IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,	)	
Plaintiffs,	)	
v.	)	Nos. 18-cv-1261 (KBJ) 18-cv-1348 18-cv-1395 18-cv-1444
DONALD J. TRUMP, *in his official capacity as President of the United States, et al.*,	)	
Defendants.	)	

PLAINTIFF AFGE'S OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' OPPOSITION TO AFGE'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Administrative Decisions

Statutes

Regulations

Other Authorities

INTRODUCTION

The American Federation of Government Employees ("AFGE") challenges the lawfulness of Executive Order No. 13837, 83 Fed. Reg. 25335, entitled "Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use", (the "Official Time Order"). Because AFGE has shown that Sections 2(j), 3(a), 4(a)(ii), 4(a)(iii), and 4(a)(v) of the Official Time Order are *ultra vires* and that Section 4(a)(v) interferes with AFGE's rights under the First Amendment, AFGE is entitled to judgment as a matter of law. The Court should therefore grant AFGE's Motion for Summary Judgment. The Court should, moreover, deny defendants' cross-motion for summary judgment in its entirety.

ARGUMENT

Defendants' arguments are without merit and should be rejected. To begin with, defendants do not meaningfully confront AFGE's argument that Sections 2(j), 3(a), 4(a)(ii), 4(a)(iii), and 4(a)(v) of the Official Time Order are *ultra vires* because they seek to rewrite the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq., (the "Statute") in a manner that is contrary to the Statute's text, purpose and structure; particularly as embodied by 5 U.S.C. § 7131.[1] Nor do defendants acknowledge the weight of AFGE's argument that Section (4)(a)(i) of the Official Time Order is *ultra vires* because it is contrary to 5 U.S.C. § 7102(1) and 5 U.S.C. § 7131, and 5 U.S.C. § 7211, because, without an express statutory prohibition (which

[1] *Cf.* Letter from Congressman Jan Schakowsky, et al., to Hon. Donald J. Trump (July 9, 2018), available at https://schakowsky.house.gov/uploads/Federal%20Worker%20EO%20letter%20to%20Trump.pdf (last visited July 20, 2018); Letter from Congressman Brian Fitzpatrick, et al., to Hon. Donald J. Trump (June 11, 2018), available at https://www.afge.org/globalassets/documents/executive-orders/congressional-letter-to-president-trump---recent-executive-orders-on-government-employees.pdf (last visited July 20, 2018).

defendants are unable to point to), those sections provide union representatives a right to directly lobby Congress while on official time.

Instead, defendants seek to deflect attention to cases that either pre-date the Statute, e.g., *Old Dominion Branch No 496, Nat'l Ass'n of Letter Carriers, v. Austin*, 418 U.S. 264 (1974) ("*Letter Carriers*"), and which do not therefore support defendants' essentially unlimited construction of the President's power to curtail the Statute through executive order, and to cases the facts of which are simply inapposite, e.g., *Dalton v. Specter*, 511 U.S. 462 (1994) ("*Dalton*"), because unlike the law there, the Statute does not grant the President unfettered discretion over federal-sector labor relations.

Defendants go on to paint with far too broad a brush by mischaracterizing AFGE's claims as tantamount to a negotiability appeal, which they are not, and arguing that once so mischaracterized, the Statute bars them from this court's review. AFGE's case is not a negotiability appeal, nor does AFGE allege an unfair labor practice. AFGE challenges the validity of the Official Time Order in the first instance, and no amount of rhetorical sleight of hand may bring this claim within the scope of the Statute's administrative procedures. The Official Time Order is not a personnel action nor is it any other form of action falling within the ambit of the Statute. Because the issuance and validity of executive orders are not matters covered by the Statute, the Statute cannot remove them from this court's jurisdiction.

Nor is AFGE's challenge unripe. Defendants manage not even the barest rebuttal to AFGE's argument, or the facts supporting it, that agencies are presently implementing the Official Time Order without waiting to engage in collective bargaining, and certainly without waiting for the Office of Personnel Management ("OPM") to issue implementing regulations. Defendants merely assert that "prudential" considerations warrant delaying this court's review

because OPM may issue implementing regulations. But OPM has already issued guidance as to implementation of the Official Time Order and that guidance does not depend on OPM issuing implementing regulations in the future. *See* https://chcoc.gov/content/guidance-implementation-executive-order-13837-–-ensuring-transparency-accountability-and (last visited July 20, 2018).

Finally, Defendants attack on AFGE's First Amendment claim is unavailing. Defendants still offer no convincing rationale for the Official Time Order's limitation on the availability of official time for union representatives, and solely union representatives. The Court should therefore grant summary judgment for AFGE.

I. The Court has Jurisdiction Over AFGE's Claims

a. The Statute Does Not Preclude AFGE's Claims Because They Fall Outside the Statute's Scope

The Statute does not preclude AFGE's challenge to the Official Time Order. Neither the Official Time Order nor AFGE's claims fall within the scope of the Statute. The Federal Labor Relations Authority ("FLRA") also lacks the power to decide AFGE's facial challenge to the validity of the Official Time Order. Defendants' arguments to the contrary are therefore without merit and should be rejected.

As the Supreme Court most recently explained in *Elgin v. Dep't of the Treasury*, the appropriate inquiry to determine whether the Civil Service Reform Act, which houses the Statute, precludes a claim is whether it is "fairly discernible" from the Statute that "Congress intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme." 567 U.S. 1, 10 (2012) ("*Elgin*"). Because the petitioner in *Elgin* appealed a covered employment decision, the Department of the Treasury's decision to terminate his employment, and because the Statute gave him a dedicated avenue through which he could

contest that precise action, the court found his claims to be precluded. *Elgin*, 567 U.S. at 22 ("A challenge to a removal is *precisely* the type of personnel action regularly adjudicated by the MSPB [the Merit Systems Protection Board] and the Federal Circuit within the CSRA scheme. Likewise, reinstatement, backpay, and attorney's fees are *precisely* the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide.") (emphasis added).

