No. 21-___

In the Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEP'T, ET AL.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Civil Service Reform Act of 1978, which empowers the Federal Labor Relations Authority to regulate the labor practices of federal agencies only, *see* 5 U.S.C. §7105(g), empower it to regulate the labor practices of state militias?

2. The second Militia Clause empowers Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. Const. art. I, §8, cl. 16. Assuming the Civil Service Reform Act of 1978 permits the Federal Labor Relations Authority to regulate the labor practices of state militias, is the Act unconstitutional in its application to labor practices pertaining to militia members who are not employed in the service of the United States?

LIST OF PARTIES

The petitioners are the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department.

The respondents are the Federal Labor Relations Authority, which was the respondent below, and The American Federation of Government Employees, Local 3970, AFL-CIO, which was the intervenor below.

LIST OF DIRECTLY RELATED PROCEEDINGS

Ohio Adjutant Gen.'s Dep't v. Fed. Labor Relations Auth., No. 20-3908, 21 F.4th 401 (6th Cir. Dec. 21, 2021).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

Federal agencies "possess only the authority that Congress has provided" them. *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (*per curiam*). So an "agency literally has no power to act, let alone" to regulate the conduct "of a sovereign State, unless and until Congress confers power upon it." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) (citation omitted). Here, the Federal Labor Relations Authority claims that Congress empowered it to regulate the labor practices of a state entity: the Ohio National Guard. But Congress did no such thing. It empowered the agency to regulate the labor practices of *federal* "agenc[ies]" only—"Establishments within the executive branch." 5 U.S.C. §§7103(a)(3), 7105(g); 5 U.S.C. §§104, 105.

At least two of the Authority's three members suspected that regulating a state agency would exceed the Authority's statutory authorization. *See* Pet.App. 26a–27a. (Abbott, M., concurring); *id.* at 28a–33a (Kiko, Ch., dissenting). But the member who provided the decisive vote felt "bound" by circuit-court decisions to conclude otherwise. *Id.* at 27a (Abbott, M., concurring). So did the Sixth Circuit. Noting that "precedent dictate[d]" the outcome, *id.*, at 11a, it held that the Ohio National Guard qualifies as a "federal executive agency" subject to control by the Federal Labor Relations Authority, *id.*

The Court should grant certiorari to correct the Authority's interpretation of its power to regulate the labor practices of state militias. Admittedly, this case presents no circuit split. Nearly every circuit has already uncritically held that federal law empowers the Authority to issue orders to state militias, and to do so

even with respect to the parts of those militias that are not "employed in the Service of the United States." U.S. Const. art. I, §8, cl. 16; *see, e.g.*, Pet.App.11a–12a, 14a–15a; *Lipscomb v. Fed. Labor Relations Auth.*, 333 F.3d 611, 616–18 (5th Cir. 2003); *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 230 F.3d 377, 378 (D.C. Cir. 2000).

The uniformity of the lower-court decisions is all the more reason to hear this case. "Learned Hand once remarked that agencies tend to 'fall into grooves, … and when they get into grooves, then God save you to get them out.'" *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1122 (D.C. Cir. 2003) (Roberts, J., writing for the court) (citation omitted). He added that courts "are … apt" to do the same. Hearings to Study Senate Concurrent Resolution 21 Before a Subcommittee of the Senate Committee on Labor and Public Welfare, 82nd Cong., 1st Sess. 224 (1951). That is unfortunate. An "unwillingness to examine the root of a precedent has led to the sprouting of many noxious weeds that distort the meaning of the Constitution and statutes alike." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1515 (2020) (Thomas, J., dissenting). With respect to the question presented, the courts of appeals have persistently deferred with little analysis to wrongly decided, out-of-circuit precedents. Absent this Court's intervention, the law will have ossified. To prevent that from happening—to make sure this Court has the final word on this important matter of federal law—the Court should grant the petition and hear this case.

OPINIONS BELOW

The Sixth Circuit's opinion is published at 21 F.4th 401 and is reproduced at Pet.App.1a. The decision of the Federal Labor Relations Authority is available at 71 F.L.R.A. 829, 2020 WL 3631361, and is reproduced at Pet.App.17a. The decision of the administrative law judge is available at 2018 WL 3344946, and is reproduced at Pet.App.34a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered judgment on December 21, 2021, and denied *en banc* review on February 14, 2022. This Court has jurisdiction over the Sixth Circuit's judgment under 28 U.S.C. §1254(1). The Sixth Circuit had jurisdiction to review the Federal Labor Relations Authority's order under 5 U.S.C. §7123(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are listed in the petition appendix at Pet.App.170a.

