**[ORAL ARGUMENT NOT SCHEDULED]**

**No. 18-5289**

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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On Appeal from the United States District Court
for the District of Columbia

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# BRIEF FOR APPELLANTS

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

**A. Parties and Amici**

Plaintiffs in district court, and appellees here, are: American Federation of Government Employees, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; American Federation of Teachers, AFL-CIO; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers Beneficial Association/National Maritime Union (AFL-CIO); and National Treasury Employees Union.

Defendants in district court were Donald J. Trump, in his official capacity as President of the United States; the U.S. Office of Personnel Management; and Jeff T.H. Pon, in his official capacity as Director of the Office of Personnel Management. Appellants in this Court are Donald J. Trump, in his official capacity as President of the United States; the U.S. Office of Personnel Management; and Margaret Weichert,

in her official capacity as Acting Director of the Office of Personnel Management, *see* Fed. R. App. P. 43(c)(2). As of the time of filing, the following had indicated their intent to participate as amici in this appeal: Elijah E. Cummings; Peter T. King; William Clay, Sr.; Jim Leach; Thomas W. Wolf; National Nurses Organizing Committee/National Nurses United; International Brotherhood of Electrical Workers, AFL-CIO; International Union of Operating Engineers, AFL-CIO; and American Federation of Labor & Congress of Industrial Organizations AFL CIO.

**B. Rulings Under Review**

The government seeks review of the August 24, 2018 Order and the August 25, 2018 Memorandum Opinion in four consolidated cases in the United States District Court for the District of Columbia, *see American Fed'n of Gov. Emps., AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C.) (No. 1:18-cv-1261) (Jackson, J.), reproduced at Joint Appendix (JA) 40-42 (Order) and 43-164 (Mem. Op.).

**C. Related Cases**

The case on review has not previously been before this Court or any other, save the district court from where it originated. No related cases are currently pending in this Court, any other court of appeals, or any court in the District of Columbia.

*s/ Joseph F. Busa*
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**GLOSSARY**

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|---|---|
| Add. | Addendum |
| APA | Administrative Procedure Act |
| FLRA | Federal Labor Relations Authority |
| FSLMRS | Federal Service Labor-Management Relations Statute |
| JA | Joint Appendix |
| OPM | Office of Personnel Management |

## INTRODUCTION

In May 2018, the President issued three Executive Orders that aim to make collective bargaining more efficient, to ensure that employees serve the public while on paid time, and to promote employee accountability. The Orders do so by setting presumptively reasonable goals for agency negotiators to strive to achieve (*e.g.*, completing new collective-bargaining agreements within six months of beginning negotiations). The Orders also direct the President's subordinates to exercise their lawful authority to decline to bargain over so-called permissive subjects—topics that are negotiable by statute only at the election of the agency (*e.g.*, the number of employees assigned to a work unit). And the Orders establish narrow government-wide regulations for employee conduct (*e.g.*, employees may not lobby for unions or any other private organization while on government-paid time).

Plaintiffs, several federal-employee labor unions, brought a facial challenge in district court contending that these provisions of the Orders exceed the President's authority under the Federal Service Labor-Management Relations Statute. Apparently recognizing that it could not directly enjoin the President or vacate the Orders, the district court instead, at plaintiffs' suggestion, prohibited all of his subordinates from implementing these provisions—thereby confirming that plaintiffs' actual objection is that officials who implement the provisions in collective bargaining will violate the statute. Indeed, the district court's sole basis for enjoining the challenged provisions was a supposed conflict with the statute. Congress has established an exclusive review

mechanism for precisely that sort of claim, which must be submitted for administrative adjudication before the Federal Labor Relations Authority, followed by direct judicial review in the courts of appeals. In concluding that it nevertheless had jurisdiction, the district court not only departed from this exclusive review scheme, but also deprived itself (and this Court) of the Authority's considerable legal and practical expertise in administering its own statute. The court's judgment should therefore be vacated for lack of jurisdiction and plaintiffs' claims dismissed.

In any event, the district court's ruling on the merits is unsustainable. The court concluded that the President's Orders violated the statute, but its justifications for invalidating the challenged provisions would apply even if agencies had adopted such provisions themselves. Yet nothing in the statute limits agencies' authority to seek to accomplish on their own what the President directed here. And any suggestion that the President cannot order his subordinates to engage in lawful conduct would conflict not just with the statute but with Article II. Indeed, some of the restrictions the court imposed on agencies' ability to deal with their employees raise significant concerns about the President's ability to ensure the faithful exercise of executive power.

The district court erroneously concluded that each invalidated provision would violate the Federal Service Labor-Management Relations Statute. For example, the district court recognized that the Orders' goal-setting provisions expressly admonished that agency negotiators must still bargain in good faith, but the court

nevertheless speculated, without any basis in fact or law, that merely being subject to presumptively reasonable goals would invariably cause negotiators to bargain in bad faith. Likewise, there is no support for the district court's atextual conclusion that a statutory provision leaving to "the election of the agency" whether to address certain topics through permissive bargaining somehow mandates an unspecified level of bargaining on those topics. Finally, the court held that the provisions of the Orders that create rules for employee conduct could not permissibly displace the government's duty to bargain over such matters—notwithstanding that the statute expressly exempts from bargaining matters that are covered by such government-wide rules, and notwithstanding that both this Court and the Authority have approved materially indistinguishable government-wide rules.

Indeed, the district court's flawed reasoning on the merits further underscores that these questions fall within the Authority's exclusive jurisdiction. In stark contrast to the district court, the Authority has the expertise to decide whether an agency negotiator will inevitably bargain in bad faith by striving to achieve a goal, whether the statute implicitly mandates some unspecified minimum of permissive bargaining, and whether the statute implicitly limits the President's express authority to establish conduct rules for federal employees. In sum, whether for lack of jurisdiction or merit, the district court's judgment cannot stand.

## STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331, alleging violations of, among other things, the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135. For the reasons set out at Part I of the Argument, jurisdiction is disputed. The district court issued a final order and permanent injunction on August 24, 2018. JA 41-42. Defendants filed a timely notice of appeal on September 25, 2018. JA 165. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

The issues presented are:

1. Whether plaintiffs may bypass the exclusive regime for administrative and judicial review established in 5 U.S.C. § 7123, which requires that labor-relations disputes be brought before the Federal Labor Relations Authority, with direct review in the courts of appeals.

2. Whether it violates the statutory duty to bargain in good faith, 5 U.S.C. § 7114, for agency negotiators to strive to achieve presumptively reasonable goals—such as the duration of negotiations, the amount of official time that agency employees use, and the scope of negotiated grievance procedures—or to request the exchange of written proposals.

3. Whether requiring agency heads to elect against permissive bargaining violates 5 U.S.C. § 7106(b)(1), which provides that agencies may bargain over permissive matters "at the election of the agency."

4. Whether certain provisions of the Executive Orders exercising the President's power to "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301, properly remove such matters from collective bargaining pursuant to 5 U.S.C. § 7117(a)(1), which provides that the duty to bargain does not extend to any matter that would be "inconsistent with … any Government-wide rule."

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutes, regulations, and Executive Orders are reproduced in the addendum to this brief.

## STATEMENT OF THE CASE

### A. Labor Relations In Federal Employment

#### 1. Presidential Authority To Regulate The Conduct Of Federal Employees

Executive Orders in the 1960s established the legal framework under which federal employees first formed unions and engaged in collective bargaining. *See* Exec. Order 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969); Exec. Order 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962). The Supreme Court recognized that these Orders were a "reasonable exercise of the President's responsibility for the efficient operation of the

Executive Branch" under Article II of the Constitution and under 5 U.S.C. § 7301, which provides that the President may "prescribe regulations for the conduct of employees in the executive branch." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974).

### 2. Federal Service Labor-Management Relations Statute

Against that backdrop, in 1978, Congress enacted the Federal Service Labor-Management Relations Statute (FSLMRS or "the statute") as title VII of the Civil Service Reform Act. *See* Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1191; 5 U.S.C. §§ 7101-7135. The statute creates a "scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983). It grants federal employees the right to form and join a union and "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102(2). Agencies and unions must "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." *Id.* § 7114(a)(4).

**a.** The duty to bargain in "good faith" requires that the parties "meet at reasonable times … as frequently as may be necessary, and … avoid unnecessary delays." 5 U.S.C. § 7114(b)(3). Bargaining procedures are generally established by mutual agreement. *Id.* § 7114(a)(4). Parties must "approach the negotiations with a sincere resolve to reach a collective bargaining agreement," *id.* § 7114(b)(1), but are not required to "agree to a proposal or to make a concession," *id.* § 7103(a)(12). If

the parties reach an impasse, the Federal Service Impasses Panel may ultimately impose a binding outcome on the parties. *Id.* § 7119.

**b.** The duty to bargain over "conditions of employment" requires that agencies and unions generally must bargain over "personnel policies, practices, and matters … affecting working conditions." 5 U.S.C. §§ 7102(2), 7103(a)(14). But the statute "excludes from negotiations a host of subjects that employers would be obliged to bargain about in the private sector." *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) (en banc).

For example, "conditions of employment" do not include "matters … specifically provided for by Federal statute," 5 U.S.C. § 7103(a)(14), such as wages and retirement benefits. More broadly, agencies are not required to bargain over any matter that would be "inconsistent with any Federal law or any Government-wide rule or regulation." *Id.* § 7117(a)(1). As this Court has described it, this provision "essentially permits the government to pull a subject out of the bargaining process by issuing a government-wide rule that creates a regime inconsistent with bargaining." *IRS v. FLRA*, 996 F.2d 1246, 1250 (D.C. Cir. 1993).

Agencies also do not bargain over the substance of specified management rights, which include, among many other things, the agency's ability to "hire" and "layoff" employees, and to "make determinations with respect to contracting out." 5 U.S.C. § 7106(a). Agencies must, however, still engage in impact-and-implementation

bargaining over procedures for exercising management rights, and "appropriate arrangements" for affected employees. *Id.* § 7106(b)(2), (3).

The statute further provides that, "at the election of the agency," there may be bargaining over a list of permissive subjects, including, for example, the number of employees assigned to a work project. 5 U.S.C. § 7106(b)(1).

