No. 20-1868

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES,
Appellant-Plaintiff,

v.

JAMES R. MCHENRY III, Director of the
Executive Office of Immigration Review,

Appellee-Defendant.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 20-cv-0731 (The Hon. Liam O'Grady)

BRIEF OF LABOR LAW SCHOLARS AND EXPERTS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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(name of party/amicus)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Danielle Leonard Date: October 5, 2020

Counsel for: Amici Legal Scholars and Experts

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INTEREST OF *AMICI CURAIE*

Amici are law professors long engaged in the study and teaching of labor law at institutions across the United States, along with two former General Counsels of the Federal Labor Relations Authority ("FLRA") who are experts on the statute that governs federal employee labor relations, the Federal Service Labor-Management Relations Statute ("FSLMRS"), Title VII of the 1978 Civil Service Reform Act ("CSRA"). *Amici* all have extensive experience studying, teaching, or applying the doctrines of labor law, including as pertains to the rights of federal employees, and share a scholarly and practical interest in the proper application of the laws and doctrines here at issue. With this brief, *amici* seek to assist the Court in explaining the proper scope and application of the statute and the jurisdictional doctrines that interact with the FSLMRS.

We all believe the expansion of the jurisdictional channeling doctrine in this case has exceeded the proper bounds of that implied doctrine as it relates to federal employees and this statute, and has incorrectly denied employees access to federal court to hear important First Amendment claims.[1]

Amici submit this brief solely on their own behalf, not as representatives of their universities and/or employers. The list of *amici* are provided in Appendix A,

[1] Because the Appellant's brief fully addresses the underlying First and Fifth Amendment claims, we focus exclusively on the District Court's reliance on implied jurisdictional doctrines.

with institutional affiliations provided solely for identification. All parties have consented to the filing of this brief.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress did not intend for the FSLMRS to remove the longstanding federal court jurisdiction to hear the First Amendment claims of federal employees challenging government policies that impose a prior restraint on their personal speech. By using the doctrine of *implied* jurisdictional channeling, derived from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207–13 (1994), to dismiss the First Amendment claims in this case, the District Court veered too far from congressional intent and statutory text. The statute at issue was carefully crafted by Congress as part of the historic overhaul of the federal employment system in the 1978 CSRA. In the FSLMRS, Congress created three very specific administrative mechanisms for dealing with particular types of statutory labor disputes—not for adjudicating and remedying constitutional claims for which federal court jurisdiction is a bedrock principle of our constitutional system.

[2] This brief is submitted in accord with FRAP 29(a) and the Rules of this Court. No party or party's counsel in this case authored this brief in whole or in part, or contributed any funds to support the preparation or submission of this brief. The fees of counsel for the *amici* were partially subsidized by a coalition of non-party entities that includes the: American Federation of Government Employees, National Association of Government Employees; National Federation of Federal Employees, Service Employees International Union and International Association of Machinists and Aerospace Workers.

We explain the statute below in detail to correct misperceptions in the District Court's analysis and to illuminate congressional intent. Upon examination, the text, structure and purpose of the FSLMRS reveal that Congress created administrative procedures to adjudicate statutory claims and protect the labor rights granted under that statute, not to address constitutional concerns that have long been the territory of federal courts. The doctrine of implied removal of jurisdiction should be employed cautiously, not zealously, and the *Thunder Basin* factors should be used as a tool to identify congressional intent, not impose an alternative judicially-driven view of statutory purpose. The only conclusion consistent with the 1978 law is that the important First Amendment claims of the federal employees in this case should proceed in federal court.

ARGUMENT

I. History, Text, Structure, and Purpose of the FSLMRS

In the 1978 CSRA, Congress engaged in sweeping reform of the laws governing federal employment, creating the modern federal civil service system. 5 U.S.C. §1101 *et seq*. Among these reforms was the creation of the first statute governing federal employee labor relations, the FSLMRS, 5 U.S.C. §7101 *et seq*. Prior to 1978, federal employee labor rights were provided for only by Executive

Order,[3] in contrast to private-sector employment that had been subject to the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq*., and related federal statutes, for decades.

In the FSLMRS, Congress codified the right of federal employees to form and join unions, 5 U.S.C. §7102, and required employing agencies and such unions to bargain in good faith over the conditions of employment, subject to exemptions discussed further below, *id*. §§7102, 7114, 7116(a)(5) and (b)(5).[4] Congress declared that collective bargaining is "in the public interest" because, among other things, it "contributes to the effective conduct of public business" and "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment," §7101. Congress also established the FLRA, to which Congress delegated enumerated duties including supervising union representation elections, adjudicating unfair labor practice complaints, and resolving disputes over the negotiability of bargaining proposals. §7104.

