IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS AFFAIRS COUNCIL,

Plaintiff,

v.

FEDERAL SERVICE IMPASSES PANEL; MARK ANTHONY CARTER, In his official capacity as Chairman of the Federal Service Impasses Panel; and FEDERAL LABOR RELATIONS AUTHORITY,

Defendants,

and

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Intervenor-Defendant.

Case No. 20-cv-837-CJN

PLAINTIFF NATIONAL VETERANS AFFAIRS COUNCIL'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff National Veterans Affairs Council ("Plaintiff" or "NVAC") respectfully requests a preliminary injunction to maintain the status quo and prevent the Federal Service Impasses Panel ("Panel", "Impasses Panel", or "FSIP") from issuing a binding, nonreviewable decision imposing contract terms upon Plaintiff while this litigation proceeds. The Panel has asserted jurisdiction over NVAC's contract dispute with the Department of Veterans Affairs ("VA"). Briefing will be complete on July 5, 2020, after which the Panel will be free to issue a decision imposing contract terms upon the roughly 350,000 VA employees who provide care and services for the nation's veterans. Once issued, the decision will not be subject to administrative or judicial review.

The Panel, a dispute resolution entity within the Federal Labor Relations Authority ("FLRA" or the "Authority"), wields enormous power. Operating without supervision from any individual or entity, the Panel resolves labor disputes, often by imposing contract terms on the parties that are binding for the life of the contract. Its decisions, once issued, are final and nonreviewable. Moreover, the Panel can radically alter the working conditions of VA employees, imposing provisions on matters such as the degree to which VA employees may telework, when union officials may use "official time" to perform union functions (including aiding employees at disciplinary hearings, and meeting with employees), excluding certain topics from grievance procedures, and restricting how employees use leave. Despite their unsupervised and unchecked power, none of the Panel's members were appointed with the advice and consent of the Senate.

As discussed below, NVAC has a high likelihood of success on the merits. First, the appointment of the Panel's members was not made in accordance with the Appointments Clause of the U.S. Constitution, which requires that principal officers first be nominated by the President and then confirmed to their positions "by and with the Advice and Consent of the Senate," U.S. Const. Art. II, § 2, Cl. 2. The Appointments Clause "serves both to curb Executive abuses of the

appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond v. United States*, 520 U.S. 651, 659-60 (1997) (quoting The Federalist No. 76, at 386–387). The Panel operates without supervision and issues decisions binding upon the parties before it without administrative or judicial review. And the authorizing statute provides that Panel members can only be removed by the President (notwithstanding a recent attempt to head off an Appointments Clause challenge by attempting to delegate removal authority to the FLRA). *See* 5 U.S.C. § 7119(c)(3). Because the Panel's members are "principal officers" whose appointments require Senate confirmation, their appointments are constitutionally invalid. Given this plain and obvious constitutional defect, NVAC's likelihood of success is substantial on the Appointments Clause issue alone.

In addition, the Panel members were not appointed "*solely* on the basis of fitness to perform the duties and functions involved" from among individuals "who are familiar with government operations and knowledgeable in labor-management relations." *See* 5 U.S.C. § 7119(c)(2) (emphasis added). Congress intended that the Panel be an impartial body made up of unbiased individuals skilled in dispute resolution or arbitration. The current appointments fail on both counts. None of its members are certified neutrals or arbitrators, and many of them continue to work actively against public unions while serving on the Panel. The Panel's membership not only fails to meet the "fitness" requirement of the statute, but also deprives NVAC of its right under the Due Process Clause to an unbiased decisionmaker.

NVAC's high likelihood of success—the "most important factor," *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) —warrants granting the injunction. But the remaining factors support an injunction as well. Absent an injunction, NVAC will be subject to the jurisdiction of an improperly constituted Panel, and face an imminent decision that will be administratively and

judicially unreviewable. In addition, once the Panel issues a decision, defendants likely will assert, as they have in other litigation,[1] that this court lacks jurisdiction because NVAC is challenging an unreviewable decision of the Panel.

Defendants, with no vested interest in a prompt decision, will not suffer any injury from an injunction. Nor will the VA, which has been operating under the current collective bargaining agreement since the initial term expired in March 2014. An injunction would also serve the public interest, vindicating the important constitutional principles furthered by the Appointments Clause and the due process requirement of impartial tribunals.

The court therefore should grant the injunction to prevent irreparable harm to those whose labor-management contracts are likely to be radically altered by this Panel's imminent ruling.

STATEMENT OF FACTS

I. The Federal Service Labor-Management Relations Statute.

Congress enacted the Federal Service Labor-Management Relations Statute (the "Statute") as Title VII of the Civil Service Reform Act of 1978 (the "CSRA" or "Act"). *See* 5 U.S.C. §§ 7101-7135. The Statute established "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco & Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 91 (1983).

The Statute declares that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101 (a)(2). Its purpose is to prescribe rights and obligations of federal employees and establish procedures "to meet the special requirements and needs of the Government" "consistent with . . . an effective and efficient Government." *Id*. § 7101(b). The

[1] *See* Mot. to Dismiss for Lack of Jurisdiction, *Am. Fed. Of Gov't Emps. v. Federal Service Impasses Panel*, No. 1:19-cv-01934, ECF No. 20; Mot. to Dismiss for Lack of Jurisdiction, *Ass'n of Admin. Law Judges v. Federal Service Impasses Panel*, No. 1:21-cv-01026, ECF No. 22.

Statute grants federal employees the express right "'to form, join, or assist any labor organization, or to refrain from any such activity,' [*id.*] § 7102, and imposes on federal agencies and labor organizations a duty to bargain collectively in good faith." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 92 (citing 5 U.S.C. § 7116(a)(5) and (b)(5)). In establishing these requirements, Congress found that protecting employees' right to organize "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a)(1)(C).

The Statute established the FLRA to "provide leadership in establishing policies and guidance relating to matters" under the Act. 5 U.S.C. § 7105(a)(1) . Members of the FLRA are "appointed by the President by and with the advice and consent of the Senate," and may be removed "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 7104(b) . The Authority may promulgate regulations, issue guidance, determine the appropriateness of bargaining units, supervise labor organization elections, and adjudicate disputes arising under the Civil Service Reform Act, including appeals from unfair-labor-practice disputes. *See id.* § 7105(a)(2). Any person "aggrieved by any final order" of the FLRA may petition for judicial review in the federal circuit court in which the person resides or transacts business, or in the D.C. Circuit. *Id.* § 7123(a) .

The General Counsel of the FLRA is also appointed by the President with the advice and consent of the Senate. *Id*. § 7104 (f)(1). The statute gives the General Counsel authority separate from that of the FLRA. *Turgeon v. Fed. Labor Relations Auth.*, 677 F.2d 937, 939 n.4 (D.C. Cir. 1982). The General Counsel may "investigate alleged unfair labor practices under this chapter," and "file and prosecute complaints under this chapter." *Id*. § 7104(f)(2). "The General Counsel is the only person given authority to issue unfair labor practice complaints." *Turgeon*, 677 F.2d at

939 n.4. The General Counsel's decision whether to issue an unfair labor practice complaint is not subject to judicial review. *Id.* The position of General Counsel of the FLRA has been vacant since November 16, 2017.

II. The Federal Service Impasses Panel.

The Federal Service Impasses Panel is "an entity within the [FLRA], the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives." 5 U.S.C. § 7119(c)(1). The Panel "shall be composed of a Chairman and at least six other members." *Id.* § 7119(c)(2). It "serves as a forum of last resort in the speedy resolution of disputes . . . after negotiations have failed." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1257-58 (D.C. Cir. 2006) ("*NATCA I*") (internal quotation marks and citation omitted).