### 3. Federal Labor Relations Authority

The Federal Labor Relations Authority (FLRA, or Authority) adjudicates disputes regarding compliance with the FSLMRS, *see* 5 U.S.C. §§ 7104-7105, including so-called negotiability disputes as to whether the duty to bargain "extend[s] to any matter," *id.* §§ 7105(a)(2)(E), 7117(c), and "unfair labor practice[]" charges, *id.* §§ 7105(a)(2)(G), 7118, which include disputes regarding whether an agency has refused to collectively bargain over negotiable matters, engaged in bad-faith negotiations, or "otherwise fail[ed] or refuse[d] to comply with any provision of" the statute, *id.* § 7116(a). With exceptions not relevant here, the Authority's final orders are subject to direct review in the courts of appeals. *Id.* § 7123(a).

### 4. Executive Authority Under The Statute

The statute provides that none of its provisions, "[e]xcept as otherwise expressly provided," should be construed to "limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date" of the statute. Pub. L. No. 95-454, § 904, 92 Stat. at 1224; Addendum (Add.) 1. Accordingly, Congress expressly confirmed that it

had preserved the President's pre-existing authority under 5 U.S.C. § 7301 to "prescribe regulations for the conduct of employees in the executive branch," which are "Government-wide rule[s]" that eliminate agencies' duty to bargain over an "inconsistent" proposal, 5 U.S.C. § 7117(a)(1).

Presidents have invoked this authority to issue Executive Orders that, for example, required mandatory drug testing for federal employees in sensitive positions, Exec. Order 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986); prohibited federal employees from smoking in federal buildings except in designated areas, Exec. Order 13,058, 62 Fed. Reg. 43451 (Aug. 9, 1997); and mandated that federal employees comply with ethics regulations, Exec. Order 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989).

**5. Other Statutory Provisions**

Several other provisions of law are relevant to this appeal.

**a.** Official time is a non-duty status in which federal employees are paid by a federal agency to perform work on behalf of a union. *See Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 98-108. The statute requires that federal employees negotiating on behalf of a union "shall be authorized official time for such purposes," 5 U.S.C. § 7131(a), and that the Authority "shall determine whether any employee participating" in FLRA proceedings "shall be authorized official time for such purpose," *id.* § 7131(c). For "any other matter covered by" the statute, official time

"shall be granted … in any amount the agency and the [union] involved agree to be reasonable, necessary, and in the public interest." *Id.* § 7131(d).

**b.** The statute requires that "any collective bargaining agreement shall provide procedures for the settlement of grievances," including binding arbitration. 5 U.S.C. § 7121(a)(1), (b)(1)(C)(iii). "Grievances" are defined broadly to include complaints by an employee or union concerning "any matter relating to" employment and complaints regarding violations of a law, rule, or collective-bargaining agreement. *Id.* § 7103(a)(9). The parties may agree to "exclude any matter from the application of the grievance procedures." *Id.* § 7121(a)(2).

**c.** The Civil Service Reform Act requires federal agencies to develop "performance appraisal systems" and to "use the results of performance appraisals as a basis for," among other things, "rewarding" and "removing employees." 5 U.S.C. § 4302(a). Congress provided that the Office of Personnel Management (OPM) "shall prescribe" regulations administering this provision, including regulations providing for performance appraisals, "recognizing and rewarding employees whose performance so warrants," and "removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance." *Id.* § 4302(c)(3), (4), (6).

### B. The Executive Orders At Issue Here

**1.** The Collective Bargaining Order, Exec. Order 13,836, 83 Fed. Reg. 25,329 (June 1, 2018), Add. 7-12, aims to "develop[] efficient, effective, and cost-reducing collective bargaining agreements." Add. 7.

As relevant here, Section 5(a) sets a goal for how long it should "ordinarily" take to bargain: six weeks or less to negotiate ground rules (that is, the rules governing how an agency and union will negotiate a collective-bargaining agreement), and four to six months to negotiate collective-bargaining agreements. Add. 9. Section 5(a) directs that "[a]gencies shall commit the time and resources necessary to satisfy these temporal objectives and to fulfill their obligation to bargain in good faith." *Id.* Section 5(b) directs that "[t]he agency head shall notify the President … of any negotiations that have lasted longer than 9 months" without agreement or submission of an impasse for resolution by the Impasses Panel. Add. 10.

Section 5(e) states a preference that unions and agencies exchange written proposals while bargaining. "[A]gency negotiators shall request the exchange of written proposals" with unions. Add. 10. If existing agreements "contain requirements for a bargaining approach other than the exchange of written proposals addressing specific issues," the agency is urged that it "should, at the soonest opportunity, take steps to eliminate them" in subsequent negotiations. *Id.*

Section 6 provides that "[t]he heads of agencies subject to the provisions of [the FSLMRS] may not negotiate over the substance of the subjects set forth in"

5 U.S.C. § 7106(b)(1)—which lists permissive subjects that are negotiable only "at the election of the agency"—and requires agencies to "instruct subordinate officials that they may not negotiate over those same subjects." Add. 10.

**2.** The Official Time Order, Exec. Order 13,837, 83 Fed. Reg. 25,335 (June 1, 2018), Add. 13-18, contains various provisions designed to "ensure that" official time "is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest," and that federal employees "spend the clear majority of their duty hours working for the public." Add. 13.

As relevant here, Section 3 sets a goal: an agency's "union time rate"—the number of hours that employees in a bargaining unit spend on official time in a year, divided by the number of employees in the bargaining unit—should "ordinarily" not "exceed 1 hour," taking into account various factors that may drive the rate higher or lower in particular circumstances. Add. 14. When agencies negotiate with unions over how much official time to authorize under Section 7131(d), the agency "shall commit the time and resources necessary to strive for a negotiated union time rate of 1 hour or less, and to fulfill [its] obligation to bargain in good faith." *Id.* An agency may agree to authorize official time in an amount that would cause the union time rate to exceed 1 hour if doing so is "reasonable, necessary, and in the public interest." In that situation, the agency must report to the President and give an explanation. *Id.*

Section 4 establishes six government-wide rules to which "all employees shall adhere," Add. 15, pursuant to the President's authority to "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301.

Section 4(a)(i) provides that, while employees are on "paid time," they may "engage in lobbying activities" only "in their official capacities as an employee." Add. 15. Because "paid time" includes time performing work on behalf of an agency as well as official time working for a union, Add. 14, this rule has the effect of prohibiting employees from lobbying on behalf of unions or other private organizations while on the clock. Employees remain free to lobby for these organizations while on leave or off duty. Add. 16.

Section 4(a)(ii) requires that employees "shall spend at least three-quarters of their paid time" each year "performing agency business or attending necessary training." Add. 15. The Order allows employees to exceed that cap in order to engage in collective bargaining on behalf of a union under 5 U.S.C. § 7131(a) and to represent a union before the Authority under Section 7131(c). But any excess above the cap will count toward the next year's cap and thus have the effect of limiting the time an employee may spend in that next year on, for example, official time for other purposes under Section 7131(d).

Section 4(a)(iii) provides that, when a federal employee is acting on behalf of a union, that employee may not receive "the free or discounted use of government property" or "resources," such as office space and computer systems, "if such free or

discounted use is not generally available" for employees acting on behalf of other organizations. Add. 15.

Section 4(a)(iv) provides that "[e]mployees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation." Add. 15.

Section 4(a)(v) provides that employees may use official time to prepare their own grievances, to appear as a witness in any grievance proceeding, or to prepare a whistleblower grievance. But employees "may not use" official time "to prepare or pursue grievances" on behalf of others, like a fellow employee or a union. Add. 15. Employees may, however, help prepare such grievances while on leave or off duty. Add. 16.

Section 4(b) provides that federal "[e]mployees may not use" official time "without advance written authorization from their agency," except where advance notice is impracticable. Add. 15.

**3.** The Removal Procedures Order, Exec. Order 13,839, 83 Fed. Reg. 25,343 (June 1, 2018), Add. 19-23, notes that the "[f]ailure to address unacceptable performance and misconduct undermines morale … and inhibits the ability of executive agencies … to accomplish their missions," and announces measures designed to hold federal employees "accountable for performance and conduct." Add. 19.

As relevant here, Section 3 sets a goal for agencies in negotiations: "[w]henever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under [5 U.S.C. § 7121] any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance." Add. 20. The Order requires agencies to "commit the time and resources necessary to achieve this goal" while also reiterating that agencies must also comply with their duties "to bargain in good faith." *Id.* If agencies reach collective-bargaining agreements that "fail[] to achieve this goal, the agency head shall provide an explanation to the President." *Id.*

Sections 4(a) and 4(c) prescribe certain government-wide rules applicable to all federal employees. Section 4(a) states that, "no agency shall … subject to grievance procedures or binding arbitration disputes concerning: (i) the assignment of ratings of record [*i.e.*, performance appraisals]; or (ii) the award of any form of incentive pay." Add. 20. Section 4(c) states that, "no agency shall … generally afford an employee more than a 30-day period to demonstrate acceptable performance under" 5 U.S.C. § 4302(c)(6), "except when the agency determines in its sole and exclusive discretion that a longer period is necessary." Add. 21.

The President directed that all of these Orders be "implemented consistent with applicable law." Add. 11, 18, 22.

### C. District Court Proceedings

Several federal-employee labor unions filed four consolidated actions in district court seeking, as relevant here, declaratory and injunctive relief against the provisions of the Executive Orders described above. On cross motions for summary judgment, the district court declared these provisions invalid and permanently enjoined Executive Branch officials from enforcing them, while upholding the validity of other provisions. *See* JA 41-42.

The court rejected the government's threshold argument that plaintiffs' claims must be considered in proceedings before the Authority with direct review in the courts of appeals, as Congress directed in the FSLMRS. *See* JA 78-104. The court concluded that plaintiffs' claims were not among those that Congress intended to channel through the Authority because, in the court's view, "the Unions will *not* be able to obtain meaningful judicial review" following administrative review because the Authority "cannot hear cases of this nature, and as a result, no court of appeals will have the opportunity to review the instant claims." JA 83.