STATEMENT

This case involves certain members of the Ohio National Guard. The precise question asks whether these members have federal labor rights that a federal agency can enforce against the Guard, the Ohio Adjutant General's Department, and the Ohio Adjutant General—the highest uniformed military official in Ohio.

1. First, some background. The Ohio National Guard, like the national guard in every other State, is the descendant of the militias that the Constitution repeatedly mentions. *See* art. I, §8, cls. 15, 16; *see also Maryland v. United States*, 381 U.S. 41, 46 (1965)

reh'g granted, judgment vacated on other grounds, 382 U.S. 159. The Constitution's references to the militia "contemplate" that the States and the federal government will "share[] responsibility for the National Guard." *Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 992 (D.C. Cir. 2010). The "precise nature of" the state-federal "relationship is not always obvious." *Id.* But at least this much is clear: the second Militia Clause "reserv[es]" to the States the responsibility for appointing the Militia's officers and for training its members. U.S. Const. art. I, §8, cl. 16. That clause provides:

> The Congress shall have Power … To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States* respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Id. (emphasis added).

Because the Constitution divides authority over the National Guard between the federal and state governments, the National Guard "has been, and today remains, something of a hybrid." *N.J. Air Nat'l Guard v. Fed. Labor Relations Auth.*, 677 F.2d 276, 279 (3d Cir. 1982). "Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law." *Id.* at 279; *accord Tirado-Acosta v. P.R. Nat'l Guard*, 118 F.3d 852, 852–53 (1st Cir. 1997).

The hybrid status of the national guards translates to a hybrid status for the guards' individual members. Enlisting in a State's national guard means enlisting in two organizations at once. "Since 1933 all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States." *Perpich v. Dep't of Def.*, 496 U.S. 334, 345 (1990). Thus, the guardsmen who come most readily to mind—the men or women who devote a weekend a month and two weeks a year to military duties—have both a state status and a federal status.

The States' national guards are composed of both these guard members and a less-well-known group of members, whom this brief will refer to as "technicians." Technicians are the subject of this litigation. They are full-time employees who support each state national guard's mission in roles relating to equipment maintenance, human resources, information technology, and more. These employees "perform a wide range of administrative, clerical, and technical tasks" that "correspond directly to those of other civilian employees," but "arise in a distinctly military context, implicating significant military concerns." *N.J. Air Nat'l Guard*, 677 F.2d at 279. Indeed, if no technician can fill a role, a non-hybrid military member will.

Until 1968, these technicians "were state employees paid with federal funds." *Dyer v. Dep't of the Air Force*, 971 F.3d 1377, 1380 (Fed. Cir. 2020). But in 1968 Congress passed a law—the National Guard Technicians Act—"converting technicians to federal employees in order to provide them with a uniform system of federal salaries and benefits, and to clarify their status as covered by the Federal Tort

Claims Act." *Id.*; *see* National Guard Technicians Act, Pub. L. No. 90-486, 82 Stat. 755, 32 U.S.C. §709.

Although the Technicians Act made the technicians federal employees, technician employment "has characteristics of two different statuses." *Babcock v. Kijakazi*, 142 S. Ct. 641, 644 (2022). In the Act, Congress recognized "the military requirements and the State characteristics of the National Guard by providing for certain statutory administrative authority at the State level with respect to the technician program." *Dyer*, 971 F.3d at 1380 (quoting H.R. Rep. No. 90-1823, at 1 (1968)). The statute gave adjutants general, "who are State officers," "the statutory function of employing Federal employees." S. Rep. No. 90-1446, at 15 (1968). One Senator described the law's "basic purpose" as establishing for technicians "a uniform and adequate retirement and fringe benefit program" while also "provid[ing] for statutory administrative authority at the State level … in recognition of the military requirements and State characteristics of the National Guard." 114 Cong. Rec. 23,251 (July 25, 1968) (remarks of Sen. Stennis).