None of the factors counseling preclusion is present here. The substance of AFGE's claims against the Official Time Order cannot, as defendants contend, be recharacterized as a negotiability matter. This is so for several reasons. First, the President is not an "agency" within the meaning of the Statute, 5 U.S.C. § 7103(a)(3). Second, because the President is not an agency, the Official Time Order is not an agency action within the meaning of the Statute, nor is the order a "personnel action" under the CSRA. *See* 5 U.S.C. § 2302(2)(A) (defining personnel action).

Of equal importance, AFGE is challenging the facial validity of the order itself. AFGE is not challenging whether a specific bargaining proposal falls within an agency's duty to bargain and should therefore be considered negotiable. This is important because the FLRA lacks the power to pass on the underlying legality of an executive order. *See Fort Bragg Ass'n of Educators, NEA and Dep't of the Army, Fort Bragg Schools*, 31 F.L.R.A. 70, 71 (1988) (scope of review in negotiability matter is limited to negotiability of proposals and does not encompass legality of underlying executive order); *see also NTEU and Dep't of the Treasury, IRS*, 60 F.L.R.A. 782, 783 (2005) ("It is long and well-established that the Authority does not have the power to assess whether an OPM regulation is invalid."). It would indeed be incongruous, and pose its own serious constitutional concerns, to suggest that an Executive agency may review or pass on the lawfulness of an executive order. Consequently, the Statute neither covers nor

precludes AFGE's challenge.

For example, in *American Federation of Government Employees, AFL-CIO, Local 446 v. Nicholson* ("*Nicholson*"), the union sought review of a decision issued by the Under Secretary for Health of the Department of Veterans Affairs. 475 F.3d 341 (D.C. 2007). The case arose out of the union's efforts to enforce an arbitration award that the union had earlier obtained in its favor. The agency refused to comply with the award. The union filed an unfair labor practice charge with the FLRA over the agency's refusal to comply. *Nicholson* at 346.

While the union's unfair labor practice charge was before the FLRA, the Under Secretary issued a decision pursuant to 38 U.S.C. § 7422. The agency then argued to the FLRA that the Under Secretary's decision had the effect of, *inter alia*, removing the subject of the union's arbitration award from the collective bargaining process, thereby rendering it unenforceable. The agency also argued that the FLRA could not review the Under Secretary's Section 7422 decision because Section 7422 provided that the Under Secretary's decision could not be reviewed by any other agency. The FLRA dismissed the union's unfair labor practice charge, finding it lacked jurisdiction to rule on the validity of the Under Secretary's decision. *Id*.

The union filed suit in district court, alleging that the Under Secretary's Section 7422 decision was unlawful. *Id*. Relying on *AFGE v. Loy*, 367 F.3d 932 (D.C. 2004), as defendants do here, the government argued that the district court lacked jurisdiction over what the government characterized as the union's unfair labor practice claim because the FLRA had exclusive jurisdiction over such claims. *Nicholson* at 347. The district court agreed and dismissed the union's case. The union appealed.

The court of appeals found, contrary to the district court, that because the union challenged the legality of Section 7422 decision itself, and because the legality of the disputed

Section 7422 decision was outside the purview of the FLRA, *Loy* did not apply. *Nicholson* at 348. The court of appeals went on to hold that:

> Because the Union is presumptively entitled to judicial review of its claim that the Under Secretary's § 7422 Decision was unlawful, and because the D.C. Circuit could not provide that review on a petition for the review of the FLRA decision dismissing the ULP complaint, *Loy* does not provide a basis for the district court dismissing this case for lack of jurisdiction.

Id. In other words, the court recognized that not only did the union's claim fall outside the Statute, the union would not be able to obtain meaningful review of its claim that the Section 7422 decision was unlawful if the union were forced to pursue that claim before the FLRA.

This is the case here. The FLRA may not review whether an executive order was issued *ultra vires* nor may the FLRA review the constitutionality of an executive order. Likewise, any eventual judicial review of an unfair labor practice decision or negotiability determination by the FLRA would be limited, as the *Nicholson* court explained, to review of the FLRA's order.[2] *See also Nat'l Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 940 n. 7 (D.C. Cir. 1987) (finding with respect to drug testing executive order that "[i]f the union files a complaint with the FLRA, it can only seek a determination that the drug testing program is subject to collective bargaining. Accordingly, the FLRA will rule on the negotiability of the program, not its legality. And, in defending against a union request for bargaining rights, the government surely will not argue that its drug testing program is illegal. So, *no matter how the FLRA rules on the negotiability issue, an appeal will not involve the legality of the drug testing program*.")

[2] It is of no moment that the exclusion in *Nicholson* sprang from the text of Section 7422 rather than from the text, purpose, and structure of the Statute. Defendants do not argue, nor can they, that the FLRA is empowered to decide the legality of an Executive Order. This conclusion is further supported by defendants' contention on the one hand that plaintiffs' claims are negotiability claims for the FLRA to decide, Def. Cross-Mot. p. 21, and defendants' claim on the other hand that the President may by Executive Order categorically exclude "discrete issues" from collective bargaining and render them non-negotiable. *Compare* Def. Cross-Mot., p. 21, *with* Def. Cross-Mot., pgs. 37-38. Defendants' arguments just do not work. If the President may remove matters from bargaining by Executive Order, then the propriety of that decision itself does not fall within the confines of a negotiability appeal or an unfair labor practice.

(emphasis added).

That is, for example, if the FLRA were to issue an order holding that it lacked the power to hear AFGE's claims or declare the Official Time Order invalid, the court of appeals would be bound to review the FLRA's order without ever reaching the merits of AFGE's claims. Put differently, preclusion may not be implied in this case because accepting defendants' arguments would create exactly the type of lose-lose situation that would deprive AFGE of meaningful review of its core claim that the Official Time Order is unlawful.