On the merits, the district court concluded that it would invalidate and enjoin provisions of the Executive Orders that conflict with the FSLMRS. JA 120-21. The court invalidated the Executive Orders' goal-setting provisions—Section 5(a) of the Collective Bargaining Order (duration of negotiations), Section 3 of the Official Time Order (union time rate), and Section 3 of the Removal Procedures Order (grieving removals)—on the ground that they create "an impermeable straightjacket" for

negotiators that, as a matter of law, will induce them to bargain in bad faith, in violation of Section 7114. JA 146-48. The court also invalidated Section 5(e) of the Collective Bargaining Order, which requires agencies to request the exchange of written proposals, on the mistaken assumption that this provision requires that negotiations occur exclusively in writing. JA 148-49.

In addition, the court invalidated Section 6 of the Collective Bargaining Order, which directs agencies to elect against permissive bargaining under 5 U.S.C. § 7106(b)(1), which provides for permissive bargaining "at the election of the agency." In the court's view, the statute mandates some amount of permissive bargaining. JA 133-34, 138, 144.

Finally, the court invalidated certain government-wide rules that the President created in Sections 4(a) and 4(c) of the Removal Procedures Order and Sections 4(a) and 4(b) of the Official Time Order. As exercises of the President's authority to prescribe regulations for employee conduct, 5 U.S.C. § 7301, those rules bar grievances about performance reviews and incentive-pay awards, set a presumptive maximum duration of the time that employees have to demonstrate adequate performance before being removed, and create certain other requirements regarding what employees may do while they are on the clock, such as a requirement that employees spend at least three-quarters of their paid time each year performing agency business. The court held that the President could not create rules that would

have the effect under Section 7117(a)(1) of displacing collective bargaining over matters that the FSLMRS makes negotiable. JA 134-37, 151-55.

## SUMMARY OF ARGUMENT

**I.** The Federal Service Labor-Management Relations Statute establishes a comprehensive scheme for administrative and judicial review of labor-relations disputes—a scheme that requires adjudication before the Federal Labor Relations Authority and allows for direct review in the courts of appeals. *See* 5 U.S.C. § 7123. That scheme applies to precisely the kinds of claims that plaintiffs bring here—claims alleging violations of various sections of the FSLMRS. In fashioning that comprehensive scheme, Congress precluded review in the district court. As this Court has held, the review provisions of the FSLMRS are the "exclusive [means] by which federal employees and their bargaining representatives may assert federal labor-management relations claims," and federal employee unions "cannot circumvent this regime by instead bringing a suit in district court." *AFGE v. Secretary of the Air Force*, 716 F.3d 633, 637-38 (D.C. Cir. 2013). Nothing about plaintiffs' claims permits a different result here, and the district court's judgment should be vacated for lack of jurisdiction.

**II.** If this Court were to reach the merits of plaintiffs' claims, it should reverse. The challenged provisions do not conflict with the FSLMRS.

**A.** Section 5(a) of the Collective Bargaining Order (duration of negotiations), Section 3 of the Official Time Order (union time rate), and Section 3 of the Removal

Procedures Order (grieving removals) set presumptively reasonable goals for agency negotiators to strive to achieve in bargaining, and require agencies to report to the President if those goals are not reasonable in a particular context or could not be reached in good-faith negotiations. This Court has held that negotiators may bargain to impasse on sincerely held goals, and a determination of bad-faith bargaining must be made based on the totality of the circumstances in a particular factual context. The district court therefore erred in concluding that these goal-setting provisions will inevitably cause agency negotiators to bargain in bad faith, as a matter of law, in all settings across the federal government. The district court similarly erred in invalidating Section 5(e) of the Collective Bargaining Order, which simply requires that agencies request to exchange written proposals with unions, because the court misread that provision as a unilateral mandate that bargaining take place exclusively through such exchanges.

**B.** Section 6 of the Collective Bargaining Order appropriately exercises the President's power to direct agency heads in how to use their authority under Section 7106(b)(1) of the statute to elect against permissive bargaining. The district court erred in concluding that a statute that leaves the availability of permissive bargaining to "the election of the agency" actually requires agencies to elect some unspecified amount of permissive bargaining.

**C.** Section 4 of the Official Time Order and Sections 4(a) and 4(c) of the Removal Procedures Order exercise the President's authority under 5 U.S.C. § 7301 to

"prescribe regulations for the conduct of employees in the executive branch," thereby creating government-wide regulations that remove those matters from collective bargaining pursuant to Section 7117(a)(1). The district court erred in concluding that government-wide regulations may not directly affect the scope of collective bargaining, a proposition squarely rejected by the Authority and this Court. The Orders' regulations do not approach the kind of sweeping veto mechanisms that this Court has held to be impermissible uses of Section 7117(a)(1) and instead fit within the appropriate limitations imposed by Section 7117(a)(1) and this Court.

## STANDARD OF REVIEW

This Court reviews the district court's weighing of the equitable considerations and the ultimate decision to issue relief for abuse of discretion. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). This Court reviews the district court's legal conclusion de novo, and will reverse where the injunction rests on errors of law. *Id.*

## ARGUMENT

The Executive Orders at issue here strive to make collective bargaining more efficient, to ensure that employees serve the public while on paid time, and to promote employee accountability. Those purposes, and the provisions in the Orders that carry them into effect, are consistent with the FSLMRS. Plaintiffs' claims to the contrary must be presented to the Authority for administrative adjudication.

## I. Plaintiffs Must Adjudicate Their Claims Before The Federal Labor Relations Authority As Congress Required, Not In District Court.

The district court lacked jurisdiction to entertain plaintiffs' claims. Plaintiffs' contentions should be raised in disputes before the Authority pursuant to the comprehensive scheme of administrative and judicial review required by the FSLMRS.

### A. Plaintiffs' Claims Fall Within The Statute's Exclusive-Review Scheme.

In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), the Supreme Court "set forth a framework for determining when a statutory scheme of administrative and judicial review forecloses parallel district-court jurisdiction." *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015). Under that two-part test, "courts determine that Congress intended that a litigant proceed exclusively through a statutory scheme of administrative and judicial review when (i) such intent is fairly discernible in the statutory scheme, and (ii) the litigant's claims are of the type Congress intended to be reviewed within the statutory structure." *Id.* at 15 (quotation simplified).

The district court correctly held that the FSLMRS creates an exclusive regime providing for administrative review before the Authority, followed by judicial review in the courts of appeals, 5 U.S.C. § 7123—an exclusive regime that forecloses district court review for matters that fall within its ambit. *See* JA 80-81; *see, e.g.*, *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990). The only issue on appeal regarding the district court's jurisdiction relates to the second prong of

the test: whether plaintiffs' claims are of the type that Congress intended to channel through Section 7123.

They are. Although plaintiffs sought to enjoin the President, the district court did not, and could not, adjudicate such a claim for relief: the President is not an agency subject to the Administrative Procedure Act (APA), *see Franklin v. Massachusetts*, 505 U.S. 788, 796-801 (1992), and the President cannot be sued for equitable relief where review of his orders is subject to judicial review when implemented by his subordinates, *see Swan v. Clinton*, 100 F.3d 973, 976-81 (D.C. Cir. 1996). Aware of these limitations, and at plaintiffs' suggestion, the district court instead granted claims for relief prohibiting all of the President's subordinates from implementing the enjoined provisions. Even assuming that enjoining every presidential subordinate in the Executive Branch was an appropriate extension of *Swan*, the fact that plaintiffs sought, and the district court granted, relief against those subordinates confirms that plaintiffs' core objection to the Executive Orders is that agency officials will allegedly implement those Orders in collective bargaining in violation of the FSLMRS. Indeed, the district court's express and sole rationale for its decision was that the enjoined provisions "exceed the President's statutory authority because they conflict with the letter and the spirit of the FSLMRS." JA 150; *see also, e.g.*, JA 52, 120-21, 133-37, 147.

Such claimed violations of the FSLMRS are precisely the kind of matters that the statute channels to the Authority for administrative adjudication. The statute makes it "an unfair labor practice for an agency … to refuse to … negotiate in good

faith," or "to otherwise fail or refuse to comply with any provision of" the statute. 5 U.S.C. § 7116(a)(5), (8). And the statute tasks the Authority with adjudicating unfair-labor-practice charges. *Id.* § 7118. The Authority may thus hear, in an unfair-labor-practice proceeding, all of plaintiffs' core contentions: that agency negotiators who implement the Orders' goal-setting provisions will bargain in bad faith, in violation of Section 7114; that agencies may not elect against all permissive bargaining under Section 7106(b)(1); and that certain government-wide rules created by the Executive Orders do not operate under Section 7117(a)(1) to remove the duty to bargain over contrary matters. The Authority may also hear the latter contentions in a negotiability proceeding—an expedited process for determining whether a matter is subject to collective bargaining. *See* 5 U.S.C. § 7117(c)(1); *e.g.*, *NFFE Local 2058*, 33 FLRA 702, 708 (Oct. 31, 1988) (drug-testing Executive Order). And the unions could ask the Authority to issue a "general statement of policy or guidance" where, among other things, doing so "would prevent the proliferation of cases involving the same or similar question." 5 C.F.R. § 2427.5; *see* 5 U.S.C. § 7105(a)(1).

In sum, the FSLMRS creates several mechanisms for bringing claims like plaintiffs' to the Authority for resolution. Indeed, plaintiffs' allegations of FSLMRS violations fall within the heartland of matters that must be brought for administrative adjudication before the Authority—the expert agency that adjudicates claimed violations of the FSLMRS every day.

### B. Plaintiffs Provide No Strong, Countervailing Rationale For District Court Review.

Where, as here, a statute provides for administrative review and channels judicial review through the courts of appeals, this Court "requires a strong countervailing rationale" before it will conclude that a litigant's claims fall outside that exclusive regime and may instead be brought in district court. *Jarkesy*, 803 F.3d at 17. Three guideposts help determine whether particular claims may be brought in district court: (1) whether channeling review through the statutory scheme would "foreclose all meaningful judicial review," (2) whether a litigant's suit is "wholly collateral" to the statute's scheme, and (3) whether the claims are "outside the agency's expertise." *Id.* Those factors do not supply any rationale—much less a strong one—for permitting plaintiffs' claims to proceed in district court.