Over the decades, the circuits have consistently described the Technicians Act as creating a unique employment status for technicians. An early decision described the Act's "principal purpose" as creating "a bifurcated nature of technician employment," conferring "*federal* status on civilian technicians while granting administrative authority to *State* officials, headed in each State by the Adjutant General." *Davis v. Vandiver*, 494 F.2d 830, 832 (5th Cir. 1974) (emphases added). The D.C. Circuit later called the law "a special act of Congress enacted for the limited purpose of making fringe and retirement benefits of federal

employees and coverage under the Federal Tort Claims Act … available to National Guard technician employees of the various states." *Am. Fed'n of Gov't Emps., Local 2953 v. Fed. Labor Relations Auth.*, 730 F.2d 1534, 1536–37 (D.C. Cir. 1984). That is, the Act makes technicians "nominal federal employees for a very limited purpose," while still recognizing "the military authority of the states through their Governors and Adjutants General to employ, command and discharge them." *Id.* at 1537–38. For example, technicians are exempted from personnel actions such as "reductions" in force that govern "Department of Defense civilian personnel" and "shall only be reduced as part of military force structure reductions." 10 U.S.C. §10216(b)(3). More recently, the D.C. Circuit described technicians as "part civilian," in that they serve "as a federal employee" of the Army or Air Force, and "part military," in that they serve "as a member of the state National Guard." *Dyer*, 971 F.3d at 1378.

In light of all this, "the employment status of National Guard technicians is a hybrid, both of federal and state, and of civilian and military strains." *Ill. Nat'l Guard v. Fed. Labor Relations Auth.*, 854 F.2d 1396, 1398 (D.C. Cir. 1988). The Technicians Act "divides authority in a manner compatible with the National Guard's dual role, whereby the United States has chosen to defer to the state authorities on matters of daily operations, including individual membership." *Ass'n of Civilian Technicians*, 603 F.3d at 992 (internal quotation marks and citation omitted). Put more succinctly, technicians' employment status is "sui generis." *N.J. Air Nat'l Guard*, 677 F.2d at 279.

Technicians' unique status plays out in the various ways their day-to-day tasks are managed. On one hand, each State's adjutant general is charged with supervising the technicians on a day-to-day basis. *See* 32 U.S.C. §709(f)(2), (3). The adjutants general retain the power to remove technicians from their jobs "for cause." *Id.* at (f)(2). And a technician who wants to challenge his or her removal has no right of appeal beyond the supervising adjutant general if the removal related to the technicians' "fitness for duty." *Id.* at (f)(4).

On the other hand, technicians' perform their day-to-day work under regulations handed down by the National Guard Bureau. The Bureau is the federal government's "channel of communications on all matters pertaining to the National Guard." 10 U.S.C. §10501(b). It is tasked with assuring that state national guard units are "capable of augmenting the active forces in time of war or national emergency." 10 U.S.C. §10503(5). The Bureau supervises state guards in their use of federal property and funds. *See id.* §10503(7). And it has the power to withdraw federal recognition of state guard units, and to set in motion a process to withhold federal funds. *See id.* §10503(8); 32 U.S.C. §108.

But there is one thing the National Guard Bureau does not do: it does not issue direct orders to state national guards. Rather, the guards are to be "administered" and "trained" by their respective adjutants general. *See* 10 U.S.C. §10107. Nothing authorizes the Bureau "to take over a state National Guard's daily administrative duties," even if the state guard "has failed to comply with" Bureau regulations. *Ass'n of Civilian Technicians*, 603 F.3d at 993. The National Guard Bureau's control is exercised through

funding and recognition, not through direct commands.

Technicians' dual status also plays out in their compensation, a topic this Court recently confronted in the context of retirement benefits. Ultimately, the Court held that technicians' roles can be compartmentalized for purposes of calculating social security payments. *Babcock*, 142 S. Ct. at 647. But while it may be possible from an "administrative bookkeeping" standpoint to separate the time spent earning money as a civilian versus time spent earning money for other guard activities, *id.*, it is not possible to separate those roles with respect to the control exerted over technicians by the Adjutant. The Adjutant General—a state official—is the supervisor for both. And the Adjutant General retains the power to dismiss technicians from either role.

2. All of this detail about technicians and their dual status matters because a different federal law—the "Reform Act"—confers labor relations rights on many federal employees. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. §§7101–7135. The Reform Act gives federal employees "the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal," including the right "to engage in collective bargaining." 5 U.S.C. §7102 & §7102(2). The Federal Labor Relations Authority enforces these rights. It has the power to "require an agency or a labor organization to cease and desist from violations of" the Reform Act "and require it to take any remedial action it considers appropriate." 5 U.S.C. §7105(g)(3).

The Reform Act covers federal agencies, and the employees of those agencies. 5 U.S.C. §7103(a)(2)(A), (a)(3). It does not apply to employees of non-agencies; the Federal Labor Relations Authority has no power, under the Reform Act, to issue any orders to any employer that is not a federal agency.