The Impasses Panel has a substantial amount of authority to resolve federal labor disputes. It is empowered to "assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section." 5 U.S.C. § 7119(c)(5)(A). When an agency and its employees' labor representative reach an impasse in negotiations, either party may request that the Panel resolve the dispute. *Id.* § 7119(b)(1). The Panel must "promptly investigate any impasse presented to it," *id.* § 7119(c)(5)(A), and then "either (1) [d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction" or "(2) [a]ssert jurisdiction," 5 C.F.R. § 2471.6 (a).

After asserting jurisdiction, the Panel may use dispute resolution techniques to resolve the impasse. *See* 5 U.S.C. § 7119(c)(5); 5 C.F.R. §§ 2471.1, 2471.6. If the parties do not reach an agreement, the Panel may hold hearings, administer oaths, take testimony or depositions, issue subpoenas, or "take whatever action is necessary and not inconsistent with this chapter to resolve

the impasse." 5 U.S.C. § 7119(c)(5)(B). The Panel's final action "shall be binding on [the] parties during the term of the agreement, unless the parties agree otherwise," 5 U.S.C. § 7119(5)(C). The Panel's decisions therefore are final and not subject to judicial review. *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984). The failure to comply with a Panel decision, however, constitutes an unfair labor practice. *See* 5 U.S.C. § 7116 (a)(6), (8), (b)(6), (8).

III. The Appointment of Panel Members and the Panel's History as a Neutral Arbiter.

Recognizing the broad authority given to the Panel, Congress sought to ensure that Panel members would be neutral arbiters skilled at resolving labor disputes without favoring either side. Thus, the Act provides that Panel members "shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with government operations and knowledgeable in labor-management relations." 5 U.S.C. § 7119(c)(2).

President Nixon established the first Panel in 1969 by executive order, following the report and recommendations of a study chaired by then-Secretary of Labor George P. Shultz. Exec. Order No. 11491, 34 Fed. Reg. 17605 (October 29, 1969) §§ 5, 17. The report specified that the Panel "*should be above all an impartial body*, each of whose members will be concerned with the public interest rather than with the special interests of either party to an impasse." Study Committee Report and Recommendations, August 1969 (the "*Shultz Report*"), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT, 96th Cong., 1st Sess. (Comm. Print 1979), at 1218-43 (emphasis added) (attached as Exhibit A to Declaration of Matthew M. Collette, filed simultaneously with this motion).

When President Nixon appointed the first Panel in July 1970, all seven members had "backgrounds as neutrals in labor relations" and "extensive arbitration and/or mediation

experience." Frederic Freilicher, *The Resolution of Negotiation Impasses in the Federal Service*, 23 CATH. U. L. REV. 1, 11 (1974). None were affiliated with either management or labor. *Id.*

Congress designed the Panel as a neutral arbiter to resolve impasses when the Federal Mediation and Conciliation Service or any other third-party mediation entity failed. 5 U.S.C. § 7119(b)(1)-(2). The first Panel following the passage of the CSRA, appointed by President Carter, continued to reflect the understanding that the Panel should consist of neutral arbiters. All seven members of the Carter Panel were experienced arbitrators, with extensive backgrounds in labor-management relations. Howard G. Gamser, *Statement of the Federal Service Impasses Panel*, General Oversight on Civil Service Agencies: Hearing Before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, House of Representatives (September 22, 1981) (stating that "[a]ll of the members are experienced arbitrators . . . whose presence lends acceptance and credibility to the Panel's decisionmaking") (Collette Decl. Ex. B); Annual Report – Federal Service Impasses Panel (1978) ("All of these individuals . . . are arbitrators with varied backgrounds in the fields of law and economics, and have extensive experience in labor-management relations) (Collette Decl. Ex. C); *see also* Federal Service Impasses Panel, Information Release (January 16, 1990) (noting Jean McKelvey and Irving Bernstein's affiliations with the National Academy of Arbitrators) (Collette Decl. Ex. D); https://www.presidency.ucsb.edu/documents/federal-service-impasses-panel-appointment-seven-members (noting Arthur Stark's presidency of the National Academy of Arbitrators) (Collette Decl. Ex. E).

Of the nine members who served on the Impasses Panel during the administration of President Clinton, seven had "extensive backgrounds in neutral dispute mediation." Alyssa Rosenberg, *At an Impasse*, GOV'T EXEC. (July 15, 2007) (Collette Decl. Ex. F). Under the Obama

Administration, all eight members of the Panel were certified neutrals with membership in at least one professional arbitration organization such as the American Arbitration Association. Press Release, *President Obama Announces More Key Administration Posts*, White House (September 14, 2009) (Collette Decl. Ex. G).

Beverly Schaffer, one of the original members of the first Panel established following the passage of the Act, noted that "[w]hile the Statute permits the President to remove any member of the Panel at will, it also establishes professional qualifications for members and specific terms of office. Any attempt to politicize the Panel will likely result in a serious diminution of the Panel's effectiveness in resolving negotiation impasses and redound to the detriment of the labor-management relations program." Beverly K. Schaffer, *Negotiation Impasses: The Road to Resolution*, 47 J. AIR L. & COM. 281, 285 n.21 (1982). Unfortunately, politicizing the Panel is precisely what the present Administration has done, to the predicted detriment of labor-management relations in the federal government.

IV. The Current Membership of the Panel.

In May 2017, President Donald J. Trump unilaterally removed all members of the Panel. The President appointed the existing members of the Panel between July 2017 and March 2020.

The current members of the Impasses Panel are Karen M. Czarnecki, Andrea Fischer Newman, David R. Osborne, Jonathan Riches, F. Vincent Vernuccio, Robert J. Gilson, Maxford Nelsen, Michael Lucci, Patrick Wright, and Chairman Mark Anthony Carter. *The Federal Service Impasses Panel Biographies*, Fed. Lab. Relations Auth. (Collette Decl. Ex. H). All Panel members serve part-time, engaging in private endeavors while not working for the Panel.

All of the Panel members were appointed by the President without the advice or consent of the Senate. Under the statute, Panel members may be removed by the President. 5 U.S.C § 7119(c)(3) ("Any member of the Panel may be removed by the President."). On November 12,

2019, however, the President issued a Memorandum purporting to delegate his statutory removal authority to the FLRA. *See* Presidential Memorandum on the Delegation of Removal Authority Over the Federal Service Impasses Panel, 84 Fed. Reg. 63789 (November 12, 2019) (Collette Decl. Ex. I).

The current Panel members were not chosen "solely" on the basis of their fitness to perform the functions of the office as required by the statute. None of the current members are certified neutrals. Many of them lack even basic experience in federal labor-management relations. And those that have experience have betrayed either bias or conflicts of interest so severe that Plaintiff is deprived of its fundamental right to a neutral arbiter.

For instance, David R. Osborne is the President and General Counsel of the Fairness Center, a nonprofit that he helped launch in 2014 that "provides free legal services to those hurt by public-sector union officials." The Fairness Center - About (Collette Decl. Ex. J). Since assuming his role on the Panel, he has continued to represent plaintiffs suing public employee unions for alleged "violations of their First and Fourteenth Amendment rights as a result of the compulsory collection of union fees." *Hartnett v. Pennsylvania State Educ. Ass'n*, 390 F. Supp. 3d 592, 594 (M.D. Pa. 2019); *see also Kabler v. United Food & Commercial Workers Union, Local 1776 Keystone State*, No. 1:19-CV-395, 2020 WL 1467255, at *1 (M.D. Pa. Mar. 26, 2020); *Williams v. Pennsylvania State Educ. Ass'n*, No. 1:16-CV-02529-JEJ, 2017 WL 1476192 (M.D. Pa. Apr. 25, 2017).