#### 1. Plaintiffs Can Obtain Meaningful Review Through The Mechanisms Provided By The Statute.

The district court mistakenly believed that meaningful review of plaintiffs' claims would not be available through the route established by Congress for two reasons: (a) the Authority has jurisdiction only over "fact-specific inquires," not "broad, abstract questions of law regarding labor-management relations," JA 84, like plaintiffs' *ultra vires* claims, such that the Authority has "no jurisdiction to hear *any part* of this case," JA 92; and (b) the jurisdiction of the courts of appeals is "*entirely derivative*" of the Authority's jurisdiction. JA 87. Both assumptions are wrong.

**a.** As this Court has made clear, the Authority has jurisdiction to hear disputes that an agency action affecting collective bargaining was *ultra vires* and without statutory authority. In *AFGE, AFL-CIO v. Loy*, 367 F.3d 932 (D.C. Cir. 2004), for example, the Court held that the Authority could properly hear a claim that an agency directive, which limited collective bargaining for particular types of employees, was in excess of statutory authority. *Id.* at 936. As this Court explained, review of the unions' claim of *ultra vires* action "may be had, but it must be in the court of appeals and it may occur only after the claim has been presented to and finally decided by the FLRA." *Id.* Similarly, in *Secretary of the Air Force*, the Court held that a union could challenge an Air Force uniform regulation as being "in excess of the Secretary's statutory authority," but only by presenting that claim to the Authority and petitioning for review in this Court. 716 F.3d at 635-38 & n.4.

The district court erroneously concluded that the Authority would not be able to hear plaintiffs' claims, even those arising in the context of particular disputes, by relying on a line of cases in which the Authority has disclaimed power to review whether another agency's regulations are consistent with that agency's own statute. JA 85. In negotiability disputes raising such issues, the Authority has said, its task is to determine whether a bargaining proposal is inconsistent with the regulations, not to determine whether those regulations are contrary to the statute that the other agency administers. *See, e.g.*, *NTEU & IRS*, 60 FLRA 782, 783 (Mar. 29, 2005). But, regardless of whether those cases are correct on their own terms, they are irrelevant

here: plaintiffs allege violations of the FSLMRS, which the Authority administers, not violations of another agency's organic act. The Authority has acknowledged that it has the power to decide such matters, and it has done so while expressly distinguishing the line of cases on which the district court relied. *See AFSCME Local 3097 & Department of Justice*, 31 FLRA 322, 345-47 (Feb. 23, 1988).

Accordingly, the Authority has jurisdiction to consider the interaction of the FSLMRS with other statutes that give OPM and the President authority to prescribe regulations, *see* 5 U.S.C. §§ 4302, 7301, and to determine if such regulations operate under Section 7117(a)(1) of the FSLMRS to remove the duty to bargain over contrary proposals. *See Transportation Sec. Admin. & AFGE AFL-CIO*, 59 FLRA 423, 427-30 (Nov. 4, 2003) (considering whether an agency directive issued pursuant to another statute lawfully foreclosed all collective bargaining under the FSLMRS for employees in particular positions).

**b.** The district court also mistakenly concluded that this Court would not be able to consider any portion of plaintiffs' claims if the Authority would lack jurisdiction to consider those same claims. As discussed above, the Authority has jurisdiction over plaintiffs' FSLMRS claims. In any event, the district court erred because the general rule, applicable here, is that this Court may consider claims even if the Authority lacks jurisdiction to do so.

The Supreme Court held in *Elgin* that federal employees removed from service for failure to comply with a statute (requiring men to register with the Selective

Service) must bring their claims that the statute is unconstitutional to the Merit Systems Protection Board for administrative adjudication, followed by review in the Federal Circuit—regardless of whether the Board could declare the federal statute unconstitutional. 567 U.S. at 17. The Court reasoned that the court of appeals could meaningfully address that claim even if the Board could not. *Id.* As the Court explained, "[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide." *Id.* at 18 n.8; *see also Jarkesy*, 803 F.3d at 17-19 (constitutional non-delegation challenge must go through administrative review); *Loy*, 367 F.3d at 936 (First Amendment challenge must go through FLRA).

Contrary to the district court's conclusion, the FSLMRS does not "plainly" create an unusual regime of "*entirely derivative*" appellate jurisdiction. JA 87. All of the features of 5 U.S.C. § 7123 that the district court cited for that conclusion—the court of appeals has "jurisdiction of the [Authority's] proceeding and the question determined therein"; the court of appeals' decree (*e.g.*, affirming or modifying) is in relation to "the order of the Authority"; litigants generally may not raise objections that they did not urge before the Authority; and the Authority's findings of fact are conclusive when based on substantial evidence, 5 U.S.C. § 7123(c)—are widely shared among other direct-review statutes that nonetheless provide for meaningful appellate review even of claims that may not be heard by the agency, including the statute at issue in *Thunder Basin*. *See* 510 U.S. at 215 (virtually identical provisions); *see also Sturm,*

*Ruger & Co. v. Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002) (virtually identical provisions); *Jarkesy*, 803 F.3d at 16, 18 (similar provisions).

The district court also erred in concluding that *AFGE, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341 (D.C. Cir. 2007) "firmly establishes" that this Court's appellate jurisdiction under Section 7123 is entirely derivative of the Authority's own jurisdiction. JA 89. As this Court has since explained, *Nicholson* turned on a specific statute, 38 U.S.C. § 7422(d), that prevented any review at all by the Authority, or any other agency, of the order at issue. *See Secretary of the Air Force*, 716 F.3d at 640 ("*Nicholson* is distinguishable because it involved a challenge to" an order "expressly outside the FLRA's purview."). There is no similar statute here that would deprive the Authority of its ability to hear plaintiffs' claims. And *Nicholson* did not hold that, where a matter may properly be presented to the Authority in a concrete context, the court of appeals may not address on petition for review a claim that the Authority may have been unable to address itself. In any event, *Elgin* (decided after *Nicholson*) explains that the courts of appeals are generally able to hear claims on direct review of agency action, even where the agency itself is unable to hear those same claims. 567 U.S. at 17.

The district court attempted to distinguish cases such as *Elgin* and *Thunder Basin* on the ground that they involved disputes about discrete actions—the removal of an employee from federal service in *Elgin* and a mine inspection in *Thunder Basin*. JA 92. By contrast, the district court reasoned, "the instant case does not involve such a

matter—there is no alleged unfair labor practice, grievance, or negotiability dispute over which the FLRA could otherwise exercise jurisdiction." *Id.*

But that is precisely the problem: filing suit immediately in district court allowed plaintiffs to preempt context-specific adjudication. That deliberate consequence of evading Congress's comprehensive statutory scheme cannot supply its own justification. "To hold otherwise would be to excuse non-compliance with the requirement that one must exhaust administrative remedies on the basis that the party failed to comply." *Loy*, 367 F.3d at 936.

Plaintiffs may not skirt the jurisdiction-channeling provision of the statute by re-packaging the legal arguments that could be raised in concrete disputes into an abstract challenge. As this Court has held, the principle of mandatory administrative review "applies to a 'systemwide challenge' to an agency policy interpreting a statute just as it does to the implementation of such a policy in a particular case." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 448-49 (D.C. Cir. 2009); *see also Fornaro v. James*, 416 F.3d 63, 67-68 (D.C. Cir. 2005). Nothing would prevent plaintiffs from bringing all of the challenges they raise here in an unfair-labor-practice proceeding arising from a concrete bargaining context.

Moreover, no authority indicates that plaintiffs may bring suit in district court provided that they do so before a concrete dispute comes before the Authority. To the contrary, the Eleventh Circuit, in *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016), squarely rejected a similar argument asserted by plaintiffs who sought to enjoin an

enforcement proceeding that had not yet been initiated, explaining that "it makes no difference that the … respondents filed their complaint in the face of an impending, rather than extant, enforcement action. The critical fact is that the … respondents can seek full postdeprivation relief under" the statutory remedial scheme. *Id.* at 1249. The same is true here.

### 2. Plaintiffs' Suit Is Not "Wholly Collateral" To The Statute.

**a.** Plaintiffs seek the type of relief that they could obtain from the Authority—a determination regarding whether agency implementation of the challenged provisions conflicts with the statute, and an order enforcing compliance with the statute. The remedies available under the FSLMRS include orders to refrain from bad-faith conduct or other violations of the statute, and orders to bargain over matters that are properly negotiable, including the possibility of giving the outcome of such negotiations retroactive effect or awarding back pay. *See* 5 U.S.C. §§ 7105(g)(3), 7118(a)(7). Where necessary, the Authority "may petition any appropriate United States court of appeals for the enforcement of any order." *Id.* § 7123(b).

The claims asserted here are in no sense collateral to the kind of disputes that the Authority may hear. As discussed above, the district court enjoined the provisions at issue here because, in its view, they "conflict with the letter and the spirit of the FSLMRS." JA 150. Accordingly, plaintiffs' claims, like those in *Thunder Basin*, "at root require interpretation of the parties' rights and duties" under the statute. 510

U.S. at 214. And there is a "close[] connection between the relief sought in the judicial action and that available in the administrative process." *Fornaro*, 416 F.3d at 68. As this Court has recognized, the FSLMRS "entrusted the Authority, and not [the courts]," with remedial discretion to best effectuate the policy of the statute. *NTEU v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990).

The district court's order here has the effect of pre-determining, on a government-wide basis, issues that would otherwise be decided by the Authority in concrete bargaining contexts. Plaintiffs cited several such disputes that arose in the wake of the Executive Orders to help establish their standing in district court and as part of their statement of undisputed facts when seeking summary judgment. *See* ECF 29, at 15-16; ECF 26, at 23; ECF 26-1, at 6-13; ECF 29-3, at 4-14. Disputes like these have largely been resolved or rendered moot by the district court's order. Plaintiffs' decision to pursue relief in district court rather than before the Authority was thus an undisguised attempt to "jump the gun and make an end run around" the statute's review provisions. *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 501 (D.C. Cir. 2018).