3. These principles give rise to this question: Are the Ohio National Guard or the Ohio Adjutant General federal agencies that are, under the Reform Act, subject to the Federal Labor Relations Authority's oversight?

The question reaches this Court because a union representing dual-status technicians in Ohio's Army and Air National Guards filed unfair-labor-practice complaints with the Federal Labor Relations Authority. The union alleged that the Ohio National Guard committed unfair labor practices by: (1) not deducting union dues from paychecks; (2) not bargaining in good faith; (3) failing to recognize the union as the exclusive bargaining representative; (4) violating a collective-bargaining agreement by reassigning some technicians without consulting the union; and (5) recommending that union-dues deductions stop. *See* Charges, C.A.6 App'x, pp. 89a–93a; *see also* Pet.App.38a–39a. Underlying all of these allegations is a disagreement between the union and the Ohio Adjutant General about whether the Reform Act gives technicians collective-bargaining rights. *See* Charges, C.A.6 App'x, p. 91a.

After an investigation, the Authority's general counsel filed a complaint against the Ohio National Guard. An administrative law judge held a hearing, and made two relevant rulings. First, he determined that the Ohio Adjutant General and his department

are federal "agencies" covered by the Reform Act. Pet. App.117a–118a. Second, with one exception, the administrative judge ruled that the Ohio Adjutant General violated the substantive aspects of the Reform Act in dealings with union officials and union members. *See id.* at 118a–162a. The administrative judge ordered the Adjutant General to, among other things: follow the mandatory terms of the expired collective-bargaining agreement; reinstate union-dues withholding; reimburse the union for dues not collected; bargain with the union (if requested); and email a notice to all union members and managers about these actions. *Id.* at 162a–164a.

The Authority's adjudicatory wing affirmed in a few short paragraphs. But two of its three members expressed serious reservations about ordering the Ohio Adjutant General to comply with the Reform Act. Pet.App.18a–19a. The Authority's Chair argued that it was "wrong" to treat state adjutants general as federal executive agencies subject to the Reform Act. *Id.* at 28a (Kiko, Ch., dissenting). A second member agreed with the Chair, but concurred in the judgment on the ground that "current judicial precedent" foreclosed the result for which the Chair advocated. *Id.* at 27a (Abbott, M., concurring).

The members' concerns were legal in nature, but they tracked a practical problem. The administrative orders commanded actions that the Adjutant General cannot take. The orders directed the Adjutant to "[r]einstate to dues withholding status all" technicians "who did not fill out dues revocation forms in the anniversary month of their allotment." Pet. App.21a. And the Authority further ordered the Adjutant General to "[r]eimburse the Union for the dues it would have received had the [Adjutant] not

removed employees unlawfully from dues withholding." *Id.*; *see also id.* at 163a, 166a. But the Adjutant General does not control the payroll process for technicians—the federal government does. A federal officer who monitors the Ohio Adjutant General's use of federal resources testified that Department of Defense regulations would not allow union payroll deductions without a form on file for each employee. Hearing Tr., C.A.6 App'x, pp. 260a–261a, 273a; *see also* Dep't of Defense Reg. 7000.14-R, V. 8, Chap. 11, ¶110202(A). When that Defense employee audited personnel records, he found that the required forms were missing for several union members from whose pay union dues were being deducted. Hearing Tr., C.A.6 App'x, p. 268a. That audit led to a halt of dues deductions that were not authorized by a verifiable form completed by the technician. *Id.* at p. 467a–468a; *see also Janus v. Amer. Fed. of State, County, and Municipal Emps.*, 138 S. Ct. 2448, 2486 (2018) (explaining that union dues may not be withdrawn without an employee's consent). In short, federal regulations required a federal officer to stop deducting union dues. The Ohio Adjutant General cannot command that dues again be deducted in violation of federal law.

4. Facing these conflicting commands, the Ohio Adjutant General petitioned for review in the Sixth Circuit. The circuit court upheld the orders. It concluded that the Ohio Guard "is a federal executive agency." Pet.App.12a. It believed this answer was "dictate[d]" by circuit precedent and consistent with out-of-circuit authority. *Id.* at 11a. As to the question whether the Reform Act is unconstitutional under the Second Militia Clause in its application to state militia members not presently called into service of the

United States, the court adopted the reasoning of a Fifth Circuit opinion that had rejected a similar argument. *Id.* at 15a (citing *Lipscomb v. Fed. Labor Relations Auth.*, 333 F.3d 611, 618–19 (5th Cir. 2003)). The Sixth Circuit did not independently parse the Militia Clause's text.