Another Panel member (Jonathan Riches) also has continued to serve as counsel in lawsuits challenging public employee unions while serving as a member of the Panel. *See State v. City of Austin*, No. 03-17-00131-CV, 2017 WL 4103617, at *1 (Tex. App. Sept. 12, 2017) (challenging paid "release time" for firefighters). Another (F. Vincent Vernuccio) is a prolific author of anti-

union editorials and has continued to publish this material even after assuming his position as a purported neutral decision maker on the Panel.[2]

Another Panel member (Maxford Nelsen) has filed almost 80 complaints before the Public Disclosure Commission of Washington state, nearly all of which are against labor unions or companies who have deducted union dues from their employees' paychecks.[3] In addition, he has written numerous incendiary editorials in which he has clearly aligned himself against unions[4] and accused public-employee unions of engaging in "downright un-American" practices[5] and other unions of "bullying,"[6] "harassment,"[7] and conspiracy.[8] His organization (the Freedom Foundation) has been described as having "waged a campaign to hamstring public-sector unions"—an effort that included "lawsuits and door-to-door canvassing of members of unions." Jim Brunner and Daniel Beekman, *Podcast: Freedom Foundation's Maxford Nelsen on battling*

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[2] *See, e.g.*, F. Vincent Vernuccio, *Union Brags About Winning Wage Increase Already Paid by Non-union Employers*, TOWNHALL (May 18, 2019) (Collette Decl. Ex. K); F. Vincent Vernuccio, *The GM strike isn't about what's best for workers*, CNN BUSINESS (September 20, 2019) (Collette Decl. Ex. L); F. Vincent Vernuccio, *New name, same bad ideas: Democrats introduce union wish list*, THE HILL (May 4, 2019) (Collette Decl. Ex. M).

[3] *See* Washington State Public Disclosure Commission, Search Results for Enforcement Actions Brought by Maxford Nelsen, https://www.pdc.wa.gov/search?search_api_views_fulltext=%22maxford%20nelsen%22&f%5B0%5D=type%3Aenforcement_case (last visited May 14, 2020).

[4] Maxford Nelsen, *Neil Gorsuch can give workers a win over unions at the Supreme Court -- if we fight for it*, WASHINGTON EXAMINER (September 28, 2017) (Collette Decl. Ex. N).

[5] Maxford Nelsen, *Public-Employee Unions Do Not Promote Labor Peace*, NATIONAL REVIEW (Feb. 2, 2018) (Collette Decl. Ex. O).

[6] Maxford Nelsen, *Unions are siphoning Medicaid funds by bullying caregivers*, WASHINGTON EXAMINER (May 10, 2017) (Collette Decl. Ex. P).

[7] Maxford Nelsen, *Records show continued SEIU harassment of caregivers* (July 25, 2018) (Collette Decl. Ex. Q).

[8] Maxford Nelsen, *West Coast states and unions conspiring to keep skimming Medicaid funds* (Feb. 15, 2019) (Collette Decl. Ex. R).

public-sector unions, THE SEATTLE TIMES, (April 6, 2018) (Collette Decl. Ex. S). He has performed many of these activities while serving on the Panel and adjudicating federal union-agency disputes.

Another member (Patrick Wright) currently serves as Vice President of Legal Affairs for Mackinac Center for Public Policy, a research organization that "advances the principles of free markets and limited government." Mackinac Center for Public Policy Home Page (Collette Decl. Ex. T). His biography on the Mackinac Center website touts the fact that the Supreme Court cited his brief on behalf of the Center in support of the petitioner challenging public union "agency fees" in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). Mackinac Center Biography for Patrick Wright (Collette Decl. Ex. U).

Given their ongoing anti-union activity, it is not surprising that knowledgeable observers have noted that the current Panel "has handed down mostly pro-management decisions." Erich Wagner, *Labor Groups and Lawmakers Vow to Fight 'All-out Assault' on Unions and Federal Employee Rights*, GOV'T EXEC. (Sept. 24, 2019), https://perma.cc/VSF9-PY4L. Former FSIP Executive Director Joseph Schimansky has observed that the current Panel has favored the agency more than 90% of the time. David Elfin, *FSIP Veteran Schimansky Says Voluntary Settlements are the Way to Go*, CYBERFEDS (July 26, 2019) (Collette Decl. Ex. V). And this Panel has imposed more stringent positions than what the employing agency itself has been willing to concede, for example imposing only one day per week of "official time" where the agency had proposed two. *See* Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821, 1848 (2019) ("It is startling, and may well be unprecedented, that any third-party neutral would make an award outside the parameters of the parties' final offers." (citing Decision and Order, United States Dep't of Agric., USDA Rural Dev. & AFSME Local 3870, 17 F.S.I.P. 060 (2018)).

V. Plaintiff's Pending Labor Dispute Before the Panel.

NVAC and the VA have a longstanding and continuing collective bargaining relationship governed by the Act. They are parties to a collective bargaining agreement where the initial term expired on March 15, 2014, but are currently in an indefinite extension until a new agreement is negotiated.

Beginning on June 26, 2018, NVAC began negotiating the ground rules for a new collective bargaining agreement with the VA. NVAC and the VA entered into a "ground rules" agreement on April 2, 2019, which governed the prospective substantive negotiation process. After the VA made multiple declarations that the parties had reached an impasse in their substantive negotiations, on December 19, 2019, the VA requested that the Impasses Panel intervene.

On March 18, 2020, over NVAC's objection, the Panel asserted jurisdiction over the purported impasse. Collette Decl. Ex. W. On April 3, 2020, Panel Chairman Carter issued an order requiring the parties to submit statements of their positions by June 4, 2020, with each party's rebuttal statements due July 5, 2020. *See* Collette Decl. Ex. X. After these submissions, the Panel will "take whatever action it deems appropriate to resolve the dispute, which may include the issuance of a binding decision." *Id*. Accordingly, at any time after July 5, 2020, the Panel can issue a decision that is binding on both parties and is not subject to direct judicial review.

THIS COURT HAS JURISDICTION OVER THIS ACTION

Defendants have indicated they intend to move to dismiss this action for lack of jurisdiction, as they have done in other challenges to the Panel's appointments. Any such motion would not be well taken.

"Provisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type

Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). In determining whether Congress intended to preclude judicial review over a particular claim, the courts look to "the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Thunder Basin*, 510 U.S. at 207 (citation omitted).

Generally, a party cannot obtain judicial review seeking reversal of a specific decision of the Panel. *Council of Prison Locals*, 735 F.2d at 1498. The Panel's decision imposing particular contract terms on the parties (or declining to assert jurisdiction) is "final and nonreviewable." *Id.* at 1499. Indeed, it is this immense, unreviewable power that renders the Panel members principal officers under the Appointments Clause, and makes their fitness and impartiality central to the statutory scheme.

But this case does not seek review of a specific decision of the Panel. The Panel has not issued any such decision, but has merely asserted jurisdiction over NVAC's dispute with the VA. Rather, NVAC here seeks a declaration that the Panel has been improperly constituted because its members have not been properly appointed under the Constitution and the applicable statute. Those claims fall outside the statutory preclusion of review. *See Free Enterprise*, 561 U.S. at 489-91 (Appointments Clause challenge permitted even where statute does not provide for judicial review).