The Supreme Court's decision in *Karahalios v. Nat'l Federation of Federal Employees* is not to the contrary. 489 U.S. 527 (1989). In *Karahalios*, the heart of the petitioner's argument was that his union breached its duty of fair representation by refusing to prosecute grievances brought on his behalf and thereby committed an unfair labor practice ("ULP"). 489 U.S. at 530. When the FLRA settled a ULP charge filed by Karahalios, he brought suit against the union in district court seeking damages and restating his ULP claims against the union. *Id*.

The question the court grappled with in *Karahalios* was thus whether Congress intended to create a private right of action, for damages, to enforce a union's duty of fair representation when the Statute provided distinct ULP remedies, 5 U.S.C. § 7118(a)(7), and gave the FLRA the power to adjudicate the substance of ULP claims. *Id*. at 532. Because the Statute explicitly provided an administrative mechanism that precisely paralleled Karahalios's claim and specifically gave the FLRA the power to grant a remedy, the court found no private right of action to enforce the duty of fair representation.

More specifically, the court found Karahalios's suit to be barred by the Statute because he sought to bring damages suit over the breach of a duty expressly created by the Statute, the duty of fair representation, against a party expressly covered by the Statute, the union, even

though the Statute: (a) expressly provided a forum for the exact substance of his claim, the FLRA, and (b) expressly gave that forum the power to grant a remedy, and (c) provided a mechanism for judicial review of his exact claim, i.e., that the union had committed a ULP. *Id.* at 531. As shown above, this is not the case here.

Finally, even assuming *arguendo* that some manner of implied preclusion could be found, which it cannot, this court would still have jurisdiction pursuant to *Leedom v. Kyne*, 358 U.S. 184 (1958). The *Leedom* exception applies when: (1) the statutory preclusion of review is implied, rather than express; (2) the government has acted contrary to a clear and mandatory statutory provision; and (3) the plaintiff has no other meaningful and adequate means of vindicating its statutory rights. *Id.*

AFGE meets these criteria in this case. It should go without saying that there is no express preclusion of AFGE's claim, nor do defendants make this argument. As explained in AFGE's opening brief, 5 U.S.C. § 7131(d) is also a clear and mandatory statutory provision that requires, *inter alia*, decisions as to what amounts of official time are reasonable, necessary, and in the public interest be determined by the mutual agreement of unions and agencies. 5 U.S.C. § 7131(d). Similarly, 5 U.S.C. §§ 7102, 7131(d), and 7211 together provide express Congressional authorization for union representatives to directly lobby Members of Congress on representation issues while on official time. The Official Time Order is contrary to these clear and mandatory statutory provisions because, *inter alia*, it purports to give the Executive a unilateral right to deny AFGE the rights granted therein. *See* Exec. Order 13837, Section 4. And, as shown above, shunting AFGE's claims to the FLRA would deprive AFGE of a meaningful and adequate means of vindicating its statutory and constitutional rights because (a) the FLRA may not decide those claims and (b) any eventual judicial review would be limited to review of the FLRA's order.

AFGE's claim that Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), 4(a)(iii) and 4(a)(v) of the Official Time Order are *ultra vires* is also a claim that is "wholly collateral" to the Statute's review provisions and outside the expertise of the FLRA because AFGE's claim is neither a negotiability matter nor an unfair labor practice allegation. Thus, an erroneous finding of "preclusion could foreclose all meaningful review." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994). Consequently, and for all the reasons above, the Court should grant AFGE's motion for summary judgment and deny defendants' cross-motion for summary judgment.

b. The Court has Jurisdiction to Hear AFGE's Claim for Non-Statutory Review Because the Statute Did Not Give the President Unfettered Discretion

It is beyond cavil that the President of the United States is not above the law. Thus, as AFGE explained in its opening brief, when Congress has spoken, as it has here via the Statute, but the President nevertheless seeks to exercise power on his own behalf in a manner that is incompatible with the will of Congress, as he has here via the Official Time Order, his power is at its "lowest ebb." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). Yet, defendants, in the guise of trying to confront AFGE's Separation of Powers claims, suggest that AFGE's claims are not justiciable. Def. Cross-Mot., pgs. 3, 58. Nothing could be farther from the truth.[3]

More specifically, although defendants do not address AFGE's arguments directly, they argue that the plaintiffs cannot pursue their Separation of Powers claims because those claims are

[3] To the extent defendants suggest that plaintiffs' claims present a political question, this suggestion is not well-taken. *See* Def. Cross-Mot., p. 60, citing *Nixon v. U.S.*, 506 U.S. 224, 228 (1993). This case bears none of the hallmarks of presenting a political question. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 942-3 (1983) ("[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications[.]").

coterminous with plaintiffs' claims that the executive orders are *ultra vires*. Def. Cross-Motion, p. 58, citing *Dalton*. That is, defendants argue that a statutory violation does not make a constitutional one. Defendants appear also to argue that even plaintiffs' *ultra vires* claims are unreviewable because 5 U.S.C. § 7301 grants the President general authority to prescribe regulations governing the Executive Branch. Def. Cross-Mot., p. 59, citing *Letter Carriers*. But this is incorrect on the law and the facts.

As this court's reviewing circuit explained in *Chamber of Commerce v. Reich*, "*Dalton's* holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." 74 F.3d 1322, 1331 (D.C. Cir. 1996) ("*Reich*"). But, as the circuit continued, it is "untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant" to the statute at hand. *Reich* at 1332 (emphasis in original).

Thus, dealing with defendants' latter argument first, *Reich* is more analogous to the instant matter than *Dalton*. In *Reich*, the appellants challenged an executive order that barred the federal government form contracting with employers who hired permanent replacements during a lawful strike. Appellants argued that that order violated an employer's right under the National Labor Relations Act ("NLRA") to hire permanent replacements for economic strikers. *Reich*, 74 F.3d at 1325. The district court first held that the appellants' claims were not ripe. The circuit reversed and remanded. The district court then held that appellants' statutory claims were not reviewable. Purporting to follow *Dalton*, the district court held that the Federal Property and Administrative Services Act, 40 U.S.C. § 471, (the "Procurement Act") gave the President

discretion to, *inter alia*, "ensure the economical and efficient administration and completion of Federal Government contracts." *Id*.