5. The Ohio Adjutant General, his department, and the Ohio National Guard sought rehearing *en banc*, but the Sixth Circuit denied the petition. They timely filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This is the rare case in which the Court should grant certiorari to decide an important issue notwithstanding the lack of any circuit split. It is easiest to see why by first explaining where the Sixth Circuit went wrong. This petition begins there, before turning to the reasons that justify taking the case to correct the Circuit's error.

I. The Sixth Circuit incorrectly held that the Ohio Adjutant General, his department, and the Ohio National Guard are federal agencies subject to the Reform Act.

This case presents the following question: Does the Reform Act empower the Federal Labor Relations Authority to issue orders to the Ohio Adjutant General regulating the Ohio National Guard's labor practices? The answer is "no." And to the extent the answer is "yes," then the Reform Act is unconstitutional in its application to the labor practices of guardsmen who are not "employed in the Service of the United States."

A. The Reform Act, by its terms, does not regulate the labor practices of state national guards.

1. The Reform Act gives the Authority jurisdiction over federal "agenc[ies]" only. 5 U.S.C. §7105(g). The Act defines "agenc[ies]" to mean "Executive agenc[ies]." 5 U.S.C. §7103(a)(3). And it says that "'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. §105. The meanings of "Executive department" and "Government corporation" are plain and irrelevant to this case. The meaning of "independent establishment" is perhaps less clear. So the Act defines it to mean:

> (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment;
>
> and
>
> (2) the Government Accountability Office.

5 U.S.C. §104.

Applied here, these definitions compel the conclusion that neither the Ohio Adjutant General, his department, nor the Ohio National Guard is subject to the Reform Act. Again, the Act applies only to Executive departments, government corporations, and independent establishments. *Id.* §105. Because neither the Adjutant General, his department, nor the Ohio Guard is a corporation, none is a "Government corporation." *Id.* Further, none of these individuals

or entities is an "Executive department" or an "independent establishment." *Id.* By definition, executive departments and independent establishments are entities within the executive branch of the federal government. *Id.* §§104, 105. Rather than organs of federal government, the Adjutant General, his department, and the Guard are components of Ohio's government. The Ohio Adjutant General is appointed by Ohio's Governor, not the President. Ohio Const. art. IX, §3. What is more, the Adjutant General's role, qualification requirements, and pay are set by Ohio statute. Ohio Rev. Code §§5913.01, 5913.021(A), 141.02(A), 124.15(B), (H). Major General Harris works for the State. And the department he heads—the Ohio Adjutant General's Department—is part of the State. *See* Ohio Rev. Code §5913.01. Likewise, the Ohio National Guard is part of Ohio government, not the federal government. The Ohio National Guard is a "distinct organization" from the National Guard of the United States. *Perpich v. Dep't of Def.*, 496 U.S. 334, 345 (1990). The Ohio National Guard and the National Guard of the United States may "share members," but they are separate entities, "the one commanded by the state's Governor, the other commanded by the President of the United States." *In re Sealed Case*, 551 F.3d 1047, 1054–55 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

Federal law, it is true, requires each State to have an adjutant general. 32 U.S.C. §314. And federal law directs adjutants general to report to the Secretary of the Army or the Secretary of the Air Force. *Id.* §314(d). But that same law recognizes that adjutants general "perform the duties prescribed by the laws" of the appointing State. *Id.* §314(a). This reporting requirement in federal law hardly turns state officers

into federal officers. Many federal laws require a state officer to take some federal-law action without converting the officer into a member of the federal executive branch. The National Voter Registration Act, for example, tells each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under this" Act. 52 U.S.C. §20509. But no one thinks that the secretaries of state in each State are federal officers. Part of the Medicaid program directs States to "provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan." 42 U.S.C. §1396a(a)(5). Those agencies do not thereby become federal agencies. In much the same way, the federal laws requiring the Ohio Adjutant General to work with or report to federal actors do not transform him into a member of the federal government.

Because the Adjutant General and the departments he oversees are not executive departments, government corporations, or "independent establishment[s]," 5 U.S.C. §105, they are not subject to the Reform Act. The Federal Labor Relations Authority thus had no power to order the Ohio Adjutant General to comply with its labor-relations orders.