[3] Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969); Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962).

[4] All FSLMRS citations are to Title 5 of the U.S. Code. We have included, for the convenience of the Court, an Appendix B of the primary provisions of the FSLMRS cited herein.

This law resulted from extensive congressional hearings and negotiations, against the backdrop of existing labor laws governing the private sector.[5] The rights and procedures created by the FSLMRS reflected a careful balance of interests specific to the federal government. *See, e.g.*, *U.S. Army Eng'r Ctr. v. FLRA*, 762 F.2d 409, 417 (4th Cir. 1985) (describing the statute as "Congress' attempt to preserve in careful balance the interests of federal employees in negotiating their working conditions, of agencies in the exercise of their regulatory powers, and of the country in the orderly and efficient administration of government."). Thus, while paralleling the NLRA by protecting exclusive representation and the duty to bargain, this statute also differed from that law in significant ways.

First and foremost, the duty to bargain with respect to federal employees excludes significant matters impacting the terms and conditions of employment (such as wages which are set by statute). Under the FSLMRS, the duty to bargain

[5] The lengthy legislative history is set forth in: Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978* (hereinafter "Legislative History")). *See id.* at vii-viii (Transmittal Letter from Chairman Rep. Clay) ("Although eventually passed as part of the Civil Service Reform Act, the labor-management provisions were themselves the focus of considerable attention both on their own and as part of the act… Such a history is necessarily complex; a dozen different versions of complete labor-management legislation received consideration in the congressional activity leading ultimately to [the] adoption of title VII.").

does not extend to proposals involving any of the extensive management rights reserved by the Statute, §7106.[6] The duty also does not extend to proposals that conflict with federal statutes, §§7103(a)(14), 7117, any government-wide rules and regulations, §7117(a)(1), or any agency regulations for which there is a compelling need, §7117(a)(2),(3). *See also FLRA v. Aberdeen Proving Ground, Dep't of the Army*, 485 U.S. 409, 410 (1988) ("[R]ecognizing 'the special requirements and needs of the Government,' §7101(b), Title VII exempts certain matters from the duty to negotiate.").[7] The rationale given for creating these exclusions from bargaining in the federal sector was a concern that government would not operate efficiently if agencies were required to negotiate over management prerogatives and issues otherwise subject to legal requirements.[8]

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[6] The duty to bargain does not extend to the substance of policies that implicate the management rights set forth in §7106(a), but can extend to certain procedures and arrangements for implementation of those policies under §7106(b). *U.S. Dep't of Treasury, Office of Chief Counsel, I.R.S. v. FLRA.*, 960 F.2d 1068 (D.C. Cir. 1992).

[7] *Compare* §§7103(a)(12), (a)(14), 7106, 7114(a)(4), and §7117 *with* the NLRA, 29 U.S.C. §§157, 158(a)(5),(d).

[8] *See* §7101(b) (the FSLMRS was designed to satisfy special needs of government and is to be interpreted "in a manner consistent with the requirement of an effective and efficient Government"); Legislative History at 744–46 (S. Rep. No. 969, 95th Cong., 2d Sess. 2–4 (1978)); Legislative History at 679 (H.R. Rep. No. 1403, 95th Cong., 2d Sess. 3 (1978)).

Second, Congress eliminated a very powerful economic weapon supporting collective bargaining in the private sector: the right to strike. §7311(3). In exchange for such limitations, Congress codified other rights, granting employees the right to use paid "official" time for representational activities, §7131, and creating the Federal Service Impasses Panel ("FSIP") to help resolve bargaining impasses pre-implementation, §7119.

By this statute, Congress also created three very specific adjudicatory processes: unfair labor practice proceedings (§§7116, 7118); "negotiability" appeals (§7117); and appeals from arbitration decisions (§7122). Only the first procedure parallels the NLRA; the other two are unique to the federal sector. Each of these mechanisms protects and enforces carefully defined statutory rights. As this Court has previously explained:

> The care which Congress gave this legislation is attested to by over 1,500 pages of legislative history. It is significant that Congress chose to provide separate avenues of negotiability appeals and unfair labor practice proceedings to resolve different kinds of questions.

U.S. Army Eng'r Ctr., 762 F.2d at 416.

Unfair Labor Practice Proceedings. Congress defined a set of enumerated statutory violations by unions and employing agencies that constitute unfair labor practices. §7116. The enumerated list protects rights afforded by the FSLMRS (such as the right to union representation), and does not encompass or permit adjudication of other types of rights or claims, such as allegations of

unconstitutional action by federal agencies or violations of other statutes. *Id*. Notably, while the unfair labor practice provisions protect the duty to bargain in good faith, §7116(a)(5), that protection is limited to matters about which the statute requires bargaining (*id*., "as required by this chapter"). It does not extend, for example, to those management rights Congress excluded from that duty, §7106.