Nat'l Air Traffic Controller Ass'n. v. Fed. Serv. Impasses Panel, 606 F.3d 780, 787-88 (D.C. Cir. 2010) ("*NATCA II*"), controls here. In that case, the union brought an action challenging the Panel's decision that it lacked authority to consider the union's impasse with the Federal Aviation Administration (FAA). The union sought a declaration that the Panel had jurisdiction

over the impasse and an injunction requiring the Panel to assert jurisdiction over all pending and future impasses between the parties. *Id*. at 783. The D.C. Circuit held that the district court had jurisdiction over the action because the union's complaint did not seek to reverse a decision of the Panel. *Id*. at 787.

The *NATCA II* court recognized that, based upon its previous decision in *NATCA I*, the district court lacks subject matter jurisdiction in an action seeking review of a Panel decision declining to exercise jurisdiction over an impasse. *NATCA II*, 606 F.3d at 787. But the court held that *NATCA I* cannot be read "so broadly as to require that any question about the jurisdiction of the FSIP—even one that does not entail reviewing a decision of the Panel—be submitted to the FLRA in the garb of an unfair labor practice charge and resolved by the FLRA before a court may consider it." *Id*.

In *NATCA II*, however, the union "identifies no specific decision of the FSIP or of the General Counsel." *Id*. at 787. The court concluded that because "the Union does not seek review of a decision of either the FSIP or the General Counsel," the district court erred in dismissing the action for lack of jurisdiction. *Id*. at 787-88.

The D.C. Circuit also squarely rejected the argument that judicial review is unnecessary because a party could obtain review by violating the order, facing an unfair labor practice charge, and then seeking review of an adverse decision in the unfair labor practice proceeding. The court observed that "if every such question had to be framed as an unfair labor practice charge and resolved first by the FLRA, then it would be the General Counsel who, by her exercise of unreviewable discretion not to issue a complaint, could strip the court of jurisdiction over issues concerning the reach of the FSIP's authority." *NATCA II*, 606 F.3d at 788. The court then

concluded: "[w]e do not believe the Congress intended the General Counsel of the FLRA to exercise such control over our jurisdiction." *Id*. at 788.

This action falls squarely within the reasoning of *NATCA II*. NVAC does not seek to review a decision of the Panel. Rather, NVAC seeks a declaration that the Panel is improperly constituted and therefore that any rulings it makes are null and void. *See* Compl. at 18. And while the complaint also seeks an injunction preventing the Panel from issuing decisions regarding NVAC until its members are properly appointed, that does not undermine jurisdiction because "the injunction is merely a means by which to enforce the requested declaratory judgment." *NATCA II*, 606 F.3d at 787 n.**.

The government's position to the contrary would allow the FLRA to insulate the Panel from judicial review, precluding any challenge to the validity of the Panel's membership. According to the government, the only way for a union to get judicial review is to refuse to negotiate or refuse to abide by an agreement imposed by the Panel. At that point, the General Counsel would have the discretion to bring an unfair labor practice charge against the union, which would be subject to review by the FLRA and subsequently the courts. *See* Statement of Points of Law and Authorities in Support of Defendants' Motion to Dismiss, *Am. Fed. of Gov't Emps., Nat'l Council of HUD Locals, Council 222, AFL-CIO v. FSIP, et al.*, No. 19-cv-1934-RJL (D.D.C.) ("*AFGE HUD Locals*"), Dkt. 20-1, at 17-18. But that would place this court's jurisdiction first in the hands of the relevant employing agency (which would have to assert an unfair labor practice), and then with the unreviewable discretion of the FLRA General Counsel. *See* 5 U.S.C. § 7118 (a)(1). The employing agency or the General Counsel can determine that a structural challenge to the appointments of Panel members is not worth the risk, and decline to pursue an unfair labor

practice charge, making it impossible for the union to seek review. It is therefore not surprising that the D.C. Circuit rejected the FLRA's reasoning in *NATCA II*, 606 F.3d at 788.

Moreover, the Supreme Court "normally do[es] not require plaintiffs to 'bet the farm ... by taking the violative action' before 'testing the validity of the law.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490–91 (2010) (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). The potential consequences of violating a bargaining agreement can be severe. If a union's violation can be characterized as instigating a "strike, work stoppage, or slowdown," the union risks decertification. *See* 5 U.S.C. § 7120(f) . The government has not explained precisely *how* a union should violate a Panel order on an issue important enough to generate an unfair labor practice action while threading the needle to ensure that the consequences of its violation will not be catastrophic.

Nor does the government's cavalier advice to violate the Panel's orders consider the potential consequences for an individual employee tasked with violating the order. Should union employees provoke an unfair labor practice by taking more telework than authorized by the agreement, thus risking disciplinary action from their employers? Should a union employee take more "official time" than authorized, facing discipline and possible termination for refusing to show up for work? A regime that requires unions and their employees to face potentially dire consequences to gain the mere possibility of judicial review does not provide "meaningful" review.

Free Enterprise also demonstrates why jurisdiction exists here. In that case, the Supreme Court held that the plaintiffs could bring an Appointments Clause challenge to the Public Company Accounting Oversight Board without first challenging a Board decision before the SEC and then seeking judicial review of the SEC decision. *See* 561 U.S. at 489. The court found that the plaintiffs could not "meaningfully pursue their constitutional claims" before the SEC, because to

do so the plaintiffs would first have to incur a sanction for noncompliance with a Board decision. *Id*. at 490-91. The court also reasoned that the "constitutional claims are also outside the Commission's competence and expertise." *Id*. at 491.

Under *Free Enterprise*, along with *Thunder Basin*, judicial review is available notwithstanding the existence of a statutory scheme when "(1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim is wholly collateral to the statutory review provisions; and (3) the claims are beyond the expertise of the agency." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 500 (D.C. Cir. 2018). Each of these factors supports a finding of judicial review here.

First, NVAC would be denied all meaningful review here. Panel decisions are not subject to review, and (as discussed above) requiring the union and its members to engage in the risky practice of engaging in an unfair labor practices is insufficient to provide meaningful judicial review. *See NATCA II*, 606 F.3d at 788; *Free Enterprise*, 561 U.S. at 490-91.

Second, the claims here are wholly collateral. NVAC challenges the method by which Panel members are appointed and whether their appointments meet statutory requirements. Those questions are separate from the merits of any specific Panel decision. *See Free Enterprise*, 561 U.S. at 490 (finding the challenge collateral because the plaintiffs "object to the Board's existence, not to any of its auditing standards.").

Third, the FLRA has no expertise in deciding Appointments Clause issues. Nor does the FLRA's typical docket of negotiability and unfair labor practice proceedings provide it any expertise on whether the appointments of FSIP members are consistent with statutory requirements or whether the members harbor untenable conflicts of interest. These issues "do not require technical considerations of [agency] policy" but "are instead standard questions of administrative

law, which the courts are at no disadvantage in answering." *Free Enterprise*, 561 U.S. at 491 (internal quotation marks and citation omitted). Accordingly, this court has jurisdiction to entertain this action.

ARGUMENT

To assess a preliminary injunction motion, the "court must balance four factors: (1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). The D.C. Circuit has adopted a "sliding scale" approach to these factors. *Id.* "For example, if the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success." *Id.* at 1292. Each of the applicable factors favors issuance of a preliminary injunction here.

I. Plaintiff is Likely to Succeed on the Merits.

Likelihood of success on the merits is the "most important factor" to a preliminary injunction analysis. *Aamer*, 742 F.3d at 1038. Here, NVAC is likely to succeed on all three of its claims. Panel members wield enormous authority over the working conditions of federal employees. They may impose contract provisions that govern the federal workplace, with no supervision and no meaningful opportunity for administrative or judicial review. Yet Panel members are not appointed with the advice and consent of the Senate as required by the Appointments Clause. In addition, the Panel's membership fails to meet the fitness requirements for appointment under the CSRA, and the ongoing anti-union activities of numerous members creates a clear bias that deprives NVAC of its due process right to an impartial tribunal.