2. The exclusion of the state national guards from the meaning of "[e]xecutive agency" accords with the statutorily defined relationship between the federal military and the state national guards. Many statutes recognize that the federal government enjoys direct control over the state guards only when they are called into active duty, and often only with consent of the governor. *See, e.g.*, 10 U.S.C. §§252, 12301(b), (d); 32 U.S.C. §325(b). But the federal government's power

to directly control state national guards ends there. At all other times, the federal government is limited to influencing state national guards by requiring compliance with policies as a condition of continued federal funding and recognition. If a state national guard falls out of step with federal policy, the remedy is a withholding of federal funds or privileges. 32 U.S.C. §108; *Knutson v. Wis. Air Nat'l Guard*, 995 F.2d 765, 767 (7th Cir. 1993). And that is because the federal military, except when the state guards are called into active federal duty, does not issue orders to the state national guards. In the same vein, no other federal agency may issue orders to the state national guards or their adjutants general. This system of cabined direct control, coupled with broader purse-string control, is "consistent with the Militia Clause," a topic addressed in greater detail below. *Ass'n of Civilian Technicians, Inc. v. United States*, 603 F.3d 989, 995 (D.C. Cir. 2010).

As all this suggests, exempting state national guards and their adjutants general from the dictates of the Reform Act *does not* leave technicians without recourse for wrongdoing. Technicians are free to lodge grievances with the National Guard Bureau. The Bureau "is an agency of the United States that is responsible for administering approved policies and programs of the Departments of the Army and the Air Force, publishing Army and Air National Guard Regulations, implementing such programs, and granting and withdrawing federal recognition of officers in each state." *Bollen v. Nat'l Guard Bureau*, 449 F. Supp. 343, 345 (W.D. Pa. 1978). The Bureau's mandate specifically includes an obligation to set "policies and programs for the employment and use of National Guard technicians." 10 U.S.C. §10503(9).

Exercising that power, the Bureau reviews and approves union contracts for technicians. *See, e.g.*, *Mont. Air Nat'l Guard v. Fed. Labor Relations Auth.*, 730 F.2d 577, 577–78 (9th Cir. 1984). So the Bureau could impose its view (or the Federal Labor Relations Authority's view) of union-management relations on the Ohio National Guard by issuing directives imposing the technicians' sought-after requirements. And it may pressure the Ohio National Guard to follow those directives by threatening to pull its funding if the Guard refuses to comply. But the Bureau's power to indirectly regulate labor relations—backed by plain congressional authorization—does not justify the Federal Labor Relations Authority's attempt to do the same directly.

One other body of law bolsters the conclusion that state adjutants general are state, not federal, officers: they can be held liable under 42 U.S.C. §1983, which applies only to individuals acting under color of *state* law. Several courts have treated state adjutants general as state officers under §1983. *See, e.g.*, *Johnson v. Orr*, 780 F.2d 386, 390–91 (3d Cir. 1986) (cataloging cases). If adjutants general are state officers under that statute, they are not federal agencies subject to the Reform Act.

3. Two interpretive principles bolster the conclusion that the Reform Act gives the Authority no power to regulate the labor practices of state militias.

First, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," courts must "adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). As explained

in greater depth below, any interpretation of the Reform Act that empowers the Authority to regulate state militias' labor practices raises very grave constitutional problems. *See below* 20–24

Second, Congress must speak clearly if it wants to regulate matters traditionally left to the States or to upset "the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (citation omitted). A law empowering a federal agency to regulate a state militia unquestionably authorizes an intrusion on state sovereignty and greatly alters the usual balance of state and federal power. The Constitution specifically "reserves" to the States certain powers over their militias. Art. I, §8, cl. 16. And federal interference with such matters constitutes a noteworthy intrusion. To see why, recall that, when interpreting laws that govern the *federal* military, "courts must be careful not to circumscribe the authority of military commanders to an extent never intended by Congress." *Brown v. Glines*, 444 U.S. 348, 360 (1980) (citation and internal quotation marks omitted). This reflects the fact that military "matters [are] textually and prudentially committed to the political branches." *Hanson v. Wyatt*, 552 F.3d 1148, 1168 (10th Cir. 2008) (Gorsuch, J., concurring in the judgment). As a result, judicial meddling with such matters, if "not congressionally authorized," "represent[s] an inappropriate intrusion" into those branches' authority. *Id.* (Gorsuch, J., concurring in the judgment). Further, it is "difficult to conceive of an area of governmental activity in which the courts have less competence." *Austin v. U. S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring), (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). The same logic applies to the States' militias.