As with the NLRA, unfair labor practices are not automatically adjudicated as a result of the filing of a claim, as in court. Anyone may bring issues to the FLRA General Counsel's attention by way of filing a charge. §7118(a)(1). The General Counsel has prosecutorial discretion to investigate and enforce these provisions through administrative complaints. *Id.* The General Counsel, not the charging party, then prosecutes any complaint before an Administrative Law Judge, and ultimately, the FLRA, §7118(a)(6)–(8).[9] Decisions of the FLRA General Counsel to dismiss a charge that he or she believes lack merit are not subject to judicial review. *E.g., Rizzitelli v. FLRA*, 212 F.3d 710 (2d Cir. 2000); *Turgeon v. FLRA*, 677 F.2d 937, 940 (D.C. Cir. 1982).[10] Correspondingly,

[9] Under regulations issued by the FLRA, some of these duties are delegated to the FLRA Regional Directors. *See* 5 C.F.R. Part 2423. However, only the General Counsel has the statutory authority to issue a complaint, §7118.

[10] The FLRA has not had a General Counsel since 2017. As the agency explains on its website: "ULP complaints may only be issued when the FLRA has a General Counsel." *See* FLRA website: *Absence of a General Counsel*, at https://www.flra.gov/components-offices/components/office-general-counsel-ogc/absence-general-counsel. Thus, the processing of charges and complaints, and

Congress created no private right of action to directly enforce an unfair labor practice violation in court. §§7116, 7118.

When the General Counsel issues a complaint, and the issues are ultimately resolved by the FLRA, the resulting FLRA order is subject to limited review in the federal Courts of Appeals. §7123. Review proceeds on the administrative record, §7123(c), pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §706, and therefore is subject to review only as arbitrary and capricious or otherwise contrary to law, *id*.; no issue not raised before the FLRA may be considered, §7123(c); and the agency's factual determinations are deemed "conclusive," *id*.

Negotiability Appeals. Labor and management at times disagree as to whether a particular issue falls within or outside the duty to bargain. In the private sector, disputes over whether a matter is subject to the duty to bargain are resolved by way of unfair labor practice charges involving a failure or refusal to bargain over subjects the other side contends are mandatory, or corresponding charges that a party is unlawfully insisting on bargaining over proposals that are not in fact subject to bargaining. In the FSLMRS, Congress created a specific procedure—the

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FLRA adjudications of complaints, have remained at a standstill for years. And, according to the agency, "[t]he FLRA receives about 4,000 charges per year from federal employees, unions, and agencies" which indicates an incredible backlog. *See ULP Factsheet – Filing through Appeals*, at https://www.flra.gov/system/files/webfm/OGC/ULP%20Factsheet%20-%20Filing%20through%20Appeals(10.28.16).pdf.

"negotiability appeal"—to permit unions and federal agencies to resolve certain disputes over whether matters are subject to bargaining under the statute. §7117.[11]

The procedures for reaching the FLRA set forth in §7117 were very carefully crafted by Congress to apply in limited circumstances. *U.S. Army Eng'r Ctr.*, 762 F.2d at 414 ("Congress paid careful attention to §7117."); *see also Aberdeen Proving Ground*, 485 U.S. at 410-12. Negotiability appeals arise during bargaining from disputes over whether specific bargaining *proposals* are subject to the duty to bargaining in good faith. §7117; 5 C.F.R. §2424.2(e); *Negotiability Guide* at 3.[12] Because the scope of the duty to bargain is statutory, these appeals encompass only the following specific types of circumstances: first, where a union and agency disagree over whether a particular union proposal falls inside or outside the duty to bargain because it falls within management rights (§7106), a federal statute (§§7103(a)(14) and 7117), a government-wide rule (§7117(a)), or agency rule for which there is a compelling need (§7117(a)(2),(3)); and second, where a union and agency disagree as to whether a union proposal is lawful (and

[11] The FLRA has also enacted regulations pertaining to negotiability appeals that further delineate the specific types of disputes that fall within the narrow scope of this procedure. 5 C.F.R. Part 2424; see also *FLRA Guide to Negotiability Appeals* ("*Negotiability Guide"*), available at: https://www.flra.gov/cases/negotiability.