**b.** The district court erred in concluding that plaintiffs' claims are collateral to administrative review because they seek "across the board invalidation" of the challenged provisions, such that individual adjudication before the Authority would "alter[] the fundamental character of the relief that is being claimed." JA 101. There is no reason to think that the challenged provisions would escape review if plaintiffs were to proceed through the statute's scheme. The Authority has held that "when

higher-level management directs or requires management at a subordinate level to act in a manner that is inconsistent with the subordinate level's bargaining obligations under the Statute, the higher level entity" also commits an unfair labor practice that may be reviewed by the Authority. *Air Force Logistics Command & AFGE, AFL-CIO, Local 1592*, 46 FLRA 1184, 1186 (Jan. 14, 1993). And, in any event, as this Court held in *Secretary of the Air Force*, a union may not "avoid" the statute's jurisdiction-channeling provisions simply because it believes the statute "provides only an 'inconvenient' remedy" that "lack[s] the directness and immediacy" of suit in district court. 716 F.3d at 639.

The district court also erred (JA 95-98) in its understanding of *National Mining Association v. Department of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (per curiam), in which this Court held that mining companies could challenge regulations promulgated by the Secretary of Labor under the Black Lung Benefits Act by bringing an APA action in district court. Under the Act, the Benefits Review Board adjudicates benefits disputes, with direct review in the courts of appeals of the Board's final "order." *Id.* at 854. This Court held that the "order" in that direct-review statute included only the final order of the Board following adjudication, and did not include regulations issued by the Secretary. *Id.* at 856. Because there was no provision for direct review of the regulations, this Court concluded that "persons seeking such review would be directed by the APA to go to district court." *Id.* This Court emphasized that the mining companies' challenge to the regulations—alleging that the

regulations were impermissibly retroactive, arbitrary, and capricious—was largely extrinsic to the Act. And the Court emphasized that effective adjudication of the companies' challenges could not be had in individual benefits determinations. *Id.* at 857-58.

None of those conditions is present here. The President is not an agency and the President's actions are not subject to pre-enforcement review under the APA. Plaintiffs' challenges to the Orders are not extrinsic to the FSLMRS, but rather wholly dependent on it, as they contend that agency representatives who implement those Orders will violate the FSLMRS. And, as explained above, there is no reason that plaintiffs' challenges could not be meaningfully heard by the Authority and the courts of appeals on direct review. *See Sturm, Ruger & Co.*, 300 F.3d at 876 (distinguishing *National Mining* on similar grounds). In sum, plaintiffs' claims here are not "wholly collateral" to the FSLMRS but rather fit comfortably within its review provisions.

#### 3. Plaintiffs' Claims Would Benefit From The Expertise Of The Federal Labor Relations Authority.

**a.** This Court has recognized that the Authority has "primary responsibility for administering and interpreting" the FSLMRS and has developed "specialized expertise in the field of federal labor relations"—expertise that Congress intended for the Authority to use "to give content to the statute's principles and goals." *AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986). That is why courts afford the Authority "considerable deference when it exercises its special

function of applying the general provisions of the Act to the complexities' of federal labor relations." *NFFE, Local 1309 v. Department of Interior*, 526 U.S. 86, 99 (1999). The Authority "would seem better suited than a court to make the workplace-related empirical judgments that would help properly balance … policy-related considerations" where the statute does not speak precisely to an issue. *Id.* at 95; *see also* 5 U.S.C. § 7105(a)(1).

As illustrated by the discussion of the merits in Part II below, resolution of plaintiffs' claims would greatly benefit from the Authority's expertise and judgment. The Authority is best positioned to determine whether, for example, the provisions of the Executive Orders that set presumptively reasonable goals inevitably lead, in all contexts, to agency negotiators bargaining in bad faith in violation of Section 7114. The Authority's expertise and judgment could help resolve whether Section 7106(b)(1) implicitly mandates a minimum floor of permissive bargaining. And the Authority's insight would help determine whether Section 7117(a)(1)'s provision for government-wide rules implicitly exempts the kind of regulations of employee conduct issued by the President. By adjudicating plaintiffs' claims on the merits, the district court reserved to itself primary jurisdiction over matters governed by the FSLMRS and deprived itself and this Court of the Authority's expert views.

**b.** The district court concluded that the Authority's expertise would be no more than "potentially helpful" because plaintiffs' claims "require an assessment of questions concerning executive power"—namely, "whether or not Congress has

conferred upon the President the statutory authority to issue executive orders in the area of labor-management relations at all"—a matter that the court thought would be outside the Authority's expertise. JA 102. But, only pages later, the district court easily concluded that the President *did* have that power, and it did so because the FSLMRS—the statute that the Authority administers—says so. JA 111-20; Add. 1. And, as discussed above, the district court resolved all of plaintiffs' claims entirely by reference to what the FSLMRS requires and prohibits. *E.g.*, JA 150. The district court thus erred in failing to recognize in its jurisdictional analysis how central the FSLMRS, and thus the Authority's expertise, was to adjudicating plaintiffs' claims on the merits.

## II. The District Court Erroneously Held That The Executive Orders' Challenged Provisions Violate The FSLMRS.

If this Court concludes that plaintiffs' claims do not fall within the ambit of matters that Congress channeled through the review provisions of the FSLMRS and instead reaches the merits, the Court should conclude that the challenged provisions do not conflict with the statute, and should therefore reverse the district court's grant of declaratory and injunctive relief.

### A. Agency Negotiators Can Pursue Presumptively Reasonable Goals While Bargaining In Good Faith.

**1.** The district court declared invalid and enjoined three provisions of the Executive Orders that set presumptively reasonable goals for agencies to strive to achieve in negotiations. First, Section 5 of the Collective Bargaining Order states that

it should "ordinarily" take six weeks or less to negotiate ground rules and four to six months to negotiate collective-bargaining agreements. Add. 9. A recent ruling of the Impasses Panel, which imposed a six-month limit for term negotiations, highlights that this goal is presumptively reasonable. *See In re OPM & AFGE, Local 32*, No. 18 FSIP 036, 2018 WL 3830148, at *8 (Aug. 3, 2018). Second, Section 3 of the Official Time Order states that a negotiated "union time rate" of one hour of official time per employee per year in a bargaining unit, or more, "should … ordinarily not be considered" by an agency to be "reasonable, necessary, and in the public interest." Add. 14. Recent statistics show that a number of agencies of various sizes achieved that feasible rate even without a directive to strive to do so. *See* OPM, Official Time Usage in the Federal Government, Fiscal Year 2016, at 9-12 (May 2018), https://go.usa.gov/xPuBX. Finally, Section 3 of the Removal Procedures Order directs that, "[w]henever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures … any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance." Add. 20. That goal is also presumptively reasonable, as the Authority has held that agencies may bargain in good faith while proposing to narrow the scope of grievance procedures, and may even bargain to impasse on such a proposal. *Vermont Air Nat'l Guard & Ass'n of Civilian Technicians, Inc.*, 9 FLRA 737, 742 (Aug. 4, 1982). In sum, these provisions direct agencies to "commit the time and resources necessary" to achieve these goals, to report to the

President where those goals could or should not be met in a particular circumstance, and to implement their directives only as "consistent with applicable law" and the obligation to "bargain in good faith." Add. 9, 14, 20.

The plain text of these provisions is entirely consistent with—and expressly requires—good-faith bargaining. The district court nevertheless invalidated these provisions, in *all* of their applications, based on the court's wholly unsupported speculation about how agency negotiators might (mis)apply these provisions in concrete bargaining contexts. The district court assumed that these provisions would create "an impermeable straightjacket" in the minds of negotiators. JA 146. The court thought it was problematic to announce a desired "*endpoint* that the agency must strive to achieve in the 'ordinar[y]' course of things," and that committing the time and resources necessary to achieve those goals would lead agencies to "browbeat[] the union into accepting the stated term in the context of any negotiation." *Id.* The court further assumed, without any basis, that agencies would find it "shameful" to explain why a particular goal could or should not be met in a particular circumstance, and that this reporting requirement would keep the presumptive goals "in the forefront of [negotiators'] consciousness" and inevitably lead them to bargain not only with a goal in mind but also with an impermissibly *closed* mind—that is, in bad faith. JA 147-48.

The court offered no authority for the remarkable proposition that, as a matter of law, agency negotiators will bargain in bad faith if they are called upon to strive to achieve a presumptively reasonable goal. The law is to the contrary. The Authority

adjudicates charges of bad-faith negotiating by considering "the totality of the circumstances" in a particular bargaining context. *AFGE Council of Prison Locals 33, 1007, & 3957 & Federal Bureau of Prisons*, 64 FLRA 288, 290 (Nov. 30, 2009). And this Court has explained that "[a]damant insistence on a bargaining position … is not in itself a refusal to bargain in good faith." *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990). "[I]f the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate." *Id.*

In other words, hard bargaining is lawful. The duty to bargain in good faith "does not compel either party to agree to a proposal or to make a concession." 5 U.S.C. § 7103(a)(12). Under the statute, it is for the Impasses Panel—not the district court—to resolve any impasses that may result from hard bargaining and to use its expert judgment to render an appropriate outcome. *See id.* § 7119. The district court thus erred in deciding for itself that the presumptive goals announced in the Executive Orders are "unwarranted" on the merits. JA 146. And, under the statute, it is for the Authority—not the district court—to determine where the line is between hard bargaining and bad-faith bargaining, in the totality of the circumstances of a particular context. *See* 5 U.S.C. § 7118. For that reason, as discussed above, the district court had no jurisdiction to entertain plaintiffs' claims of bad-faith bargaining. Any such charges arising out of a particular bargaining context can and must be brought to the Authority.

There is no basis to assume, contrary to the presumption of regularity, that agency negotiators will disregard the Executive Orders' express instruction to "bargain in good faith." Nor is there any basis to assume that agency negotiators will single-mindedly strive to achieve the Orders' presumptively reasonable goals in contexts where those goals may not be reasonable or feasible. The Orders expressly provide to the contrary. *See* Add. 9 (providing goals for "ordinar[y]" circumstances); Add. 14 (same); Add. 20 (providing goal only where "reasonable in view of the particular circumstances"). The district court's judgment was the result of its own generalized guess about hypothetical negotiators' state of mind and conduct during hypothetical negotiations—a guess shorn of any context or factual basis, and one that is directly at odds with the text of the Orders. There was thus no basis for the district court to conclude that these goal-setting provisions, facially and as a matter of law, will cause agency negotiators to violate their duty to bargain in good faith. Indeed, it would impede the President's ability to fulfill his duty to supervise the faithful execution of the laws if the President or agency heads were unable to lawfully provide good-faith goals and strategies to agency negotiators.