The *Reich* appellees' first argument in the court of appeals, like the district court, was that the President's action in issuing the executive order was not reviewable pursuant to *Dalton* because appellants were essentially claiming that the President had abused his discretion.[4] The court of appeals dispensed with this argument, as shown above, finding non-statutory review to be available because: (a) appellants were "alleging a palpable violation of the NLRA – the Executive Order's impingement on the long-recognized NLRA right to hire permanent replacements"; and (b) it did not matter for purposes of reviewability whether the statutory right was found in the statute "in so many words" or was the product of controlling judicial interpretations; and (c) the Procurement Act did not give the President "unlimited authority to make decisions he believes will likely result in savings to the government." *Reich*, 74 F.3d at 1330.

The court of appeals then looked to an employer's right under the NLRA to permanently replace economic strikers and found it to be concrete and well-established by caselaw. *Id*. at 1332. By comparison, the court of appeals found the authority granted to the President by the Procurement Act to be more general in nature. *Id*. Recognizing that the grant of a specific statutory right must overcome a general statutory grant of authority, the court of appeals concluded that the NLRA preempted the President's authority to issue the Executive Order in that case. *Id*. at 1339. In other words, the Executive Order in *Reich* was *ultra vires* because it

[4] Although, the government acknowledged in *Reich* that, "whatever discretion to set procurement policy the President enjoys under the Procurement Act is limited by the Constitution, and therefore an independent claim of a President's violation of the Constitution would certainly be reviewable." *Reich*, 74 F.3d at 1326.

relied on a general grant of authority made by the Procurement Act to set conditions which conflicted with a more specific right granted by the NLRA.

Here, AFGE seeks to vindicate rights that it holds by the text of the Statute, e.g., the right to official time in mutually agreed-upon amounts provided by 5 U.S.C. § 7131(d), and by decisions rendered pursuant to the Statute's carefully crafted scheme. Likewise, defendants assert that AFGE's claims are not reviewable and that even if they are, the Official Time Order is supported by Section 7301's general grant of authority, which provides only that, "[t]he President may prescribe regulations for the conduct of employees in the executive branch."

The parallels to *Reich* are thus strong and the same result should obtain. It is not AFGE's claims which the Statute preempts but rather the President's authority to issue the sections of the Official Time Order which AFGE challenges because the order purports to set conditions that are contrary to the Statute. Put another way, the Official Time Order is *ultra vires* because it relies on a general grant of authority provided by Section 7301 to set conditions which conflict with more specific rights granted by the Statute.[5] *See In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) ("Needless to say, the President is without authority to set aside congressional legislation by executive order."). AFGE is therefore entitled to judgment as a matter of law.

Defendants' argument that a statutory violation does not make a constitutional violation is only half an argument. It may be true that not every statutory violation amounts to a constitutional violation, but this does not mean that a statutory violation never amounts to a constitutional violation. It simply means that each case must be heard on its own facts.

[5] Indeed, Section 7301 is too slender a thread upon which to hang the Official Time Order in the face of the Statute, as whatever authority may be granted by Section 7301 is not directed at labor relations at all, but more focused on entry into the civil service and ethics. *See* 5 U.S.C. Chapter 73; *see also* 5 C.F.R. Part 731.

In this case, it is the nature and magnitude of the President's statutory violations that lead inexorably to his constitutional violations. Congress passed a statutory scheme, the Statute, that established a panoply of rights and obligations on the part of federal employees, their unions, and the Government. The President has issued an executive order, the Official Time Order, that negates discrete rights granted to federal employees and their unions by the Statute, most notably for the purpose of AFGE's action the right to official time enshrined in 5 U.S.C. § 7131(d). This is certainly a statutory violation. But the Official Time Order also goes one step further and attempts to rewrite the Statute by, in Section 4 of the Official Time Order, creating new rules of general applicability. Congress, however, withheld this Authority from the Executive when it passed the Statute in 1978. It did so for the purpose of replacing and supplanting prior executive orders that had governed federal-sector labor relations.

By attempting to rewrite the Statute, the President is, in reality, attempting to legislate.[6] By seeking to legislate, the President is exercising power that Article I of the Constitution reserves exclusively to Congress. So, put simply, because Article I reserves the power to legislate to Congress, and because Article II requires the President to "faithfully execute" the laws passed by Congress, the President's *ultra vires* actions in this particular case are also contrary to the Separation of Powers. *See Youngstown*, 343 U.S. at 587 ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be the lawmaker."). This is, therefore, a claim that the Court has the power to adjudicate.[7] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[6] This conclusion should be fortified by the fact that in the past there have been legislative attempts to restrict or eliminate official time, which have not been enacted into law. *See, e.g.*, H.R. 986, 105th Cong. 1997). The President may not get in through the back door what Congress chose not to let in through the front.

[7] The court's authority to adjudicate this case also puts to rest defendants' argument that compliance with the Official Time Order may not be enjoined. Among other reasons, far from seeking to enjoin the President from engaging in an act committed to his discretion, AFGE seeks to declare the Official Time Order unlawful and enjoin its implementation and enforcement by the Executive branch because the restrictions established by the order are

c. AFGE's Challenge to the Official Time Order is Ripe

That AFGE's challenge is ripe does not bear protracted discussion. OPM has issued implementing guidance. This guidance sets forth OPM's settled position that: (a) the order possesses the force of a government-wide rule; and (b) the provisions of the order are effective on the date that a collective bargaining agreement expires or rolls over, regardless of whether the agreement is reopened for negotiation; and (c) Section 4 of the order establishes new requirements and restrictions for employees regarding the use of official time, which "take effect on July 9, 2018".

