter 75 procedures), should be used in appropriate cases to address instances of unacceptable performance.

(i) A probationary period should be used as the final step in the hiring process of a new employee. Supervisors should use that period to assess how well an employee can perform the duties of a job. A probationary period can be a highly effective tool to evaluate a candidate's potential to be an asset to an agency before the candidate's appointment becomes final.

(j) Following issuance of regulations under section 7 of this order, agencies should prioritize performance over length of service when determining which employees will be retained following a reduction in force.

Sec. 3. *Standard for Negotiating Grievance Procedures*. Whenever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under section 7121 of title 5, United States Code, any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance. Each agency shall commit the time and resources necessary to achieve this goal and to fulfill its obligation to bargain in good faith. If an agreement cannot be reached, the agency shall, to the extent permitted by law, promptly request the assistance of the Federal Mediation and Conciliation Service and, as necessary, the Federal Service Impasses Panel in the resolution of the disagreement. Within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal, the agency head shall provide an explanation to the President, through the Director of the Office of Personnel Management (OPM Director).

Sec. 4. *Managing the Federal Workforce*. To promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service, to the extent consistent with law, no agency shall:

(a) subject to grievance procedures or binding arbitration disputes concerning:

(i) the assignment of ratings of record; or

(ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments;

(b) make any agreement, including a collective bargaining agreement:

(i) that limits the agency's discretion to employ Chapter 75 procedures to address unacceptable performance of an employee;

(ii) that requires the use of procedures under chapter 43 of title 5, United States Code (including any performance assistance period or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under section 4302(c)(6) of title 5, United States Code), before removing an employee for unacceptable performance; or

(iii) that limits the agency's discretion to remove an employee from Federal service without first engaging in progressive discipline; or

(c) generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance.

Sec. 5. *Ensuring Integrity of Personnel Files*. Agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

Sec. 6. *Data Collection of Adverse Actions*. (a) For fiscal year 2018, and for each fiscal year thereafter, each agency shall provide a report to the OPM Director containing the following information:

(i) the number of civilian employees in a probationary period or otherwise employed for a specific term who were removed by the agency;

(ii) the number of civilian employees reprimanded in writing by the agency;

(iii) the number of civilian employees afforded an opportunity period by the agency under section 4302(c)(6) of title 5, United States Code, breaking out the number of such employees receiving an opportunity period longer than 30 days;

(iv) the number of adverse personnel actions taken against civilian employees by the agency, broken down by type of adverse personnel action, including reduction in grade or pay (or equivalent), suspension, and removal;

(v) the number of decisions on proposed removals by the agency taken under chapter 75 of title 5, United States Code, not issued within 15 business days of the end of the employee reply period;

(vi) the number of adverse personnel actions by the agency for which employees received written notice in excess of the 30 days prescribed in section 7513(b)(1) of title 5, United States Code;

(vii) the number and key terms of settlements reached by the agency with civilian employees in cases arising out of adverse personnel actions; and

(viii) the resolutions of litigation about adverse personnel actions involving civilian employees reached by the agency.

(b) Compilation and submission of the data required by subsection (a) of this section shall be conducted in accordance with all applicable laws, including those governing privacy and data security.

(c) To enhance public accountability of agencies for their management of the Federal workforce, the OPM Director shall, consistent with applicable law, publish the information received under subsection (a) of this section, at the minimum level of aggregation necessary to protect personal privacy. The OPM Director may withhold particular information if publication would unduly risk disclosing information protected by law, including personally identifiable information.

(d) Within 60 days of the date of this order, the OPM Director shall issue guidance regarding the implementation of this section, including with respect to any exemptions necessary for compliance with applicable law and the reporting format for submissions required by subsection (a) of this section.

Sec. 7. *Implementation*. (a) Within 45 days of the date of this order, the OPM Director shall examine whether existing regulations effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order. To the extent necessary or appropriate, the OPM Director shall, as soon as practicable, propose for notice and public

comment appropriate regulations to effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order.

(b) The head of each agency shall take steps to conform internal agency discipline and unacceptable performance policies to the principles and requirements of this order. To the extent consistent with law, each agency head shall:

(i) within 45 days of this order, revise its discipline and unacceptable performance policies to conform to the principles and requirements of this order, in areas where new final Office of Personnel Management (OPM) regulations are not required, and shall further revise such policies as necessary to conform to any new final OPM regulations, within 45 days of the issuance of such regulations; and

(ii) renegotiate, as applicable, any collective bargaining agreement provisions that are inconsistent with any part of this order or any final OPM regulations promulgated pursuant to this order. Each agency shall give any contractually required notice of its intent to alter the terms of such agreement and reopen negotiations. Each agency shall, to the extent consistent with law, subsequently conform such terms to the requirements of this order, and to any final OPM regulations issued pursuant to this order, on the earliest practicable date permitted by law.

(c) Within 15 months of the adoption of any final rules issued pursuant to subsection (a) of this section, the OPM Director shall submit to the President a report, through the Director of the Office of Management and Budget, evaluating the effect of those rules, including their effect on the ability of Federal supervisors to hold employees accountable for their performance.

(d) Within a reasonable amount of time following the adoption of any final rules issued pursuant to subsection (a) of this section, the OPM Director and the Chief Human Capital Officers Council shall undertake a Government-wide initiative to educate Federal supervisors about holding employees accountable for unacceptable performance or misconduct under those rules.

Sec. 8. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) Agencies shall consult with employee labor representatives about the implementation of this order. Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) If any provision of this order, including any of its applications, is held to be invalid, the remainder of this order and all of its other applications shall not be affected thereby.

THE WHITE HOUSE,
May 25, 2018.

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