A. The Panel Appointments Violate the Appointments Clause.

The Appointments Clause of the U. S. Constitution "prescribes the exclusive means of appointing 'Officers'" of the United States. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018). It provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" all principal officers of the United States. U.S. Const. Art. II, § 2, cl. 2. Congress, however, "may by law vest the Appointment" of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The Appointments Clause is one of "the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. It "preserves … the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (internal quotation marks and citation omitted). The requirement that the President seek the advice and consent of the Senate "serves both to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond*, 520 U.S. at 659-60 (quoting The Federalist No. 76, at 386–387). "These limitations on the appointment power 'ensure that those who wield[ ] it [are] accountable to political force and the will of the people.'" *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 36 (D.C. Cir. 2016) (quoting *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991)).

The Appointments Clause governs "the permissible methods of appointing 'Officers of the United States,' a class of government officials distinct from mere employees." *Lucia*, 138 S. Ct. at 2049. It then distinguishes between "inferior" officers, who may be appointed by the President alone, and "principal" officers, whose appointments require Senate confirmation. *See Edmond*, 520 U.S. at 659-60. Here, the Panel members are "principal officers" of the United States whose appointment must be confirmed by the Senate. Because they have not been so confirmed, their appointments are unconstitutional.

1. Panel Members are Officers of the United States.

The Panel members are "officers" of the United States rather than mere employees.[9] *United States v. Germaine*, 99 U.S. 508 (1878), and *Buckley v. Valeo*, 424 U.S. 1 (1976), provide the "basic framework for distinguishing between officers and employees." *Lucia*, 138 S. Ct. at 2051. Officer status "embraces the ideas of tenure, duration, emolument, and duties" that are "continuing and permanent, not occasional or temporary." *Germaine*, 99 U.S. at 511-12. In addition, officers exercise "significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.

Panel members meet both criteria. First, their position is "established by Law" and their "duties, salary, and means of appointment" are specified by the CSRA. *Freytag*, 501 U.S. at 881 (citing U.S. Const. Art. II, § 2, cl. 2) (finding that special trial judges of the United States tax court were officers, not employees). Moreover, Panel members are not agents of a lower-ranking officer, called upon for occasional tasks. *Compare Germaine*, 99 U.S. at 512. Panel members are appointed for continuous five-year terms. 5 U.S.C. § 7119 (c)(3).

In addition, their tasks are far from "ministerial" and they exercise "significant discretion" when carrying out "important functions." *Lucia*, 138 S. Ct. at 2053. The Panel is authorized by statute to investigate, make factual findings and recommendations, hold hearings, administer oaths, take testimony and depositions, issue subpoenas, and assist in resolving impasses "through whatever methods and procedures . . . it may consider appropriate." § 7119(c)(5)(A)-(B). Like the officers in *Lucia* and *Freytag*, Panel members "have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges." *Lucia*, 138 S.

[9] Defendants appear to have admitted as much. *See* Statement of Disputed and Material Facts, *AFGE HUD Locals*, Dkt. 33, ¶ 48 ("The Panel's members are inferior officers, and not principal officers").

Ct. at 2053; *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012) (Copyright Royalty Judges who issue binding decisions exercise sufficient authority to be considered officers).

In fact, the Impasses Panel has much *more* authority than the officers in *Lucia*, *Freytag*, and *Intercollegiate Broad Sys.*, all of whose decisions were subject to judicial review. Members of the Panel can issue final, binding orders on matters that affect thousands of federal workers without a meaningful avenue for administrative or judicial review—significant authority that makes them officers of the United States. *See Ass'n of Am. Railroads*, 821 F.3d at 37-38 (arbitrator charged with rendering a final decision regarding the content of the metrics and standards exercises sufficient authority to be considered an officer of the United States).

Because they exercise this "significant authority pursuant to the laws of the United States," Panel members are *officers*, not mere employees, and they must "be appointed in the manner prescribed by" the Appointments Clause. *Buckley*, 424 U.S. at 126; *see also Edmond*, 520 U.S. at 656 (noting no dispute that Coast Guard Court of Criminal Appeals judges were officers).

2. Panel Members are Principal Officers.

"[I]nferior officers" are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663 (emphasis added). This is the "dispositive feature" that distinguishes principal officers from inferior officers. *Ass'n of Am. Railroads*, 821 F.3d at 38. Thus, "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Edmond*, 520 U.S. at 662.

To determine on which side of the line an officer falls, courts have looked to three factors: "degree of oversight, final decision-making authority, and removability." *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019); *see Ass'n of Am. Railroads*, 821 F.3d at 39.

Application of each of these factors compels the conclusion that members of the Panel are principal officers.

First, Panel members operate free from the direction or supervision of any entity or officer. The Panel may appoint an Executive Director and "any other individuals it may from time to time find necessary for the proper performance of its duties." 5 U.S.C. § 7119(c)(4). Like the FLRA itself and the FLRA General Counsel (all of whom are Senate confirmed), the Panel may "prescribe rules and regulations to carry out the provisions of this chapter applicable to" its operations. 5 U.S.C. § 7134. The authority to promulgate regulations without oversight is a key indication that the Panel is composed of principal officers. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1332 (Fed. Cir. 2019) (holding that Administrative Patent Judges of the Patent Trial and Appeal Board are principal officers and noting their "authority to promulgate regulations"). And the Panel may "promptly investigate any impasse" and "take whatever action is necessary" to resolve it. 5 U.S.C. § 7119(c)(5). As the FLRA has recognized, the Authority has no power to review the Panel's decisions. *See Nat'l Treasury Emps. Union & U.S. Dep't of Homeland Security*, 63 F.L.R.A. 183, 187 (Mar. 31, 2009).

The fact that the Panel was established as an "entity within the Authority," 5 U.S.C. § 7119(c)(1), is insufficient to render Panel members inferior officers. "It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude." *Edmond*, 520 U.S. at 662-63. Neither the FLRA, nor any officer, directs or supervises the Panel in the performance of its statutory duties.

The complete lack of supervision here is similar to that of the arbitrators at issue in *Ass'n of Am. Railroads*, 821 F.3d at 39. In that case, the court found that arbitrators authorized to "resolve any impasse between Amtrak and [the Federal Railroad Administration]" were principal

officers. The court found that the statute did not suggest the arbitrator is directed and supervised by anyone of higher rank, and that the statute "doesn't provide any procedure by which the arbitrator's decision is reviewable by the STB. Instead, it empowers the arbitrator to determine the metrics and standards 'through binding arbitration.'" *Id.* (citing *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 64 (2015) (Alito, J., concurring) ("As to that 'binding' decision, who is the supervisor?")).

The Impasses Panel members have far less supervision than the Copyright Royalty Judges found to be principal officers in *Intercollegiate Broad. Sys.*, 684 F.3d at 1338. The Librarian of Congress approves the Royalty Judge's procedural regulations (2 U.S.C. § 136), issues ethical rules for them (17 U.S.C. § 802(h)), and is entrusted with "overseeing various logistical aspects of their duties." *Intercollegiate Broad. Sys.*, 684 F.3d at 1338. Moreover, the Registrar of Copyrights issues opinions that bind the Royalty Judges, and "reviews and corrects any legal errors in the CRJs' determinations." *Id.* at 1338–39. Yet the court of appeals found even this level of supervision insufficient, holding that the Librarian did not have "an influential role in the CRJs' substantive decisions," and that despite the Registrar's ability to resolve issues of law, the "vast discretion" the CRJs exercised over rates and terms made them principal officers. *Id.* Here, the Panel members have vast, unreviewable discretion and no supervision.