Most importantly, OPM's guidance provides that:

> While any forthcoming proposed regulations from OPM may offer some more details on these new requirements and restrictions, agencies are reminded of these new EO requirements and restrictions and should make appropriate adjustments on authorization and use of taxpayer-funded union time, at the earliest practicable date permitted by law and subject to appropriate collective bargaining obligations and to the extent consistent with applicable law. Please refer to the attached EO for complete details on these new requirements and restrictions.

In other words, OPM plainly instructs agencies to implement the Official Time Order as soon as possible, and without waiting for potential future regulations that "may offer some more details."[8] Consistent with AFGE's explanation in its opening brief, the guidance recognizes that

ultra vires and unconstitutional – providing a set metric by which the President's action may be measured. *Building and Construction Trades Dep't, AFL-CIO, v. Allbaugh* is not to the contrary, as that case turned on whether the order in that case was proprietary or regulatory in nature, a consideration that is not present here. 295 F.3d 28, 36 (D.C. Cir. 2002). Another core problem with defendants' view is that their construction of Executive authority is so sweeping and their construction of an Article III court's co-equal judicial power so cramped, that if it were to be adopted, the Executive could never be enjoined from engaging in illegal and unconstitutional action. This is not the case nor can it conceivably be what the Founders intended when they established the Separation of Powers in the first instance. AFGE adopts NTEU's arguments in this regard. NTEU Br. pgs. 27-35. Finally, even assuming solely for the sake of argument that defendants' view were valid, which it is not, the Official Time Order commits its implementation to defendants OPM and Pon, who are (a) parties properly before this court; and (b) unquestionably susceptible to declaratory and injunctive relief. *See, e.g., Reich*, 74 F.3d 1322, ("That the 'executive's' action here is essentially that of the President does not insulate the entire executive branch from judicial review.").

[8] OPM's attempt to cabin its guidance with a rider of "to the extent consistent with applicable law" fails for the same reasons Sections 8 and 9 of the Official Time Order fails to render the order lawful, as AFGE explained in its

there is nothing contingent in the language of Sections 3 and 4 of the Official Time Order. AFGE Mot. for Summary Judg., pgs. 25-26. These sections are not a "precursor" to anything. The Official Time Order is, as defendants appear to concede, the rule itself. *Cf*. Defs. Mot. for Summary Judg., p. 26 ("many provisions of the Orders have immediate effect"), and p. 27 (arguing that orders are government-wide rules).[9]

Further, agencies across the federal government have implemented the Official Time Order to AFGE's detriment. For example, the Social Security Administration has denied official time to AFGE representatives using the Official Time Order as a basis. Declaration of Ralph De Juliis, attached to this opposition as Exhibit 1. Using the Official Time Order as a basis, the Department of Energy has reneged on previously agreed-upon agreement provisions, including with respect to official time, and evicted AFGE representatives from previously occupied office space. Declaration of Mark W. Lusk, attached to this opposition as Exhibit 2. And the Department of Veterans Affairs has given notice of its implementation of the Official Time Order and its unilateral rescission of controlling terms of the parties' collective bargaining agreement, also on the basis of the Official Time Order. Declaration of Oscar L. Williams, Jr., attached to this opposition as Exhibit 3.

Consequently, it cannot be said that AFGE's challenge to the lawfulness of the Official Time Order is unripe. Delaying consideration of AFGE's challenge based on the nebulous prudential consideration of regulations that may never come and which if they do, may only offer "some more details," will not inform a determination of whether the Official Time Order is

memorandum in support of its motion for summary judgment. AFGE Memo, pgs. 24-26. The government has also not contested AFGE's explanation in its cross-motion and opposition.

[9] And in any event, it is not a sustainable argument to assert that this case presents solely a question of law but assert at the same time that this case is not rip for factual reasons. Defendants' arguments fail in this regard.

invalid on its face. In the meantime, AFGE would continue to be harmed. AFGE's challenge is therefore ripe.

II. The Official Time Order is Contrary to the Statute

Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), and 4(a)(v) of the Official Time Order are contrary to the text, purpose, and structure of the Statute in that they allow the Executive branch to unilaterally determine the amount of official time under 5 U.S.C. § 7131(d) that is reasonable, necessary, and in the public interest. *See AFGE Council 214 v. F.L.R.A.*, 798 F.2d 1525, 1530 (D.C. Cir. 1986) ("*AFGE Council 214*") (Finding that the express language of 7131(d) provides that "the agency and the union together should determine the amount of official time reasonable, necessary, and in the public interest.")(internal quotations omitted). The Official Time Order's assertion that the "requirements of an effective and efficient government" necessitates the challenged restrictions of official time completely ignores that "Congress…committed the determination of the public interest to the union and the agency together, *not to the agency alone*." *See* Exec. Order 13837, Sec. 1; *AFGE Council 214*, 798 F.2d at 1530 (emphasis added).

a. Sections 2(j) and 3(a) are Contrary to the Statute

Defendants' cross-motion fails to meaningfully confront AFGE's substantive arguments that the challenged sections of the Official Time Order are contrary to the text, purpose, and structure of the Statute. The defendants' argument that Section 3 is not inconsistent with the congressional intent underlying section 7131(d) based upon prior executive orders is not supported by the legislative history of the Statute. *See* Def. Cross-Mot., pg. 35. The Circuit Court has long recognized that "Congress viewed the statute as a departure from the law that had developed under the Executive Order structure." *Dep't of Air Force, McClellan Air Force Base,*

California v. *FLRA*, 877 F.2d 1036, 1041 (D.C. Cir. 1989) citing *Dep't of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). Consequently, "the [prior] Executive Order system has limited value in interpreting the contemporary statute." *Id.*

Further, as explained in the amicus curiae brief filed by current and former members of the United States Congress, the Statute "move[d] Federal labor relations from Executive Order to statute," Statement of Jimmy Carter on Signing S. 2640 Into Law, 14 Weekly Comp. Pres. Doc. 1765 (Oct. 13, 1978), and created a "statutory Federal labor-management program which cannot be universally altered by any president," 124 Cong. Rec. 29,186 (1978) (remarks of Rep. Clay). Brief for Amici Curiae Representatives Elijah E. Cummings, Peter T. King, William (Bill) Clay, Sr., and Jim Leach, pg. 2.