If, in any particular bargaining situation, unions conclude that agency negotiators are in fact bargaining in bad faith, they are free to bring those charges to the Authority for resolution. But there is no cause to enjoin the implementation of these provisions preemptively and across the board on the assumption that agencies will contravene not only the statute but the Executive Orders themselves. *See Building*

*& Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (rejecting facial challenge that argued agencies may "try to give effect to the Executive Order when to do so [would be] inconsistent with" governing law).

**2.** The district court also invalidated a fourth goal-setting provision based on a misunderstanding. Section 5(e) of the Collective Bargaining Order, in its first sentence, directs agency negotiators to "request the exchange of written proposals," and, in its second sentence, states that agencies should "take steps to eliminate" any "agreements" they may have, such as ground rules, that may "contain requirements for a bargaining approach other than the exchange of written proposals addressing specific issues." Add. 10. The court misinterpreted Section 5(e) to require agencies to request to bargain "entirely on paper," and to compel agencies to change their "agency rules" so as to unilaterally "requir[e] this result" in an attempt to "prevent[] *negotiation* over whether or not proposals must be made in writing." JA 148-49. On this mistaken premise, the district court concluded that Section 5(e) conflicts with the duty to bargain over the means of negotiation. JA 150; 5 U.S.C. § 7114(a)(4). And it concluded that Section 5(e) would also require bad-faith bargaining because the exclusive exchange of written proposals would lead to "robotic" negotiations. JA 148-49. It further opined that a request to bargain exclusively through written proposals implies that the agency negotiator "does not have 'full' authority." JA 149.

Section 5(e), however, does not require agencies to request to bargain "exclusively" through written proposals or to create rules requiring as much. The

"request to exchange written proposals" is precisely that: a *request* to exchange written proposals, not a demand—let alone a demand for *only* such proposals to the exclusion of other means of negotiation. The district court's misunderstanding appears to have stemmed from the second sentence of Section 5(e), which states that agencies should "take steps to eliminate" any agreements they may have that "contain requirements for a bargaining approach *other than* the exchange of written proposals addressing specific issues." Add. 10 (emphasis added). Read in context with the first sentence, this second sentence requires agencies to seek to change through lawful means any existing agreements that would forbid or otherwise not envision the (non-exclusive) exchange of written proposals that agencies are to request under the first sentence.

No legal authority of which we are aware suggests that a mere request to exchange written proposals constitutes bad-faith bargaining. To the contrary, as an administrative law judge explained in ruling on a dispute before the Authority, exchanging written proposals occurs in "most negotiations," helps to "facilitate[] communication between the parties," and can help others "to objectively evaluate the parties' good or bad faith" if later called upon to do so. *Federal Bureau of Prisons & AFGE Local 3690*, No. AT-CA-11-0365, 2015 WL 1879928, at *16 n.17 (Mar. 13, 2015). The Impasses Panel has similarly concluded that "a prior exchange of proposals is a commonsense method of promoting timely and effective bargaining." *In re OPM*, 2018 WL 3830148, at *9. And the Authority itself has held that proposed ground rules are negotiable where those ground rules would have the parties exchange

written proposals. *AFGE Local 12 & Department of Labor*, 60 FLRA 533, 539, 541 (Dec. 30, 2004). In doing so, the Authority gave no indication that the proposal would institute an impermissibly "robotic" bargaining procedure, or that exchanging written proposals implies that the negotiators lack the authority to reach agreement. As the expert agency understands, but the district court did not, a request for an exchange of written proposals implies only that the negotiators and their supervisors might benefit from a more precise record of what has been proposed.

### B. Agencies May Elect Not To Engage In Permissive Bargaining At All.

The statute provides that, "at the election of the agency," certain matters may be subject to collective bargaining, such as the number of employees assigned to a work project. 5 U.S.C. § 7106(b)(1). Unions have no role in determining whether bargaining over these permissive subjects will occur: that choice is made "at the election of the agency." Nothing in the statute or the case law so much as suggests that there is a duty to bargain in good faith over permissive subjects absent an agency's election to do so, or that there is a duty to bargain in good faith regarding whether the agency will make that election. Consistent with the statutory text, this Court has described the elective-bargaining provision as listing matters over which an agency simply "need not bargain." *Department of Def. v. FLRA*, 659 F.2d 1140, 1143 n.3 (D.C. Cir. 1981).

Section 6 of the Collective Bargaining Order, Add. 10, instructs the heads of agencies to use their power under the statute to elect not to negotiate over the permissive subjects listed in 5 U.S.C. § 7106(b)(1). That directive is consistent with the President's authority under Article II to "control[] those who execute the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting James Madison, 1 Annals of Cong. 463 (1789)). For example, President Clinton made use of that authority when he instructed agency heads that they "shall" negotiate over permissive subjects and "instruct subordinate officials to do the same." Exec. Order 12,871, 58 Fed. Reg. 52,201 (Oct. 1, 1993). This Court reviewed that directive in *National Association of Government Employees, Inc. v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999), and concluded that it made appropriate use of "the President's authority '[t]o insure [his] control and supervision over the Executive Branch.'" *Id.* at 951 (alterations in original).

The district court did not question the President's power to direct agency heads as to how to use their authority under Section 7106(b)(1). Instead, it declared Section 6 of the Collective Bargaining Order unlawful because, in its view, the statute requires that there be some unspecified amount of bargaining over permissive subjects; the total absence of permissive bargaining would, in the district court's view, contravene the statute's overall scheme regarding collective bargaining of conditions of employment. JA 133-34, 138, 144. The court did not attempt to reconcile that conclusion with the text of the statute, which makes permissive bargaining turn on

"the election of the agency." Nor did the court explain how much permissive bargaining is implicitly required, or how a court should analyze that question.

The district court's conclusion turned on a misreading of *NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006). There, Congress authorized the Department of Homeland Security to promulgate regulations establishing a "human resources management system" that, among other things, "ensure[s] that employees" may "bargain collectively." 5 U.S.C. § 9701(a), (b)(4). The Department promulgated regulations that "committ[ed] the bulk of decisions concerning conditions of employment to the Department's exclusive discretion." *Chertoff*, 452 F.3d at 844.

This Court held in *Chertoff* that the regulations did not comply with the statutory command to "ensure" employees could "bargain collectively." 452 F.3d at 844. "The most extraordinary feature of the [regulations]," the Court emphasized, was that they granted the agency "the right to unilaterally abrogate lawfully negotiated and executed agreements," which "would nullify the statute's specific guarantee of collective bargaining rights." *Id.* at 858-59. Moreover, the Court observed, "[t]he scope of bargaining under the [regulations] is virtually nil, especially when measured against the meaning of collective bargaining under [the FSLMRS]." *Id.* at 860. In comparing the bargaining permitted by the regulations and the bargaining anticipated by the FSLMRS, the Court noted five specific differences. *Id.* at 862. Although one of those five was the absence of permissive bargaining, four others concerned departures from what would be mandatory bargaining under the FSLMRS: the

regulations (i) allowed the Department, as noted above, "to take any matter off the bargaining table at any time, regardless of what concessions have already been made" by the union, a power with no analog under the FSLMRS; (ii) "shr[a]nk[] … considerably" bargaining regarding "appropriate arrangements" under Section 7106(b)(3) for employees adversely affected by management rights; (iii) prohibited all bargaining regarding "the procedures" the agency "will observe in exercising" management rights under Section 7106(b)(2); and, (iv) did not require the agency to provide the union with advance notice before changing working conditions pursuant to a management right. 452 F.3d at 862. The Court concluded that, taken together, the Department's regulations "effectively strip[ped] the term 'collective bargaining'" in the Department's organic act "of any real meaning." *Id.*

The district court here misread *Chertoff* as indicating that declining all permissive bargaining under Section 7106(b)(1) violates the FSLMRS. JA 131, 138, 144. *Chertoff* was not interpreting Section 7106(b)(1), but rather a different statute that required the agency to "ensure" that employees could "bargain collectively." And *Chertoff* rejected regulations promulgated under that other statute that, to the contrary, rendered collective-bargaining agreements non-binding and eliminated bargaining over several otherwise-mandatory topics of bargaining in addition to the permissive topics of bargaining. *Chertoff* thus did not hold, nor could it have held, that permissive bargaining under the FSLMRS is actually mandatory to some unspecified degree.

That implausible conclusion would be directly at odds with the plain text of Section 7106(b)(1) and unsupported by any precedent.

The district court's error apparently stems from the passage in *Chertoff* explaining that the regulations "shr[a]nk[] the scope of bargaining well below what [the FSLMRS] provides." 452 F.3d at 862. As noted, *Chertoff* provided five ways that the regulations did this, beginning, "[f]or example," with the absence of permissive bargaining under the regulations. *Id.* Immediately after noting that factor, the Court stated: "This distinction is critical." *Id.* The "critical" distinction the Court referenced was that the regulations "shr[a]nk[] the scope of bargaining well below what [the FSLMRS] provides," a holistic conclusion drawn by the Court on the basis of five features, four of which were the absence of bargaining over matters that would be *mandatory* under the FSLMRS. *Id.* The Court did not say that the lack of permissive bargaining alone was fatal to the regulation, much less that the FSLMRS makes permissive bargaining mandatory. To the contrary, in the same paragraph, the Court explained that the absence of impact-and-implementation bargaining over procedures for using management rights (required by the FSLMRS) was the "[m]ost striking[]" example of how the regulations departed from the system of collective bargaining under the FSLMRS. *Id.*

In sum, *Chertoff* is not reasonably read to hold that Section 7106(b)(1)—a provision that *Chertoff* did not interpret, and one that allows for bargaining over certain permissive subjects solely "at the election of the agency"—actually requires

agencies to elect to bargain over some unknown portion of permissive subjects. Insofar as *Chertoff* were to be construed otherwise, it is wrong. And at a minimum, whether the FSLMRS mandates some permissive bargaining is for the Authority, not the district court, to determine in the first instance.