Second, unlike the inferior officers at issue in *Lucia* and *Freytag*, the Panel has authority to issue decisions that "are final and nonreviewable." *Council of Prison Locals*, 735 F.2d at 1499. Panel rulings cannot be reviewed, reversed, or altered by any entity within the Executive Branch, nor can they be reviewed by the courts. The Panel's authority to issue final decisions without the direction or supervision of a higher-ranking officer or entity makes clear that Panel members are principal officers. *See Edmond*, 520 U.S. at 665 ("What is significant is that the judges of the

Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."); *Intercollegiate Broad. Sys.*, 684 F.3d at 1340 (finding Copyright Royalty Board judges were principal officers because their determinations were "not reversible or correctable by any other officer or entity within the executive branch"); *Ass'n of Am. Railroads*, 821 F.3d at 39 (noting that the statute "doesn't provide any procedure by which the arbitrator's decision is reviewable by the STB.").

Indeed, the finality of the Panel's decisions exceeds that of the Copyright Royalty Judges found to be principal officers, whose decisions could be appealed to the D.C. Circuit. *See Intercollegiate Broad. Sys.*, 684 F.3d at 1335. Here, a final decision of the Panel is not subject to judicial review—a factor that strongly indicates that the Panel's members are principal officers.

Third, the statute provides that only the President can remove a member of the Panel. 5 U.S.C. § 7119(c)(3). Officials who "are answerable to and removable only by the President" are principal officers who must be "appointed by the President, by and with the advice and consent of the Senate." *Aurelius Inv., LLC v. Puerto Rico*, 915 F.3d 838, 860–61 (1st Cir.), *cert. granted on other questions sub nom. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 139 S. Ct. 2735 (2019); *see also Intercollegiate Broad. Sys.*, 684 F.3d at 1339-40 (noting that "the CRJs can be removed by the Librarian only for misconduct or neglect of duty").

In November of last year, following a similar challenge to the constitutionality of the Panel's appointments, President Trump issued a memorandum purporting to give the FLRA the authority to remove Panel members. Presidential Memorandum on the Delegation of Removal Authority Over the Federal Service Impasses Panel, 84 Fed. Reg. 63789 (November 12, 2019). But that proclamation has no effect on the Appointments Clause analysis here. The D.C. Circuit has made clear on numerous occasions that "the President himself must directly exercise the

presidential power of appointment or removal" as this is "a quintessential and nondelegable" function. *In re Sealed Case*, 121 F.3d 729, 752-53 (D.C. Cir. 1997); *see also Judicial Watch, Inc. v. Consumer Fin. Prot. Bureau*, 60 F. Supp. 3d 1, 13 (D.D.C. 2014) ("The appointment and removal power are a quintessential and nondelegable Presidential power") (internal quotation marks and citation omitted); *Ctr. for Effective Gov't v. U.S. Dep't of State*, 7 F. Supp. 3d 16, 25 (D.D.C. 2013) ("this is not a case involving 'a quintessential and nondelegable Presidential power'—such as appointment and removal of Executive Branch officials . . . where separation of powers concerns are at their highest").

In any event, the President's purported delegation alone does not render Panel members inferior officers. Removal by a principal officer is one of several factors that courts have considered, but there is no authority that suggests it is dispositive. In *Morrison v. Olson*, 487 U.S. 654 (1988), for example, the court relied on several factors for its finding that the independent counsel was an inferior officer. Not only was she subject to removal by a higher officer, "she performed only limited duties, [] her jurisdiction was narrow, and [] her tenure was limited." *Edmond*, 520 U.S. at 661. (quoting *Morrison*, 487 U.S. at 671-72). And in *Edmond*, the Judge Advocate General could not only remove the Court of Criminal Appeals judges, but also exercised administrative oversight, prescribed rules of procedure, and formulated policies and procedure in regard to their review. *Edmond*, 520 U.S. at 664. It is not *removability*, but rather direction and supervision by principal officers that is the sine qua non of inferior officer status.

As in *Ass'n of Am. Railroads*, "while it may seem peculiar to demand 'primary class' treatment for a position as banal" as the Impasses Panel, "it also seems inescapable." *Ass'n of Am. Railroads*, 821 F.3d at 39. The Constitution prescribes that such principal officers be appointed by the President *with* the advice and consent of the Senate. This powerful safeguard "serves both

to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond*, 520 U.S. at 659. While appointed by the President, none of the Panel members were confirmed by the Senate. As a result, the Panel lacks the authority to assert jurisdiction or issue any decisions.

B. The Current Panel Does Not Meet the Eligibility Criteria Set Forth in the Federal Service Labor-Management Relations Statute.

In providing for the creation of the Panel, Congress chose unique language that is rare in the U.S. Code. Panel members must be appointed "solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with government operations and knowledgeable in labor-management relations." 5 U.S.C. § 7119(c)(2). There is no similar requirement for appointment to the FLRA or its General Counsel. *See id.* § 7104.

Congress has used language such as this sparingly providing for the appointment of officers within the Executive Branch.[10] While general requirements of merit, fitness, or specific expertise are uncommon, it is even less common for Congress to require appointments based *solely* on those factors. As reflected by the positions whose governing statutes contain such requirements, Congress contemplated that those positions require demonstrated expertise, impartially, and a measure of independence. These positions include the Archivist of the United States, 44 U.S.C. § 2103(a), the Director of Operational Test and Evaluation in the Department of Defense, 10 U.S.C.

[10] Congress has provided that a number of offices within the Legislative Branch must be filled solely based upon merit or fitness. *See* 2 U.S.C. § 5582 (House Office of Interparliamentary Affairs); *id.* § 285c-d (Congressional Office of Law Revision Counsel); *id.* § 282 (House Office of Legislative Counsel); *id.* §§ 1381-82 (Office of Congressional Workplace Rights); *id.* § 288 (Office of Senate Legal Counsel); *id.* § 287b (Office of Parliamentarian of House of Representatives); *id.* § 1911 (General Counsel to the Chief of Police and U.S. Capitol Police); *id.* § 282a (House Legislative Counsel); *id.* § 4301 (staff members of Senate committees); 42 U.S.C. § 4276 (Advisory Commission on Intergovernmental Relations); 2 U.S.C. § 2242 (Chief Guide of the Capitol Guide Service); *id.* § 166 (Director of the Congressional Research Service of the Library of Congress); *id.* § 1903 (Chief Administrative Officer of the U.S. Capitol Police).

§ 139(a)(1), the Special Assistant for Indian and Alaska Native Programs at the Department of Housing and Urban Development, 42 U.S.C. § 3533(e)(1)(B), and members of the Postal Regulatory Commission, 39 U.S.C. § 502(a).[11]

Under the Statute, Panel members must meet two requirements. They must (1) demonstrate "fitness to perform the duties and functions involved"; and (2) be "familiar with government operations and knowledgeable in labor-management relations." 5 U.S.C. § 7119(c)(2). Few, if any, of the current Panel members meet these requirements.

First, many of the Panel members do not meet these requirements because they lack any arbitration or mediation background and/or harbor conflicts that prevent them from serving as neutral arbiters. The "duties and functions involved" in the position require neutral Panel members skilled in resolving labor disputes. The statute specifies that "the function" of the Panel "is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives." *Id.* at (c)(1). Yet not a single Panel member's biography mentions a background, training, certification, or credentials in arbitration or mediation.[12] In addition, at least four members have blatant conflicts of interest that disqualify them from meeting the statutory fitness requirements for service on the Panel. *See* pp. 31-33, *infra.* This stands in sharp contrast to historical Panels and is antithetical to the original intent for a Panel of impartial arbiters.