[12] The negotiability appeal process also encompasses review of bargaining *provisions* (as opposed to proposals) in the unique circumstance where an agency's negotiators and union have agreed upon a provision that is later rejected by the agency head pursuant to authority under §7114(c). 5 C.F.R. §2424.2(f); *Negotiability Guide*, at 3. This appeal mechanism is not relevant here.

therefore negotiable) or is unlawful (and therefore the agency has no duty to bargain). 5 C.F.R. §2424.2(e); *Negotiability Guide* at 5–6.

Only a union may file a petition for a negotiability review; it may file a petition to the FLRA contending that the union's proposal is "within the duty to bargain or not contrary to law, respectively." 5 C.F.R. §§2424.20, 22. The agency is permitted to respond as to: "why [the union's] proposal or provision is not within the duty to bargain or contrary to law, respectively." 5 C.F.R. §2424.24. Notably, Congress created no process for FLRA review of the negotiability or legality of any *agency's* bargaining proposals. The negotiability appeal is *not* a catch-all procedure by which the FLRA considers the legality of either agency bargaining positions or agency policies—it is statutorily limited to reviewing the agency's statutory duty to bargain with respect to a union's proposal.[13]

Thus, upon review, the FLRA will take one of two actions: 1) if the petition has merit, "the Authority will order the agency to bargain on request concerning the proposal;" or 2) if the petition lacks merit, "the Authority will dismiss the petition for review." 5 C.F.R. §2424.40. The purpose of §7117 is to permit the resolution of disputes over the negotiability of union proposals, to ensure that those

[13] If the agency's defense to bargaining is that the union's proposal falls within an agency-level rule (pursuant to §7117(a)(2) and (3)), the union may challenge that position by contending there is no "compelling need" for that agency regulation, *id*. The FLRA then resolves whether the rule is supported by a "compelling need," using narrow criteria, which do not include resolving the underlying legality of the rule. 5 C.F.R. §2424.50.

proposals respect statutory management rights (for example by limiting bargaining to union proposals to procedures, §7106(b)(2), and appropriate arrangements related to management's exercise of those rights, §7106(b)(3)), and thereby avoiding the threat and impact of unfair labor practice charges and remedies against the agency arising from the refusal to bargain —it is a one-way ratchet. *U.S. Army Eng'r Ctr*., 762 F.2d at 414 ("Section 7117(b) enables a government agency to act in furtherance of its essential mission without facing the charge and possible sanctions of an unfair labor practice."); *see also Aberdeen Proving Ground*, 485 U.S. at 410-14 (affirming strict construction of §7117).[14]

Finally, judicial review of any FLRA order resolving a negotiability appeal is subject to the constraints of §7123(c) described above (review on the

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[14] This Court explained the need to strictly construe these provisions as follows:

> Congress made in §7117 a considered decision favoring the negotiability appeals procedure over the ULP process when the question of negotiability was in doubt. This decision in turn reflected Congress' determination to obtain "more effective and efficient Federal Government that is a predictable result of a meaningful labor-management program for Federal agencies," Legislative History at 931, by balancing the duty to bargain in good faith with the need to maintain essential governmental rights and flexibility—a balance achieved primarily through the provisions regarding reserved management rights and scope of duty to negotiate, §§7106 and 7117. *See, e.g.*, Legislative History at 843–845; 927–934. Given the obvious importance that Congress attached to these provisions, we cannot turn our backs on the procedure set out in 5 U.S.C. §7117 and create for the parties the procedural choice that Congress foreclosed.

U.S. Army Eng'r Ctr.,762 F.2d at 414–15.

administrative record; reversible only if arbitrary and capricious or otherwise contrary to law; limited to issues before the agency; factual findings conclusive).

Appeals from Arbitration Awards. Congress afforded federal employees a statutory right to have their bargaining agreements include grievance and arbitration procedures that permit FLRA review upon appeal from arbitrators' decisions. §§7105(a)(2)(H), 7121, 7122. This too differs from the private sector, where grievance and arbitration rights are exclusively contractual, are not reviewed by the NLRB, and are subject to enforcement in federal district court. 29 U.S.C. §185.

The FSLMRS defines grievance more broadly than is typical in the private sector, where grievances are typically limited to enforcing collective bargaining agreement provisions; here, the statute expressly defines grievance to include complaints regarding any aspect of employment, violations of contract, and other violations of law enacted for the purpose of regulating employment. §7103(a)(9). Federal unions and agencies are then permitted to bargain for a narrower provision than the statutory definition. §7121(d). Several other aspects of the statute also operate to narrow the broad definition. For example, while unfair labor practice violations can be enforced through the grievance procedure, an election to file an unfair labor practice charge with the General Counsel forecloses a grievance (and vice versa). §7121. And, the strong management rights language in §7106(a)(1)

precludes arbitration with respect to those issues entirely ("nothing in this chapter shall affect" those management rights).