Interference by *any* branch of the federal government with militia-related matters properly left to the States constitutes "an inappropriate intrusion," *Hanson*, 552 F.3d at 1168 (Gorsuch, J., concurring), on the States' sovereign authority. And courts have no greater competence to second-guess the management of state militias than they do the operation of the United States military. So courts should not lightly read a federal law in a manner that would permit the judicial and executive branches of the federal government to intrude upon militia matters that our Constitution leaves to the States. And the Reform Act does not contain the sort of clear statement that would be needed to authorize such an intrusion.

4. The Sixth Circuit did not dispute any of this. Instead, it concluded that circuit precedent "dictate[d]" a contrary answer. Pet.App.11a. Indeed, circuit cases *can be* read as dictating the answer. But that is precisely why this Court should review this case. Unless it does so, the Federal Labor Relations Authority will continue illegally issuing direct commands to state executive actors.

B. If the statute authorizes the agency action here, it is unconstitutional.

Insofar as the Reform Act empowers the Authority to direct state militias' labor practices, the Act is unconstitutional. (We use "militia" here because the Constitution does so. Its meaning here includes all of the Petitioners.) True, courts of appeals have uniformly held otherwise. But they are wrong, and this Court has never addressed the issue. Rather than letting this constitutional violation persist, the Court should grant review and correct course now.

1. Our founding charter empowers Congress to:

> provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

U.S. Const. art. I, §8, cl. 16.

This language, like so much other language in the Constitution, represents "an accommodation of federal and state government needs." John Kulewicz, *The Relationship Between Military and Civil Power in Ohio*, 28 Clev. St. L. Rev. 611, 614 n.24 (1979); *cf.* Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 Cardozo L. Rev. 1091, 1097 (2008). Many "of the delegates" at the Constitutional Convention shared "a strong sentiment … against placing too great control of the militia in the Federal Government." Francis X. Conway, *A State's Power of Defense Under the Constitution*, 11 Fordham L. Rev. 169, 173 (1942); *see also* Patrick Todd Mullins, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 Geo. Wash. L. Rev. 328, 331 (1988). To prevent too much power from accumulating in the hands of the federal government, the People ratified a constitution that, with respect to militias, makes two explicit "reservations in favour of the States": the States retain "the right of officering" and the right "of training" militia members. *Houston v. Moore*, 5 Wheat. 1, 36 (1820) (op. of Johnson, J.). The end result is a "compromise": Congress got the power to "prescribe methods of disciplining, arming, and organizing the militia"; the States retained the power to conduct the

"actual training (except when the militia was called into federal service)." Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919, 925 (1988); *see also* Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 185 (1940).

The explicit reservations are not the end of what the Constitution tells us about the relative roles of Congress and the States. "The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). As a result, all "powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2329 (2020) (Thomas, J., concurring in the judgment) (citation omitted); *see also* The Federalist No. 39, at 256–57 (Madison, J.) (Cooke ed., 1961). Where neither the Constitution nor a validly enacted federal law limits state authority, the States are "free to engage in any activity that their citizens choose for the common weal." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). And so it is with the Militia Clauses: "what is not taken away by the Constitution" regarding the militias "must be considered as retained by the States or the people." *Houston*, 5 Wheat. at 51 (op. of Story, J.).

In light of these principles, Congress lacks the power to subject the Ohio militia to federal control under the Reform Act. Congress's power to "govern[]" militias extends only to that "Part of" the militia "as may be employed in the Service of the United States." U.S. Const. art. I, §8, cl.16. In other words, Congress's

power to govern the militias applies only to that portion of the militias called up into active duty at any one time. *See, e.g.*, *Perpich*, 496 U.S. at 347–48; 32 U.S.C. §325(a); 10 U.S.C. §12301(b). And its power to "provide for … disciplining" the militias, U.S. Const. art. I, §8, cl.16, consists of only the power to set the rules according to which militia members must be trained. After all, in the military context, "discipline" means "the habit of immediate compliance with military procedures and orders." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). A founding-era source similarly defines discipline in this context as "to train as a soldier; *esp.* to teach to respond promptly and efficiently in obedience to command." *Oxford English Dictionary Online* (3d ed. 2013) (citing a 1792 example). Further, while Congress may "provide for" the disciplining of the militias, the States expressly retain the power to implement that discipline. That follows from the express language of the Militia Clause, which says the States retain "the Authority of training the Militia." Art. I., §8, cl.16; *accord Houston*, 5 Wheat. at 36 (op. of Johnson, J.).