In other words, prior to the enactment of the Civil Service Reform Act, official time was exclusively and unilaterally controlled by the President. The Statute, and section 7131 in particular, removed this authority from the President and expressly committed the determination of the amount of official time to the agency and the union together. Permitting the President to pre-determine the result of the collective bargaining process by executive order would do violence to this statutory scheme, in which Congress entrusted the bargaining process itself to determine such results. The Court should, therefore, find that Sections 2(j) and 3(a) are contrary to the Statute.

b. Sections 4(a)(i), 4(a)(ii), 4(a)(v) are Contrary to the Statute

Defendants do not substantively rebut AFGE's argument that the Official Time Order's prohibitions and restrictions of the use of official time is contrary to the plain language of 5 U.S.C. § 7131(d) which mandates that official time be granted in any amount that an agency and its counterpart labor organization may mutually agree upon. Def. Cross-Mot., pgs. 38-41, 42-43.

Section 4(a)(i) prohibits employees from using official time to petition Congress. Section 4(a)(ii) limits employees to twenty-five percent official time per year. And Section 4(a)(v) prohibits employees from receiving official time to prepare and pursue grievances on behalf of the labor organization or on behalf of represented employees. All of these prohibitions and limitations are flatly contrary to section 7131(d) which leaves it to the discretion of agencies and unions together to determine the amount of official time that is "reasonable, necessary, and in the public interest."

Defendants' argument that Section 4(a)(ii)'s twenty-five percent official time limitation is justified because official time has a potential impact on agency staffing is also foreclosed by the D.C. Circuit's decision in *AFGE Council 214*. Def. Cross-Mot., pgs. 39-41. As the Court explained in that case, "[i]n specifically providing for official time, Congress must have envisioned either some reallocation of positions or some additional hiring[.]" *AFGE Council 214*, 798 F.2d at 1529. Moreover, the "express language of section 7131(d)…provide[s] that the agency and the union together should determine the amount of official time reasonable, necessary, and in the public interest. Congress thus committed the determination of the public interest to the union and the agency together, *not the agency alone*." *Id.* at 1530 (emphasis added). Consequently, Defendants' arguments that union representatives remain free to petition Congress or prepare and pursue grievances on their own time are beside the point. Def. Cross-Mot., pgs. 38-39; 42-43. Defendants' construction of 7131(d) impermissibly presumes that "Congress' explicit provision for official time was not meant to be a meaningful guarantee." *Id.* at 1530. Thus, Sections 4(a)(i), 4(a)(ii), and 4(a)(v) limitations and prohibitions on the use of official time are contrary to the Statute.

c. Section 4(a)(iii) is Contrary to the Statute

Section 4(a)(iii) of the Official Time Order is contrary to the Statute for the reasons discussed in AFGE's opening brief. Section 4(a)(iii) it purports to usurp the power granted to the FLRA by Congress in 5 U.S.C. §§ 7105(a)(2)(E) & 7135(b). The Authority has long held that, for example, the provision of union office space is a substantively negotiable condition of employment. *U.S. Department of Veterans Affairs and AFGE, Local 31*, 60 F.L.R.A. 479, 482 (2004).

Chapter 71's creation of the duty to bargain, in conjunction with the Authority's determination that union office space falls within that duty to bargain, disallows the Executive from trying to single-handedly un-create what the Statute has wrought and the Authority has held. This is especially so because it cannot be gainsaid that Chapter 71 grants labor organizations rights that are distinct and above whatever rights non-federal organizations may have. *See, e.g.*, 5 U.S.C. § 7114(a). Moreover, Section 4(a)(iii) is an impermissible attempt to dismantle the Statute's carefully crafted collective bargaining scheme. This section is therefore *ultra vires*.

d. 5 U.S.C. § 7301 Does Not Grant the President the Authority to Rewrite the Statute.

"Needless to say, the President is without authority to set aside congressional legislation by executive order[.]" *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 D.C. Cir. 1999). Defendants' argument that the general text in 5 U.S.C. § 7301 authorizes the President to issue executive orders contrary to the specific language of the Statute is without merit.

5 U.S.C. § 7301 provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." The general language of section 7301 cannot control the

specific language of 5 U.S.C. 7131(d), which mandates the granting of official time in any amount mutually agreed by the agency and its counterpart labor organization to be reasonable, necessary, and in the public interest. "It is a commonplace of statutory construction that the specific governs the general[.]" *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 384-85 (1992). This is especially true when, as in Chapter 71 and section 7131(d), "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996)). The general language of section 7301 does not permit the Executive to run roughshod over the specific guarantees provided in the Statute and section 7131(d).

The defendants' construction of section 7301 is not supported by the history of labor-management relations in the federal sector or the legislative history of the Statute. Similarly, the defendants' reliance on cases that predate the Statute is misplaced because "Congress viewed the statute as a departure from the law that had developed under the Executive Order structure." *Dep't of Air Force*, 877 F.2d at 1041; *see* Def. Cross-Mot., pgs. 2, 59. Whatever authority section 7301 may have granted the Executive when first enacted, that authority was substantially curtailed by the enactment of the Federal Labor Management Relations Statute in the Civil Service Reform Act of 1978. *See* 5 U.S.C. § 7135(b); *see also* Statement of Jimmy Carter on Signing S. 2640 Into Law, 14 Weekly Comp. Pres. Doc. 1765 (Oct. 13, 1978) (The Statute "move[d] Federal labor relations from Executive Order to statute[.]");124 Cong. Rec. 29,186 (1978) (remarks of Rep. Clay) (The CSRA created a "statutory Federal labor-management program which cannot be universally altered by any president[.]").