### C. There Is No Duty To Bargain Over Matters Set By Government-Wide Regulations.

**1.** The district court also declared invalid and enjoined provisions in the Executive Orders that create certain government-wide rules for all federal employees. The court enjoined Sections 4(a) and 4(b) of the Official Time Order, which establish six rules to which "all employees shall adhere" while on the clock. Add. 15. For example, employees may not lobby for a union or any other private organization while on paid time. And employees "shall spend at least three-quarters of their paid time" each year "performing agency business or attending necessary training," thereby placing an annual limit on the amount of time that an employee may be paid by the government for, among other things, certain types of official time under 5 U.S.C. § 7131(d). The district court similarly enjoined two provisions of the Removal Procedures Order: Section 4(a), which provides that grievance procedures shall not apply to "disputes concerning: (i) the assignment of ratings of record [*i.e.*, performance appraisals]; or (ii) the award of any form of incentive pay," Add. 20; and Section 4(c), which provides that no employee shall generally have "more than a 30-

day period to demonstrate acceptable performance under" 5 U.S.C. § 4302(c)(6) before being removed, Add. 21.

The President issued these rules pursuant to his authority under Article II to control those who execute the laws, *see Free Enter. Fund*, 561 U.S. at 492, and pursuant to a statute, 5 U.S.C. § 7301, which confirms that constitutional authority and provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." As the Supreme Court has explained, presidents used those same authorities to prescribe a detailed regime of collective bargaining for federal employees via Executive Order in the 1960s. *See Old Dominion*, 418 U.S. at 273 n.5. Indeed, presidents commonly use these and other authorities to directly regulate the federal workforce. *See, e.g.*, 5 U.S.C. § 3301 (presidential authority over civil service); *id.* § 3302 (presidential authority over competitive service); Exec. Order 13,843, 83 Fed. Reg. 32,755 (July 10, 2018) (excepting Administrative Law Judges from competitive service).

When Congress enacted the FSLMRS against this backdrop, Congress expressly preserved all of the President's pre-existing authorities in this area "[e]xcept as otherwise expressly provided" in the statute. 92 Stat. at 1224 (Add. 1). As detailed below, the FSLMRS does not expressly provide otherwise for the types of presidential regulations at issue here. To the contrary, the FSLMRS expressly provides that the duty to bargain shall not extend to any matter that would be "inconsistent with any Federal law or any Government-wide rule." 5 U.S.C. § 7117(a)(1). Thus, in the years

since, presidents of both parties have invoked their continuing authority to prescribe certain rules for federal employees via Executive Order, wholly independent of the collective bargaining process, in order to ensure proper management of the federal workforce. *See* Exec. Order 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986) (drug testing requirements); Exec. Order 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989) (ethics requirements); Exec. Order 13,058, 62 Fed. Reg. 43,451 (Aug. 9, 1997) (smoking in federal buildings).

Under Section 7117(a)(1), rules like these have the effect of displacing the government's duty to bargain with unions over contrary matters—even if the FSLMRS would otherwise require bargaining absent the rules. In enacting Section 7117(a)(1), Congress provided that, although the FSLMRS sets a default baseline for collective bargaining, general rules created pursuant to lawful authorities—"government-wide" rules—would permissibly subtract from that baseline. As the report of the conference committee explained, "the issuance of government[-]wide rules … may restrict the scope of collective bargaining which might otherwise be permissible under the provisions of" the FSLMRS. H.R. Rep. No. 95-1717, at 155 (1978). In sum, as this Court has recognized, Section 7117(a)(1) "essentially permits the government to pull a subject out of the bargaining process by issuing a government-wide rule that creates a regime inconsistent with bargaining." *IRS*, 996 F.2d at 1250.

In this way, Section 7117(a)(1) ensures that Congress's assignment of regulatory authority to the Executive Branch, and the Executive Branch's exercise of its own inherent authority, is not overridden by operation of the FSLMRS whenever a union would prefer a different rule than the one lawfully promulgated. For example, when an agency issues regulations of government-wide applicability pursuant to statutes that the agency administers, Section 7117(a)(1) ensures that those regulations are effective and binding, as Congress intended, regardless of whether a union would want to collectively bargaining for a different outcome under the FSLMRS. *See, e.g.*, *IRS v. FLRA*, 902 F.2d 998, 1001 (D.C. Cir. 1990) (General Services Administration regulation governing smoking on government property); *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816-17 (D.C. Cir. 1987) (State Department regulation governing overseas civilian employees); *Department of Treasury v. FLRA*, 762 F.2d 1119, 1122 (D.C. Cir. 1985) (OPM regulation governing job assessments).

And, just as Section 7117(a)(1) preserves the effectiveness of statutory delegations of regulatory authority to agencies, Section 7117(a)(1) also preserves the power of the President to promulgate regulations of employee conduct in an Executive Order pursuant to the President's own authorities in Article II and Section 7301. Indeed, it is hard to imagine a more apt source of "government-wide" rules affecting the terms and conditions of federal employment than the President, the constitutional officer charged with overseeing the entire Executive Branch and ensuring the faithful execution of the laws. It is therefore unsurprising that, as the

Authority has held, Section 7117(a)(1) ensures that presidential regulations of employee conduct are effective regardless of whether a union would desire to bargain for contrary rules. *See NFFE Local 1655 & National Guard Bureau*, 49 FLRA 874, 889 (May 2, 1994) (no duty to bargain over proposal that would be inconsistent with drug-testing Executive Order); *see also Department of Army, U.S. Army Aberdeen Proving Ground Installation Support Activity v. FLRA*, 890 F.2d 467, 469 (D.C. Cir. 1989). Indeed, if Section 7117(a)(1) did *not* preserve the power of the President to effectively regulate the conduct of federal employees to ensure that they faithfully execute the law, that itself might raise significant Article II concerns.

**2.** In light of these considerations, the district court was correct to reject plaintiffs' sweeping argument that the President could not issue any "executive orders that carry the force of law in the field of federal labor-management relations." JA 111. The court noted that the President had long done so, and the court found determinative the fact that the FSLMRS expressly preserved the President's power to do so. JA 111-20. The court also correctly recognized that government-wide rules may displace collective bargaining over at least some matters under Section 7117(a)(1). JA 154-55.

But the district court nonetheless erroneously enjoined the government-wide rules created by the Official Time and Removal Procedures Orders. The court noted that many of the matters addressed by these government-wide rules are also addressed and made negotiable by the FSLMRS. JA 134-36. For example, Section 7131(d)

provides that official time, which is affected by some of the provisions in Section 4 of the Official Time Order, is available for "any other matter covered by" the statute, and "shall be granted … in any amount" the agency and union "agree to be reasonable, necessary, and in the public interest." Similarly, Section 7121(a)(2) provides that an agency and union may agree through negotiation to "exclude any matter from the application of the grievance procedures," while Section 4(a) of the Removal Procedures Order prohibits grievances regarding performance appraisals and incentive pay. And though the subject of Section 4(b) of the Removal Procedures Order—how long employees may have to demonstrate adequate performance—is not specifically addressed by the FSLMRS, it has been negotiable as a condition of employment under Section 7103(a)(14).

The district court invalidated these government-wide rules because, in the court's view, it violates the FSLMRS to "reduc[e] … the scope of the collective bargaining that Congress has envisioned." JA 78; *see also* JA 133, 137. But Congress envisioned that government-wide rules would do precisely that. Section 7117(a)(1) specifically provides that government-wide rules and regulations can permissibly subtract from the baseline duty to bargain established in the FSLMRS. As this Court has explained, Section 7117(a)(1) "essentially permits the government to pull a subject out of the bargaining process by issuing a government-wide rule." *IRS*, 996 F.2d at 1250.

The district court concluded that the enjoined provisions could not operate under Section 7117(a)(1) to displace the duty to bargain because, in the court's view, Section 7117(a)(1) covers government-wide regulations that have a "merely *incidental* effect on workers' collective bargaining rights," but does not authorize "*direct* regulation of the scope of bargaining through the adoption of government-wide rules." JA 154-55. Even on its own terms, the district court's test is untenable. The drug-testing Executive Order, which the court cited as an example of the kind of *incidental* government-wide rule allowed by Section 7117(a)(1), JA 151, *directly* regulates conditions of employment that would otherwise be subject to collective bargaining under the FSLMRS—matters such as whether certain employees must take drug tests, how those tests must be administered, and what personnel actions may and must be taken against employees who use illegal drugs. *See* Exec. Order 12,564, 51 Fed. Reg. 32,889 (Sept. 15, 1986). Those government-wide rules are no more or less incidental to collective bargaining than, for example, whether employees may receive longer than thirty days to demonstrate acceptable performance. Yet the district court inexplicably enjoined the provision of the Executive Orders addressing the performance-improvement period while endorsing the validity of the drug-testing Executive Order.

In any event, the Authority and this Court have rejected the district court's reasoning and have held that government-wide rules may displace collective bargaining, even where those rules expressly foreclose bargaining over matters that the FSLMRS expressly and specifically makes negotiable. For example, the Authority

has held that agencies may adopt government-wide rules that foreclose the application of grievance procedures (the scope of which is made negotiable by Section 7121), if those regulations clearly state their intent to do so. *See AFGE Local 3258 & Dep't of Hous. & Urban Dev.*, 53 FLRA 1320, 1326-30 (Feb. 19, 1998). This Court held the same in *IRS*. There, the Office of Management and Budget issued a directive to agencies specifying standards that agencies must use when deciding whether to contract work out to commercial providers. 996 F.2d at 1248. That directive specified a procedure for internal review of contracting-out decisions and expressly provided that those decisions "may not be subject to negotiation, arbitration, or agreement." *Id.* at 1248-50. This Court held that the contracting-out directive was a government-wide rule under Section 7117(a)(1), and that a union's proposal to settle disputes about contracting-out decisions through negotiated grievance mechanisms and arbitration under Section 7121 was inconsistent with that government-wide rule and therefore not negotiable. *Id.* at 1250-52.