Significantly, Congress excluded from judicial review arbitration appeal orders unless they resolved unfair labor practice violations, §7123(a)(1)—as opposed to grievances involving contract violations or violations of law other than unfair labor practices which are *not* subject to judicial review. This review provision thus incorporates the statutory limitations on the substantive scope of the unfair labor practice provisions discussed above. And, those orders that are reviewable are subject to the constraints of §7123(c) described above.

***

In sum, the three different types of adjudicatory procedures created by Congress use carefully delineated and circumscribed statutory procedures to adjudicate and resolve the specific statutory rights codified by Congress in the FSLMRS. These procedures were not crafted for the purpose of the FLRA adjudicating all the other types of claims or causes of action that are available to litigants in federal court simply because they impact the rights of federal employees, including claims brought against the federal government under the Constitution, as discussed in the following sections.

II. The Expansion of the *Thunder Basin* Implied Administrative Channeling Doctrine to First Amendment Claims Protecting Federal Employee Speech Is Not Consistent with Congressional Intent

A. This Implied Doctrine Should Be Exercised Cautiously to Illuminate Congressional Intent

The removal of jurisdiction in this case was entirely implied: Congress did not *expressly* state in the FSLMRS that any claims over which the federal courts normally have jurisdiction in the first instance—let alone First Amendment claims—should first go to administrative agencies and not to court. And, the District Court's needless expansion of the *Thunder Basin* doctrine is particularly troubling in view of the Supreme Court's turn towards textualism and away from court-made implied doctrines of statutory interpretation. Although our courts once readily departed from the text enacted by Congress—fashioning "implie[d]" doctrines as they deemed "necessary to make effective the congressional purpose" expressed in that text, *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)—today that approach is recognized as an "*ancien regime*." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). Now, what the judiciary may perceive as to Congress's intentions and expectations "matters only to the extent it clarifies text." *Sandoval*, 532 U.S. at 288.

Thunder Basin's doctrine of implied administrative channeling should be considered against this backdrop. The Supreme Court in *Thunder Basin*, and subsequent cases including *Elgin v. Department of Treasury*, 567 U.S. 1, 22

(2012), and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 489 (2010)), has employed analytical factors as tools to determine unexpressed congressional intent. The turn towards textualism should act as a caution against divorcing the *Thunder Basin* factors from the intent they are supposed to help illuminate. As the Supreme Court very recently emphasized in a different context, "Congress knows how" to make its intentions clear "when it can muster the will." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) (slip op. at 8). When Congress seeks to channel the adjudication of a fundamental constitutional right into an administrative scheme not designed for that sort of adjudication, just as when it seeks to withdraw a Native American reservation previously granted, it need not use "any particular form of words," but it must "clearly express its intent to do so." *Id.* at 2463 (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)).

Such a clear intent is precisely what the *Thunder Basin* factors are meant to elucidate. If Congress has enacted an administrative scheme designed to adjudicate a very particular sort of statutory dispute and has not provided litigants a private right of action for those claims in court, its intent to channel such disputes into that administrative scheme may be clearly expressed even where it has not explicitly stated that such claims may not be brought in court in the first instance. But the analysis shifts considerably when the claims at issue are *not* those statutory

claims that Congress created the administrative scheme to address, and where there is a pre-existing right to litigate grounded in the Constitution. As the above discussion of the FSLMRS should make clear, and as explained further in the following sections, it is simply far too great a leap from the text and structure of a statute carefully aimed at adjudicating very specific and circumscribed types of statutory labor rights and labor-management disputes to infer the *silent* removal of jurisdiction over a First Amendment challenge to government policy imposing a prior restraint on speech. Moreover, it contravenes congressional intent to conclude that that federal employees seeking to vindicate their First Amendment rights must be forced to manufacture unrelated statutory claims to invoke an administrative scheme not at all designed to address these First Amendment issues (or instead to "bet the farm" by violating the challenged policy and risking loss of employment, *Free Enterprise*, 561 U.S. at 490–91). The District Court's conclusion effectively treats Congress as if it did not actually know what it was doing—contrary to the "careful" thought behind the procedures at issue recognized by this Court in *U.S. Army Engineering Center*, 762 F.2d at 414. The court below went too far in disregarding the text and structure of the actual statute, imposing its view as to what is "necessary to make effective" some nebulous and superficial conception of the statutory scheme's purpose. *Borak*, 377 U.S. at 433.