The history of the Panel and the legislative history of the Statute confirm that the Panel was designed to serve as an impartial tribunal made up of experienced arbitrators skilled at

[11] *See also* 15 U.S.C. § 2413(a) (Executive Director of the National Center for Productivity and Quality of Working Life); 42 U.S.C. § 3533(h)(2) (Special Assistant for Veterans Affairs); 38 U.S.C. § 305(a)(2) (Under Secretary for Health, Department of Veterans Affairs); 42 U.S.C. § 2000ee(h) (members of the Privacy and Civil Liberties Oversight Board).

[12] While two members served previously on the Impasses Panel, neither member lists any training or certification as a mediator or arbitrator.

resolving disputes. President Nixon established the original Panel in 1969 by Executive Order 11491. Like the current Panel, the original Panel's function was to "consider negotiation impasses" and "take any action it considers necessary to settle an impasse." Exec. Order No. 11491, § 5(b), 34 Fed. Reg. 17605 (October 29, 1969).

President Nixon created the Panel following the report and recommendations of a study chaired by his Secretary of Labor, George P. Shultz. Exec. Order No. 11491, 34 Fed. Reg. 17605 (October 29, 1969) §§ 5, 17. This report specified that the Panel "should be above all an impartial body, each of whose members will be concerned with the public interest rather than with the special interests of either party to an impasse." *Shultz Report* at 1239 (emphasis added). In language presaging the current statute, the report recommended that the Panel members "should be chosen from persons who are familiar with the Federal Government, or knowledgeable in public personnel administration, or knowledgeable in labor-management relations." *Id*. at 1239.

Consistent with this understanding, all seven members of the first Panel, appointed by President Nixon, had "backgrounds as neutrals in labor relations" and "extensive arbitration and/or mediation experience." Frederic Freilicher, *The Resolution of Negotiation Impasses in the Federal Service*, 23 CATH. U. L. REV. 1, 11 (1974). None were affiliated with either management or labor. *Id.*

When it enacted the CSRA in 1978, Congress sought to build on "[t]he basic, well-tested provisions, policies and approaches of Executive Order 11491," which "have provided a sound [and] balanced basis for cooperative and constructive relationships between labor organizations and management officials." S. Rep. No. 95-969, 95th Cong., 2d Sess. (1978) at 2734. Congress therefore adopted the basic structure and function of the Panel from the Executive Order, empowering the Panel to "provide assistance in resolving negotiation impasses," 5 U.S.C. §

7119(c)(1), and "take whatever action is necessary" to resolve them. *Id*. § 7119(c)(5)(B); *compare* Exec. Order No. 11491, § 5(b) (authorizing the Panel to "consider negotiation impasses" and "take any action it considers necessary to settle an impasse"). But Congress made one significant change, *adding* language similar to the recommendation of the Shultz Report to require that the Panel members be appointed solely on the basis of their fitness for office from persons knowledgeable about labor-management relations. 5 U.S.C. § 7119(c)(2).

That new language reflects congressional intent that Panel members meet minimum requirements not only regarding knowledge of the subject area, but also experience in dispute resolution. And that is how the Panel has been understood. For instance, the U.S. Office of Personnel Management includes the Panel on its list of "Neutrals Involved in Administering the Federal Service Labor-Management Relations Statute" Office of Personnel Management, *Labor-Management Relations in the Executive Branch*, at 5 (2014), https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf (last visited May 13, 2020). And, as discussed above (pp. 8-9, *supra*), Presidents have routinely placed certified arbitrators or neutral individuals skilled in dispute resolution on the Panel.

Until now. As noted, none of the biographies of the current Panel members list experience as a certified neutral or membership in an alternative dispute resolution organization. Indeed, eight of the members list no relevant experience in labor-management relations. Other than two members who served on the Panel previously, none of the members cite any experience with dispute resolution as a neutral. What experience the members *do* cite involves work against unions rather than as neutral arbiters. And, as noted (pp. 9-11, *supra*; pp. 31-32, *infra*), the fact that several Panel members continue to work aggressively against public sector unions is inconsistent

with the original conception of a Panel that is "above all an impartial body, each of whose members will be concerned with the public interest rather than with the special interests of either party to an impasse." *Shultz Report*, at 1239.

A statute must be interpreted to "'give effect, if possible, to every clause and word of a statute.'" *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)). The statutory language here is straightforward. Panel members—in contrast to members of the FLRA—must be appointed "solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations." 5 U.S.C. § 7119(c)(2). If that language is to have meaningful effect, Panel members (regardless of who appoints them) must be neutral arbiters.

The statute, legislative history, and historical practice make clear that Panel members must have some skill or background in neutral dispute-resolution in order to meet the statutory qualifications for membership. The current Panel falls far short of meeting the statutory criteria and thus their appointments and membership violate the CSRA.

C. The Current Panel Does Not Constitute an Unbiased Tribunal, in Violation of Plaintiff's Due Process Rights.

"Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label." *In re Al-Nashiri*, 921 F.3d 224, 233-34 (2019) ("*Al-Nashiri II*"). Public confidence in fair tribunals even requires that "jurists must avoid even the *appearance* of partiality." *Id*. at 234 (emphasis added).

Due process fundamentally requires "the right to trial by an unbiased tribunal." *Wildberger v. Am. Fed'n of Gov't Employees, AFL-CIO*, 86 F.3d 1188, 1193 (D.C. Cir. 1996); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). And a "necessary component of a fair trial

is an impartial judge." *Weiss v. United States*, 510 U.S. 163, 178 (1994). This right applies not only to courts but administrative agencies that adjudicate as well. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *see Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("of course, an impartial decision maker is essential").

The Impasses Panel, as currently constituted, fails to adhere to these principles. At the outset, we note that NVAC's claim is not based upon dissatisfaction with the Panel's specific decisions, supposed personal failings of its members, disagreement with members' political views, or even a perceived general tendency of Panel members to be more accommodating to one side or the other. Rather, NVAC's claim is based upon the presence on the Panel—an entity by whose very design is to act as a neutral arbiter to resolve labor disputes—of individuals who have no experience as neutrals and/or have devoted their careers to fighting unions.

In fact, several members of the Panel continue to derive income from litigating against and engaging in public policy activism targeting public unions. For instance, Panel member David Osborne is the President and General Counsel of an entity whose *raison d'etre* is to do battle with public employee unions. The "Fairness Center" where he works exists to help people "hurt by public-sector union officials," and Mr. Osborne—while serving on the Impasses Panel—continues to litigate against public sector unions. *See* p. 9, *supra*. It is difficult to imagine a more compelling case in which "an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality" than to have an official whose life's work is dedicated to fighting public sector unions issuing binding and unreviewable decisions imposing contract terms on federal public sector unions. *See United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

The past and ongoing activities of other Panel members also display an unacceptable bias, or at least an appearance of bias. As noted above (pp. 9, *supra*), Mr. Riches continues to serve as counsel in lawsuits against public sector unions, including cases challenging the use of "release time" or "official time," an issue that arises in nearly every federal labor-management dispute. And Messrs. Vernuccio and Nelson remain prolific in producing editorials hostile to unions, even to the point of accusing public employee unions of "un-American" tactics. Ex. O; *see also* pp. 9-11, *supra* (discussing ongoing anti-union activities of Panel members David Osborne, Jonathan Riches, and Patrick Wright); Jim Brunner and Daniel Beekman, *Podcast: Freedom Foundation's Maxford Nelsen on battling public-sector unions*, *supra* at p. 10 (noting that Panel member Nelson's "aggressive effort[s]" "to hamstring public-sector unions," have "drawn a legal and political backlash from labor organizations and their allies, who condemn [his] foundation as an anti-worker force funded by dark money.").