Accordingly, it is settled law that government-wide rules, like those in Section 4 of the Official Time Order and Sections 4(a) and 4(c) of the Removal Procedures Order, may expressly regulate otherwise-negotiable matters and thereby have the effect of removing them from the bargaining table. The district court worried that "there is no rational explanation" for why "Congress would have intended for the President to have the power" to remove from collective bargaining "matters that the FSLMRS specifically characterizes as negotiable." JA 153. But, as already discussed,

Congress made clear that, in enacting the FSLMRS, it did not intend to abrogate the President's pre-existing authority "[e]xcept as otherwise expressly provided" in the statute. 92 Stat. at 1224 (Add. 1). Congress has never expressly purported to deprive the President of the authority to prescribe regulations for employee conduct; to the contrary, when Congress created the FSLMRS, it left Section 7301 intact and thereby reaffirmed that longstanding authority. Moreover, Congress expressly provided in Section 7117(a)(1) that government-wide rules would subtract from the baseline duty to bargain established by the statute. In sum, Congress understood and intended that Section 7117(a)(1) would have precisely the effect that the district court thought implausible.

Contrary to the district court's fears, the government's power under Section 7117(a)(1) to displace collective bargaining by issuing government-wide rules is limited in important ways. Those rules must be authorized by statute or other authority, as the employee-conduct rules in the enjoined provisions of the Executive Orders here are authorized by Section 7301. Those rules must be promulgated by an entity with the authority to do so, as the rules here were promulgated by the President. The rules, as here, must have general application within the federal government. Notably, if an agency wishes to create an *agency-specific* rule, Section 7117(a)(2) of the FSLMRS provides that the rule does not displace collective bargaining over contrary matters of its own force; it does so only if the Authority determines that the rule is supported by a "compelling need." Section 7117(a)(1)'s provision for government-wide rules

contains no similar limitation, making clear that the relevant judgment—whether a rule is sufficiently important to be worth promulgating on a government-wide basis—is to be made by the politically accountable authority (here, the President) charged with the weighty duty of overseeing the Executive Branch and its employees. Finally, government-wide rules may not be enforced where they conflict with applicable, pre-existing collective-bargaining agreements. *See* 5 U.S.C. § 7116(a)(7). The rules here satisfy all of these requirements.

In addition, this Court has identified an anti-parroting limitation on Section 7117(a)(1). Under Section 7106, the government generally need not bargain over its management rights, but it must still bargain over the impact and implementation of those rights. In *OPM v. FLRA*, 864 F.2d 165, 171 (D.C. Cir. 1988), this Court held that the government could not convert its management rights into absolute rights, and foreclose impact-and-implementation bargaining, simply by parroting the management rights from Section 7106 in a government-wide rule. (There is no equivalent in Section 7117(a)(1) to impact-and-implementation bargaining; if a matter is inconsistent with a government-wide rule, it is simply not negotiable.) This Court held that government-wide rules cannot merely restate management rights but must either "provide[] management with new powers that it did not already have by virtue of section 7106(a)"—presumably through the exercise of independent regulatory authority—"or direct[] the exercise of existing management prerogatives in a *specific*

way, so that *particular* subjects or appropriate arrangements are identified as inappropriate topics of bargaining." 864 F.2d at 171.

The government-wide rules at issue here easily pass this anti-parroting test. The rules take specific and particular matters out of collective bargaining, using the President's authority under Section 7301, while leaving the sizable remainder to negotiations. The regulations do not attempt the kind of sweeping, generic veto that this Court ruled out of bounds in *OPM*. Instead, as *OPM* suggested may be permissible, the government-wide rules here represent the President's targeted determination that "*particular* arrangements … , if subject to bargaining, might threaten the governmental efficiency and merit objectives of the statute." 864 F.2d at 169.

**3.** The nature of the specific government-wide rules at issue here underscores the district court's errors in additional ways. Sections 4(a) and 4(c) of the Removal Procedures Order, for example, create certain rules regarding employee performance appraisal. It is undisputed that OPM has statutory authority under 5 U.S.C. §§ 4302(c)(3), (4), and (6) to promulgate regulations governing agency performance appraisal systems, including regulations governing how performance is assessed, how performance is rewarded, and what kind of opportunity employees have to demonstrate adequate performance. *See, e.g.*, 5 C.F.R. § 432.104 (providing for a "reasonable opportunity"). This Court has already held that OPM's regulations regarding performance appraisal systems qualify as government-wide rules under

Section 7117(a)(1)—rules that foreclose bargaining over contrary matters. *See NTEU v. FLRA*, 30 F.3d 1510, 1514-16 (D.C. Cir. 1994). While OPM's current regulations may leave matters like the duration of a performance-improvement period largely to negotiation (because the current rules decline to specify a firm upper bound), those regulations are not written in stone. There is no reason why OPM could not propose for notice-and-comment rulemaking the government-wide rules that the President directed in the Removal Procedures Order. And such rules, if promulgated, would remove any duty to bargain over, say, a proposal for a sixty-day performance-improvement period that the new rules specifically forbid.

If OPM may create the kind of rules in Sections 4(a) and 4(c) of the Removal Procedures Order that displace collective bargaining over contrary matters under Section 7117(a)(1), there is no apparent reason why the President may not create such rules under his own concurrent authorities over federal employees, such as 5 U.S.C. §§ 7301 and 3301, and obtain the same effect under Section 7117(a)(1). As noted above, presidents have relied on those same authorities to create an entire system for collectively bargaining over personnel policies and working conditions. *E.g.*, Exec. Order 11,491, § 11(a), 34 Fed. Reg. 17,605 (Oct. 29, 1969). The presidential regulations here are far narrower. Section 7117(a)(1) provides no textual basis to distinguish between government-wide rules issued by OPM or the President. And any such distinction would wilt in the face of Article II and the President's historical exercises of authority in this arena. In any event, if this Court were to conclude that

OPM may issue such regulations and take advantage of Section 7117(a)(1), but the President may not, then this Court should construe Section 7 of the Removal Procedures Order, Add. 21-22, as directing OPM to propose regulations under its own statutory authority.

Finally, the nature of plaintiffs' claims regarding Section 4 of the Official Time Order illustrates why those claims should be raised in the context of FLRA proceedings, not before the district court. In discussing the relationship between Sections 7117(a)(1) (government-wide rules) and 7131(d) (official time), this Court has "le[ft] for the FLRA in the first instance the issue of potential conflict between" them, if any. *AFGE Council of Locals 214*, 798 F.2d at 1530 n.6. The district court should have done the same, in order to allow the Authority to bring its considerable expertise to bear on the question whether Section 7117(a)(1) is subject to some implicit and unidentified exception, and to give this Court a chance to review, and possibly defer to, the Authority's reasonable resolution of that matter. *See OPM*, 864 F.2d at 169 (deferring to the Authority's "reasonable accommodation" between "conflicting policies" in Section 7117(a)(1) and Section 7106(b)(3)). And all the more so for plaintiffs' claims concerning Sections 4(a) and 4(c) of the Removal Procedures Order, where any such implied exception to Section 7117(a)(1) would have to be reconciled with the fact that OPM indisputably may promulgate government-wide rules on the very same topics.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and the Order of this Court dated November 9, 2018 because it contains 14,464 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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**Federal Service Labor-Management Relations Statute, Pub. L. No. 95-454**

**§ 904, 92 Stat. at 1224, *codified at* 5 U.S.C. § 1101 note. Powers of President Unaffected Except by Express Provisions**

Except as otherwise expressly provided in this Act, no provision of this Act shall be construed to—

(1) limit, curtail, abolish, or terminate any function of, or authority available to, the President which the President had immediately before the effective date of this Act; or

(2) limit, curtail, or terminate the President's authority to delegate, redelegate, or terminate any delegation of functions.

**5 U.S.C. § 7106. Management Rights**

. . . .

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

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

. . . .

**§ 7114. Representation Rights and Duties**

(a)

. . . .

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

. . . .

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

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

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

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

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

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

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

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

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

. . . .

**§ 7117. Duty to Bargain in Good Faith; Compelling Need; Duty to Consult**

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

. . . .

**§ 7121. Grievance Procedures**

(a)

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

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

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

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

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

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

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

. . . .

**§ 7123. Judicial Review; Enforcement**

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

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

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

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

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

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall

file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions

or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

**§ 7131. Official Time**

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

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

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

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

(1) any employee representing an exclusive representative, or

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

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

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

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

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

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

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

. . . .

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

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

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

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

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

(5) assisting employees in improving unacceptable performance; and

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

(d) In accordance with regulations which the Office shall prescribe, the head of an agency may administer and maintain a performance appraisal system electronically.

**5 U.S.C. § 7301. Presidential Regulations.**

The President may prescribe regulations for the conduct of employees in the executive branch.

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# Presidential Documents

**Executive Order 13836 of May 25, 2018**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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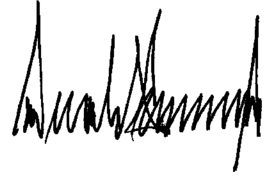
(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
*May 25, 2018.*

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

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# Presidential Documents

**Executive Order 13837 of May 25, 2018**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

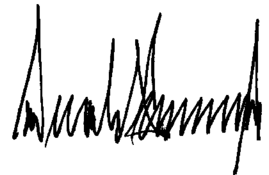
(b) Nothing in this order shall be construed to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under chapter 71 of title 5, United States Code, or encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure,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

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

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

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

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



THE WHITE HOUSE,
*May 25, 2018.*

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Filed 5–31–18; 8:45 am]
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# Presidential Documents

**Executive Order 13839 of May 25, 2018**

## Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) the assignment of ratings of record; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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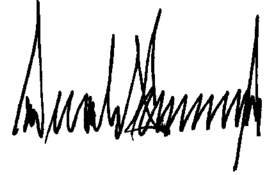
(e) If any provision of this order, including any of its applications, is held to be invalid, the remainder of this order and all of its other applications shall not be affected thereby.



THE WHITE HOUSE,
*May 25, 2018.*

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