The *Thunder Basin* doctrine's jurisdictional character gives these considerations additional force. Where Congress has altogether stripped (or unconstitutionally attempted to strip) the federal courts of jurisdiction over constitutional claims, it has done so explicitly. *See, e.g.*, *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 511–13 (1868); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–46 (1871); *Boumediene v. Bush*, 553 U.S. 723, 736–39 (2008); *Patchak v. Zinke*, 138 S. Ct. 897, 903–04 (2018). As Article III imposes "[a] virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," this implied doctrine poses a serious risk of shirking the responsibilities entrusted to federal judges by the Constitution (and therefore should be approached with caution, and analytical rigor). *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976). "[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Regardless of whether administrative or policy interests might make a refusal to exercise jurisdiction desirable, Article III compels our courts to exercise it nonetheless. *See McCarthy v. Madigan*, 503 U.S. 140, 146 (1992). That very mandate should counsel restraint in the application of *Thunder Basin*'s factors, confining them to their original

purpose: as tools to determine the types of claims that Congress did intend—and did not intend—these statutory procedures to address.

B. The *Thunder Basin* Factors Do Not Indicate that the Congress that Enacted the FSLMRS Intended to Remove Jurisdiction Over the First Amendment Claims at Issue Here

The *Thunder Basin* analytical tools, properly applied, ask the question whether the claims at issue in this case are the types of claims Congress intended to route through the administrative procedures it created. The answer provided by the text and structure of the FSLMRS, explained above in Section I, is no.

1. Congress did not provide for any route to meaningful judicial review of First Amendment claims

None of the statutory adjudication pathways created by Congress provides a remedy for, or meaningful judicial review of, the constitutional claims raised in this case.

a. The District Court suggested the plaintiff should manufacture a bargaining dispute over the new speech and publication policy, but this suggestion ignores the text, structure, and purpose of the actual statute. As discussed above, Congress created a very specific negotiability appeal procedure to resolve disputes over the duty to bargain. However, the negotiability appeal is a one-way rachet intended to resolve disputes over the negotiability and lawfulness of the *union's bargaining proposals*, not an agency's proposals or policy positions. Thus, to even trigger this process, the union would have to manufacture a counter-proposal to the

agency policy at hand and then demand to bargain. In resolving that dispute, the FLRA would never review the negotiability of the agency's position or the underlying lawfulness of that policy. *Infra*, Section I.

Moreover, the subject of the dispute—the agency's publication and speech policy—is very clearly *not* even a negotiable subject, because it involves the right to direct and discipline employees and therefore falls within the management rights provisions in §7106, which Appellant acknowledges. Any negotiability dispute over the substance of this policy in these circumstances would necessarily be knowingly manufactured.

The Congress that enacted the FSLMRS would not have intended, as the District Court concluded, that employees should engage in frivolous demands to bargain over invented proposals and non-negotiable policies. The entire point of the statutory exclusions from bargaining was to permit the government to run efficiently *without* being bogged down by adjudicating unnecessary claims that agencies were violating the duty to bargain by refusing to engage on management rights issues. Requiring employees or their union to demand bargaining over an invented counter-proposal they know is not subject to bargaining, just to get an

FLRA order dismissing their demand, could not be more *directly* contrary to congressional intent.[15]

b. The District Court apparently believed that the union could manufacture a bargaining dispute that would lead to adjudication of an unfair labor practice charge regarding the duty to bargain. But neither of the other two adjudicatory mechanisms involving unfair labor practice violations would provide a route to meaningful review either. We discuss these together because, with respect to review of FLRA orders reviewing arbitration decisions, Congress provided for judicial review only of those orders addressing unfair labor practice violations, §7123.

First and foremost, none of the unfair labor practice provisions in the FSLMRS incorporate or address violations of law beyond the provisions of the FSLMRS, and therefore, once again, any charge or grievance invoking these provisions to adjudicate a constitutional claim would be knowingly manufactured

[15] The District Court also suggested that initiating bargaining over the implementation (as opposed to the substance) of the policy would result in a bargaining dispute that would lead to an unfair labor practice charge, but that is not correct; there is no reason to believe that the agency would, contrary to law, object to bargaining over a mandatory subject of bargaining (implementation) under §7106(b), particularly as it agreed to such bargaining in the past. No dispute would result; no FLRA order would result; and no judicial review allowing courts to address the constitutional challenge would ever happen. Likewise, the District Court also suggested that bargaining to impasse would somehow result in review. This too is wrong, as there is no review from decisions of the Impasse Panel, and therefore no route to court.

and frivolous. §7116; *infra*, at Section I. And, such a charge or grievance alleging a manufactured failure to bargain would be doubly frivolous because, as discussed above, the statutory duty to bargain does not extend to policies that implicate management rights.