This is not a case in which an official or judge puts away his or her past life to take on a new role as an unbiased adjudicator. Panel members work part time, continuing in their private endeavors while serving on the Panel. Where Panel members have not only derived income from anti-union activities and litigation and made their anti-union views known, but continue to do so, a rational observer would question the impartiality of those members.

The Supreme Court in *Withrow* identified "various situations" in which the probability of bias is intolerable, including where the adjudicator has a pecuniary interest in the outcome or has been the target of personal criticism from the party before him. But the court recognized that courts are free to "determ[ine] from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58; *see Wildberger*, 86 F.3d at 1194-96. Due process includes more than "the traditional common-law prohibition on direct

pecuniary interest," but also "a more general concept of interests that tempt adjudicators to disregard neutrality." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878 (2009). Moreover, "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* at 886 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

That is the case here. One need not impugn the integrity of any of these Panel members, whose anti-union views are presumably sincerely held. But the fact that these Panel members continue to derive income from working against unions and publishing strongly held, in some cases incendiary, anti-union content demonstrates an appearance of bias so transparent that it undermines the integrity of the administrative process.

It is no answer to say that these activities involved state public sector unions rather than federal employee unions. The strong indications of opposition to public employee unions generally is evident, and the appearance of bias does not disappear merely because the adjudicator exhibits bias against one type of union but not similarly situated unions. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (holding that recusal was required where judge was a plaintiff in a lawsuit involving a similar claim against a different insurance provider defendant, noting it was "not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case . . . would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.") (internal quotation marks, ellipses, and citation omitted).

Moreover, NVAC need not show that the majority of Panel members suffer from bias or an appearance of bias. "'Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others

can be quantitatively measured.'" *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 592 (D.C. Cir. 1970) (quoting *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941)).

"[A] biased decisionmaker [is] constitutionally unacceptable." *Withrow*, 421 U.S. at 47. Because the Impasses Panel is composed of members who lack requisite neutral bona fides and/or harbor clear conflicts of interest, the Panel cannot, consistent with the Due Process Clause of the Fifth Amendment, issue binding rulings that affect federal unions and their employing agencies. To allow this Panel to enter binding orders will "irreparably dampen[]" "public confidence in the integrity of the judicial process." *In re Al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015) ("A*l-Nashiri I*") (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988)).

II. Plaintiff Will be Irreparably Harmed Unless Preliminary Relief is Granted Because the Conditions Imposed by the Panel are Final.

NVAC will suffer irreparable injury if an injunction is not granted. Not only will NVAC be required to submit to a proceeding before a tribunal whose appointments violate the U.S. Constitution, it will also be subject to a decision from a tribunal that is neither neutral nor disinterested. That decision will impose obligations upon the union and VA's employees for years to come. None of those injuries can be redressed, because the Panel's decision is not subject to meaningful administrative or judicial review.

While courts have held that an Appointments Clause challenge does not itself cause irreparable injury, they have done so *only* where the plaintiff had a meaningful opportunity for subsequent judicial review. *See, e.g., Tilton v. Sec. & Exch. Comm'n*, 824 F.3d 276, 286 (2d Cir. 2016) ("we therefore conclude that the appellants will have access to meaningful judicial review of their Appointments Clause claim through administrative channels."); *Ryder v. United*

States, 515 U.S. 177, 187–88 (1995) (court could vacate agency decision if its judges were appointed in violation of Appointments Clause).

Those cases are based upon the notion that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (internal quotation marks and citation omitted). But "[t]hat is because, if found to be constitutionally warranted, '[v]acatur, even at the appeal-from-final-judgment stage, would fully vindicate' the separation-of-powers rights of the Company." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (quoting *Al-Nashiri I*, 791 F.3d at 80. That safeguard is not available here. There is no meaningful opportunity for administrative or judicial review; the constitutional injury is irreparable.[13]

While submitting to a Panel appointed in violation of the Appointments Clause is sufficient to demonstrate irreparable injury, NVAC suffers form an additional injury. "Submission to a fatally biased decisionmaking process is in itself a constitutional injury sufficient to warrant injunctive relief, where irreparable injury will follow in the due course of events, even though the party charged is to be deprived of nothing until the completion of the proceedings." *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982); *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989).

Indeed, even the ability to obtain reversal on subsequent review does not mean the injury is not irreparable, because a party is "entitled to a neutral detached judge in the first instance." *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972); *see Gibson v. Berryhill*, 411 U.S. 564, 571-72, 574-75 (1973). As the D.C. Circuit explained in *Al-Nashiri I*, 791 F.3d at 79–80,

[13] For the same reasons, NVAC suffers irreparable injury in being required to submit to a Panel whose appointments do not meet the fitness requirements of the statute.

subsequent judicial review is insufficient for cases of "actual bias" because "it is too difficult to detect all of the ways that bias can influence a proceeding." *Id*. And appellate review of "apparent bias" is insufficient because it "fails to restore 'public confidence in the integrity of the judicial process.'" *Id*. (quoting *Liljeberg*, 486 U.S. at 860; *see Al-Nashiri II*, 921 F.3d at 238 ("no amount of appellate review can remove completely the stain of judicial bias").

Here, of course, there is *no* opportunity for appellate review. Even if it were possible to restore public confidence damaged by the apparent bias of the Panel (contrary to *Al-Nashiri I*), it could not be done here. NVAC therefore suffers irreparable injury by submitting to proceedings before a tribunal tainted by bias.

III. The Balance of Equities and the Public Interest Favor an Injunction.

The balance of equities tips in Plaintiff's favor here. As noted, Plaintiff will suffer irreparable injury in being forced to submit to an improperly constituted Panel with the power to issue a final decision without judicial review. In contrast, the Defendants—the Panel, its Chairman, and the FLRA—will suffer no harm from the issuance of an injunction. A mere delay in adjudicating the dispute between the union and the agency causes no injury to the adjudicator.

Nor will an injunction injure the VA. The initial term of the current bargaining agreement expired in March 2014, but the agreement has been extended indefinitely. Having already gone six years on an extension of the previous contract, the VA will not be harmed by any delay in reaching a new agreement while this litigation is pending.

An injunction also serves the public interest. The Appointments Clause is one of "the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659; *see Ass'n of Am. Railroads*, 821 F.3d at 36. The requirement that the President seek the advice and consent of the Senate "serves both to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond*, 520 U.S. at 659-60

(quoting The Federalist No. 76, at 386–387). Through this requirement, "the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Id*. at 660. "These limitations on the appointment power 'ensure that those who wield[ ] it [are] accountable to political force and the will of the people.'" *Ass'n of Am. Railroads*, 821 F.3d at 36 (quoting *Freytag*, 501 U.S. at 884). Ensuring that the members of the FSIP are properly appointed therefore fosters the public interest.

In addition, the public has a strong interest in ensuring that all parties have access to an impartial tribunal free of conflicts of interest. *See, e.g.*, *Al-Nashiri II*, 921 F.3d at 240 ("surely the public's interest in efficient justice is no greater than its interest in impartial justice."). This is especially true where, as here, the clear conflicts of interest of numerous Panel members give the Panel's proceedings an appearance of bias. As the D.C. Circuit made clear in A*l-Nashiri I*, public confidence in the judicial process "is irreparably dampened once 'a case is allowed to proceed before a judge who appears to be tainted.'" 791 F.3d at 79 (quoting *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir.1992)).

CONCLUSION

For the foregoing reasons, the Court should grant NVAC's motion for a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day in May, 2020, a copy of the foregoing was filed electronically via this court's ECF system, which effects service upon counsel of record.

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