The Statute provides that policies, regulations, and procedures established by Executive order would remain in effect "unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter." 5 U.S.C. § 7135(b). Section 7131 superseded prior Executive orders and removed the Executive's authority to unilaterally regulate the provision of official time by: a) mandating official time for bargaining; b) mandating official time for appearing before the Authority; and c) committing the grant of authority for official time to the *joint* discretion of the agency and the union. 5 U.S.C. § 7131. Section 7301 does not grant the President authority to rewrite the specific provisions of 5 U.S.C. § 7131(d) nor does it authorize the President to issue an executive order to unilaterally determine the amount of 7131(d) official time that is "reasonable, necessary, and in the public interest" in violation of the plain language of the Statute.

e. 5 U.S.C. § 7117(a) Does Not Grant the President the Authority to Rewrite the Statute

The defendants' reliance on Section 7117(a) to assert that the Official Time Order is not contrary to Section 7131(d) is misplaced. Most importantly, the plain text of Section 7117(a) does not grant any authority to the Executive. Section 7117(a)(1) merely concerns the duty to bargain. While Section 7117(a)(1) may exclude from bargaining certain matters that are inconsistent with federal laws or government-wide rules or regulations, it in no way authorizes the government to issue a government-wide rule that is contrary to the Statute or that would read a provision out of the Statute entirely. *See Dep't of Treasury, IRS v. FLRA*, 996 F.2d 1246, 1251 (D.C. Cir. 1993) ("*IRS II*"). The obvious problem with the defendants' argument is that it has no limit. Under the government's theory, the President would never be bound by the Statute because the Executive could issue a contrary government-wide rule, in the form of an executive order, at

any time. To the contrary, the President cannot obtain by executive order, the authority that was explicitly taken away by statute.

Section 7117(a)(1) provides that the duty to bargain does not extend to matters that are the subject of Government-wide rules or regulations.[10] Its effect is solely limited to the negotiability of proposals which fall within its ambit. Section 7117(a) does not operate as a grant of authority for the Executive or for agencies to issue government-wide rules and regulations which expand the management powers granted under the Statute. *See IRS II*, 996 F.2d at 1251. Further, section 7117(a) leaves the FLRA limited power to determine: a) whether a rule has government-wide application; b) whether a proposal implicates that rule; and c) whether a proposal is within the duty to bargain and therefore negotiable. Section 7117(a) does not grant the FLRA the power to decide the validity of a government-wide rule itself especially where, as here, the putative rule is not agency action but Presidential action falling outside the purview of the Statute itself. *See, e.g., Fed. Bureau of Prisons, Lexington, Kentucky and AFGE, Council 33*, 68 F.L.R.A. 932, 941 (2015) ("It is well established that the Authority does not have the power to assess whether an OPM regulation is invalid.").

The defendants' reliance on *IRS II* is misplaced for three reasons. One, *IRS II* is unique insofar as it relied upon a specific prohibition set forth in the text of the Statute that guaranteed an agency the management right to "make determinations with respect to contracting out[.]" *See IRS II*, 996 F.2d at 1247-48; *see also* 5 U.S.C. § 7106 (a)(2)(B). Here, there is no analogous provision in the Statute which guarantees an agency the unilateral right to determine how much

[10] The defendants' argument that Congress intended for the term government-wide rules and regulations to include "official declarations of policy" that are "binding on officials and agencies to which they apply" is missing important context. Def. Cross-Mot., pg. 27 The referenced portion of the legislative history concerns the "official declarations of policy of *an agency*"; not the President. See H.R. Conf. Rep. No. 95-1717 at 158 (1978), reprinted in 1978 U.S.C.C.A.N. 2860, 2892 (emphasis added); *see also U.S. Dep't of Human Health Services v. FLRA*, 844 F.2d 1087, 1099 (4th Cir. 1988).

official time to grant to labor organizations. Two, *IRS II* involved a government-wide rule which "does not purport to expand on management rights recognized in the statute; rather it restricts rights already granted." *Id.* at 1251. Here, the Official Time Order amounts to an expansion of the management rights provided by the Statue in the sense the court found impermissible because it seeks to restrict the amount of official time a labor organization may bargain for, and when and how that official time may be used. Exec. Order. 13837, Sec. 4(a)(i-ii), 4(a)(v). Three, *IRS II* arose from a negotiability appeal and did not involve a challenge to the validity of the government-wide rule itself. Here, the basis for AFGE's action is that the Official Time Order is contrary to the Statute. AFGE does not raise the negotiability of a particular proposal.

IRS II involved a union proposal seeking to compel the agency to comply with the Office and Management and Budget Circular A-76 ("OMB Circular") in making all contracting-out decisions and to resolve any disputes concerning those decisions through the parties' negotiated grievance procedure. *Id.* at 1248. *IRS II* is easily distinguishable from this case because the Statute provides that "nothing in this chapter shall affect the authority of any management official…in accordance with applicable laws… to make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). In other words, the text of the Statute expressly grants agencies specific management rights that place some limitations on the subjects and scope of bargaining available to labor organizations. Whereas here the Statute does not provide agencies with any special rights or privileges with respect to 7131(d) official time. Instead, the text of 7131(d) places both labor organizations and agencies on the same footing by stating that official time "*shall* be granted in *any* amount the agency *and* the exclusive representative involved agree to be reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d)

(emphasis added).[11] Thus, *IRS II* is inapposite because it involved the interpretation of a provision which expressly guaranteed the right of an agency to make determinations concerning contracting out.