Moreover, no General Counsel would issue a complaint on a charge without basis in the statute, and there be no resulting FLRA order for a court to review. The only potential FLRA order for review would therefore be for review of an arbitrator's decision resolving a (frivolous) unfair labor practice grievance. Again, requiring parties to use these procedures to file and adjudicate knowingly frivolous and manufactured unfair labor practice claims is directly contrary to congressional intent in creating these procedures.

c. Congress expressly stated in §7123(c) that judicial review of FLRA orders is confined to the administrative record and the issues addressed in those orders. Even if a reviewing court ignored that express instruction, and in reviewing an FLRA order resolving a (knowingly frivolous) negotiability dispute or an appeal from an arbitrator's order on a (knowingly frivolous) unfair labor practice grievance, decided to also resolve a collateral First Amendment challenge, that review would not be meaningful at all. Federal courts enjoin prior restraints on speech to prevent the serious harms caused by the unconstitutional chilling of protected speech—and this post-agency judicial review *cannot* prevent or remedy

that constitutional violation, period. Returning to the question that should frame the analysis: how could the Congress that enacted the FSLMRS have intended for these statutory procedures to be used to require the FLRA to resolve *frivolous* statutory claims as a trojan horse for a collateral challenge to agency action that violates the First Amendment, when that delayed review can only happen *after* the constitutional violation has taken effect by silencing employee speech? Congress provided no route for meaningful review, and that is conclusive.

2. The First Amendment claims and remedies are wholly collateral to the statutory procedures

The First Amendment issues described in the Appellants' opening brief are also "wholly collateral" to the types of statutory rights Congress created the administrative mechanisms to address and protect. *Bennett v. SEC*, 844 F.3d 174, 186–87 (4th Cir. 2016).

The claims at issue here not an alternative "vehicle" for challenging an agency enforcement action against a union, or an FLRA order protecting employee rights that would result from any of the three types of adjudication discussed above. *Id.*; *see also Free Enterprise*, 561 U.S. at 492; *Elgin*, 567 U.S. at 22; *Tilton v. S.E.C.*, 824 F.3d 276, 287–88 (2d Cir. 2016). In *Elgin*, the individual employee sought to overturn the same type of adverse employment action that the Merit Systems Protection Board ("MSPB") (created by a different Title of the CSRA) was designed to review and address, including by resolving individual

constitutional challenges to the discipline at issue. 567 U.S. at 7-8. In contrast, here, Congress provided the FLRA with no authority to address, let alone provide, the same remedy at any stage of the administrative proceedings, that the courts have pursuant to their equitable and legal authority to enjoin facially unconstitutional government policies that operate as a prior restraint on speech. The courts' long-standing First Amendment doctrine recognizes that no person should suffer the harm imposed by such a policy in violation of the Constitution, and that chilling of protected speech should be prevented. The FLRA has no such authority, and the very different types of claims are simply not vehicles for the same relief simply because the case involves federal employees, and claims brought on their behalf by their labor organization.

Nor does this constitutional challenge to the substance of the agency's speech and publication policy overlap with the legal or factual issues that the FLRA would resolve to decide an unfair labor practice complaint, review an arbitrator's decision on an unfair labor practice violation, or resolve a negotiability appeal. *Bennett*, 844 F.3d at 186 (recognizing that courts other than this Circuit have asked whether the issues are intertwined). Each of those asks statutory questions regarding the bargaining or representational duties imposed by the FSLMRS, not the speech rights protected by the First Amendment.

3. The FLRA possesses no specialized First Amendment expertise

The FLRA was created to resolve disputes regarding the very specialized federal labor relations rights and duties created by the FSLMRS. §7105. The fact that the unconstitutional speech and publication policy impacts federal employees, or a condition of employment in the broadest sense, does not transform the First Amendment challenge into a labor dispute involving rights protected by the FSLMRS. Nor does the fact that this union previously bargained over the implementation of a prior pre-publication policy transform First Amendment claims challenging the substance of the policy into a labor dispute over which the FLRA has some specialized expertise. Under our constitutional system, the *federal courts* are First Amendment specialists, not the FLRA.

III. Federal Court Jurisdiction in this Case is Consistent with Supreme Court Precedent, Not Foreclosed by It

Just one year after *Thunder Basin* in 1994, the Supreme Court decided in *United States v. NTEU*, 513 U.S. 454 (1995), that an agency unconstitutionally restricted federal employees' speech without any indication that federal courts lacked jurisdiction to hear such a challenge. To affirm the District Court's jurisdictional channeling decision, this Court would need to conclude that the Supreme Court in *NTEU* ignored a glaring and dispositive jurisdictional defect (arising from its case decided the prior term) in reaching the First Amendment

challenge to restrictions on federal employee speech. The Supreme Court made no such oversight.