IRS II is further distinguishable because in that case the government took an action which restricted the management rights of agencies, as opposed to the expansion of rights sought in the Official Time Order. As the Court explained in *IRS II*, "the government c[an] not gain the exemption from bargaining in section 7117(a) merely by restating with broader effect a provision in the management rights section." *Id.* at 1251. Rather, the government must "direct[] the exercise of *existing* management prerogatives" in a manner which does not expand on the management rights granted by the Statute. *Id.* at 1251 (quoting *Office of Personnel Management v. FLRA*, 864 F.2d, 165, 171 (1988)). The Court held that government-wide rule at issue in *IRS II* met that test because the rule "does not purport to expand on management rights recognized in the statute; rather it restricts rights already granted." *IRS II*, 996 F.2d at 1251.

Here, the Official Time Order does not purport to restrict management rights already granted. Rather, the Order impermissibly seeks to create new management powers not granted by the Statue by purporting to unilaterally mandate the amount of official time that is "reasonable, necessary, and in the public interest" and how that official time may be used. For example, the Official Time Order purports to limit the amount of official time employees may use and prohibit the use of official time to represent employees in grievances. EO 13837, Sec. 3, 4(a)(ii), 4(a)(v). As discussed above, the Statute does not grant the President the power to unilaterally determine the amount of official time that is "reasonable, necessary, and in the public interest." *See* 5

[11] The only limitation on official time contained in the Statute prohibits the use of official time for conducting "the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues)[.]" 5 U.S.C. § 7131(b).

U.S.C. § 7131(d).

Finally, *IRS II* did not involve a challenge to the validity of the underlying government-wide rule. Instead, *IRS II* concerned a negotiability appeal which was solely focused on the duty to bargain subjects related to the OMB Circular. *See generally IRS II*, 996 F.2d 1246. In the instant matter, the issue is not whether the restrictions created by the Executive Order are negotiable. The issue is whether they are lawful. Thus, *IRS II* offers limited assistance to the court in deciding this case.

III. The Official Time Order Violates the First Amendment

For the reasons discussed in AFGE's opening brief, Section 4(a)(v) of the Official Time Order violates the First Amendment because it impermissibly subjects union representatives to disparate treatment by authorizing official time for an employee to prepare or pursue a grievance filed on the employee's own behalf while at the same time prohibiting union representatives from receiving official time to prepare or pursue grievances brought on behalf of the labor organization, the bargaining unit, or an individual employee. Defendants' arguments to the contrary are without merit.

While the government may, in some scenarios not present here, have more power with respect to the free speech rights of federal employees, that power is not so vast as to allow viewpoint-based interference with AFGE's associational rights. "The bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

When establishing the statutory entitlement to official time, Congress did not segregate whether official time may be granted, or in what amount official time may be granted, based on the associational characteristics of the individual seeking the official time. That is, Congress did

not distinguish between union representatives and individuals or between personal grievances or union grievances for the purpose of granting official time. Congress instead authorized official time for both purposes. In other words, Congress already made a deliberate choice to subsidize all these types of speech through the use of official time. This is in part because the purpose of Section 7131 of the Statute was to facilitate the union's use of official time to represent bargaining unit employees and the union itself, in keeping with the union's status as employees' certified, exclusive representative. *See* Br. of Amici Curiae Representatives Cummings, King, Clay, and Leach, pgs. 2-3.

The Official Time Order, however, purports to unilaterally pick and choose to whom official time may be granted and for what purpose it may be granted, and it bases that choice on the associational nature of the user. Put another way, the Official Time Order uses an employee's union affiliation and decision to provide union representation for other employees, to determine whether to grant or withhold official time. Not only does this run directly contrary to what Congress, in fact, authorized, it interferes with the union's associational rights under the First Amendment because it discriminates in granting official time based on the expressive nature of an employee's speech; i.e., her decision to affiliate with AFGE.[12]

Defendants do not, moreover, demonstrate even a rational basis for distinguishing between official time for union representatives acting in their capacity as union representatives, and employees representing themselves. Even a rational basis must be more than a trite "it seems like a good idea," which is what defendants offer when they say that the distinction is justified by the Official Time Order's very general and cursory statement that there is a need for "effective and efficient government." In similar fashion, defendants claim that that the distinction is

[12] AFGE joins plaintiff AFSCME's arguments in this regard. AFSCME Opp. Br., pgs. 6-11.

somehow supported by a need to "keep track" of expenditures and make employees "spend their duty hours performing the work of the Federal Government" fails to qualify as a rational basis, and thus also fails any level of heightened scrutiny.

This is especially so given (a) that this was not the conclusion that Congress reached in Section 7131; and (b) that the defendants gloss over any discussion of whether there is a nexus between the limitation placed by the Order on AFGE's rights and the putative government interest that defendants have put forth – because there is not. For example, the government's purported rationale cannot explain why allowing an employee eight hours of official time to prepare and pursue her own grievance would be more "effective and efficient" than allowing an experienced union representative eight hours to prepare and pursue that same grievance on the employee's behalf. Considering also that the order carves out a separate exception for employees appearing as a witness at an arbitration, so that under either scenario witnesses could still be appearing while on official time, defendants' proposed rationale makes little sense. Exec. Order 13837, § 4(v).

Because Congress made a decision to provide official time regardless of whether an employee seeks to represent herself, or another employee, or the union, the President may not now by executive order unilaterally withhold official time based solely on an employee's connection to the union. The First Amendment does not countenance such interference with the associational rights of federal employees and their union representatives.

CONCLUSION

For the foregoing reasons, Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), 4(a)(iii), and 4(a)(v) are contrary to Chapter 71 of Title 5 of the United States Code, and are thus *ultra vires* and void. Section 4(a)(v) of the Official Time Order is contrary to the First Amendment. AFGE respectfully requests that this Court therefore grant AFGE's motion for summary judgment in its entirety, and enjoin Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), 4(a)(iii), and 4(a)(v) of the Official Time Order. AFGE also respectfully requests that the Court deny defendants' cross-motion for summary judgment in its entirety.

Respectfully Submitted,

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