No Supreme Court case has concluded that by creating the mechanisms for adjudicating specific statutory claims cognizable under the FSLMRS, Congress silently intended to remove federal court jurisdiction to hear First Amendment challenges to government action that infringes employee speech—and for good reason, as explained above. The Congress that enacted the FSLMRS did so against the backdrop of protections against unconstitutional government action and, in particular, federal jurisdiction to hear those claims. *E.g.*, 28 U.S.C. §1331; *Bell v. Hood*, 327 U.S. 678 (1946); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *see also* Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969). Far more than what this statute provides is needed to conclude that Congress *intended* to remove jurisdiction from the courts over these important claims.

Elgin, which was not a First Amendment case, resolved a different question in favor of channeling: whether Congress intended an individual employee's constitutional challenge to disciplinary action be channeled through the MSPB. 567 U.S. at 7–8. This holding does not control the outcome here, nor does it implicitly override *NTEU*. There can be no real dispute that facial challenges to government policies present viable First Amendment claims over which the federal courts normally have jurisdiction under 28 U.S.C. §1331. That claim—that the

policy violates the First Amendment on its face—is a different claim that requires different analysis and different remedies than the *Elgin* plaintiff's challenge to disciplinary action taken against him as the result of the application of an allegedly unconstitutional policy. The *Thunder Basin* factors require a claim-specific analysis to determine whether Congress intended to channel the claims at issue—that is the entire thrust of the second step of the *Thunder Basin* analysis and the question those analytical tools must be used to address. *Bennett*, 844 F.3d at 181 (the court asks "whether [the plaintiff's] 'claims are of the type Congress intended to be reviewed within [the scheme].'") (quoting *Thunder Basin*, 510 U.S. at 212). It cannot be that channeling of any type of claim under this statute necessarily results in the channeling of all claims related to the statute; that would halt the analysis at step one and ignore step two, at the expense of any rigorous analysis of actual congressional intent.

Where Congress wanted to remove federal jurisdiction, it knew in 1978 how to do it expressly. The District Court's decision to read into statutory procedures an intent to remove federal court jurisdiction constitutional claims, erred on both sides of the equation: it ignored the force of *NTEU*, 513 U.S. 454, and ignored the need to be faithful to actual congressional intent. This Court should disapprove the removal, based solely on statutory procedures intended to resolve statutory, not

constitutional claims, of jurisdiction over claims as important as First Amendment challenges to government action that restricts and chills speech.

CONCLUSION

The District Court committed a significant error of law in concluding that it lacked jurisdiction to hear Appellant's claims, and the *amici* respectfully request this Court reverse that decision.

Date: October 5, 2020

Respectfully submitted,

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APPENDIX A

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Joseph Swerdzewski, former General Counsel of the Federal Labor Relations Authority, 1993-2001

Ruben Garcia, Professor of Law and Co-Director Workplace Law Program, University of Nevada, Las Vegas, William S. Boyd School of Law

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Martin H. Malin, Professor of Law and Co-Director Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology, and former member of the Federal Service Impasses Panel, 2009-2017

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APPENDIX B

Selections from the FSLMRS, 5 U.S.C. §7101 et seq.

5 U.S.C. §§7101, 7106, 7116, 7117, 7118, 7122, and 7123

5 U.S.C. §7101. Findings and purpose

(a) The Congress finds that--

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. 7106. Management Rights

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

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

(2) in accordance with applicable laws--

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

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

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

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

(ii) any other appropriate source; and

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

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

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

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

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

5 U.S.C. §7116. Unfair Labor Practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which--

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

5 U.S.C. §7117. Duty to bargain in good faith; compelling need; duty to consult

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

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

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

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

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

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

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

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

(A) filing a petition with the Authority; and

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

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

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

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

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

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

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

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

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall--

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization--

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

5 U.S.C. §7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice--

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of--

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order--

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

5 U.S.C. §7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C. §7123. Judicial review; enforcement

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

> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or
>
> (2) section 7112 of this title (involving an appropriate unit determination),
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

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

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under

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

(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.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the typeface requirements and type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5), (6) and 32(a)(5),(7)(B). According to the word count provided in Microsoft Office Word 2010, which was the word processing system used to prepare the brief, the foregoing brief contains 6,491 words, excluding those words exempted by Rule 32(f). The text of the brief is composed in 14-point Times New Roman typeface.

Dated: October 5, 2020

/s/ *Danielle Leonard*

Danielle Leonard

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed a true and correct copy of the foregoing using the CM/ECF system, thereby sending notification of such filing to all counsel of record.

/s/ *Danielle Leonard*

Danielle Leonard

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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