Putting those insights together, the limited power to "provide for" the disciplining of militias and the even-more-limited power to "govern" those troops called into active duty cannot be stretched to justify congressional regulation of state militias' day-to-day labor practices. Thus, the Tenth Amendment reserves to the States the power to regulate those practices. Any federal statute that tries to do so exceeds Congress's authority.

2. The Sixth Circuit rejected these arguments without seriously engaging them. It relied heavily upon the Fifth Circuit's decision in *Lipscomb v. Federal Labor Relations Authority*, 333 F.3d 611 (5th Cir.

2003). Citing that decision, the Sixth Circuit reasoned that, because the Ohio National Guard is a federal executive agency, there are "no constitutional problems with Congress giving the [Federal Labor Relations Authority] jurisdiction over the state guard." Pet.App. 15a. That avoids the question whether Congress has the *power* to define a state national guard as a federal actor. It does not, for all the foregoing reasons. And neither the Sixth Circuit in this case nor the Fifth Circuit in *Lipscomb* offered anything that might justify a contrary conclusion.

II. The question presented is worthy of this Court's review.

The foregoing shows that the Sixth Circuit erred. True, "error correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the grant of certiorari." *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting from the grant of stay) (quoting S. Shapiro, *et al.*, Supreme Court Practice §5.12(c)(3), p. 5–45 (11th ed. 2019)). For two reasons, however, this case presents an "important question of federal law that has not been, but should be, settled by this Court." Rule 10(c). *First*, because the circuits have uniformly held that the Federal Labor Relations Authority can regulate the labor practices of state militias, the question presented allows the Court to remediate a widespread, ongoing, and (at least likely) illegal intrusion into state affairs. *Second*, while the Sixth Circuit's decision creates no formal circuit split, it deepens the tension with a line of circuit cases refusing to let a different agency issue orders to state militias. This section addresses both issues in turn.

A. The circuits are uniformly overlooking a serious violation of our constitutional structure.

1. Justice Scalia was fond of noting that "[e]very tin horn dictator in the world today, every president for life, has a Bill of Rights." Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905, 920 n.30 (2016) (citation omitted). His point was that a "bill of rights has value only if the other part of the constitution—the part that really 'constitutes' the organs of government—establishes a structure that is likely to preserve, against the ineradicable human lust for power, the liberties that the bill of rights expresses." Antonin Scalia, *In Praise of the Humdrum*, in THE ESSENTIAL SCALIA at 35 (2020). "[W]here that structure does not exist, the mere recitation of the liberties will certainly not preserve them." *Id.* In this way, the "vertical and horizontal separation of powers" are "the true mettle of the U.S. Constitution," and thus the "true long-term guardian of liberty." *In re MCP No. 165, OSHA Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing *en banc*).

Questions relating to the Constitution's vertical and horizontal separation of powers thus present the most important constitutional questions of all. And the question in this case raises important issues pertaining to both the horizontal and vertical separation of powers.

The horizontal aspect of the problem concerns the question whether Congress can, and did, empower the Authority to regulate the labor practices of state

militias. "Congress ultimately controls administrative agencies in the legislation that creates them." *I.N.S. v. Chadha*, 462 U.S. 919, 955 n.19 (1983). Agencies' "power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly … what they do is ultra vires." *City of Arlington v. F.C.C.*, 569 U.S. 290, 297 (2013). Thus, when "a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018).

An agency that acts in ways Congress did not authorize invades Congress's domain. Such invasions present serious constitutional concerns. Perhaps for that reason, the Court routinely agrees to hear cases presenting the question whether a federal agency acted in excess of its statutory authority. *See, e.g.*, *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (*per curiam*); *Biden v. Missouri*, 142 S. Ct. 647 (2022) (*per curiam*); *West Virginia v. EPA*, 142 S. Ct. 420 (2021) (order granting certiorari); *Return Mail, Inc. v. United States Postal Serv.*, 139 S. Ct. 1853 (2019); *SAS Inst.*, 138 S. Ct. 1348; *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *City of Arlington*, 569 U.S. 290.

This case also presents questions concerning the vertical separation of powers—in other words, the division of power between the States and the federal government. In particular, the case allows the Court to address the scope of Congress's power to regulate state militias. It takes just one hand and a few fingers to count all the cases interpreting the second Militia Clause. The oldest dates to John Marshall's chiefship; the most recent was decided before any current Justice took the bench. *See, e.g.*, *Perpich*, 496 U.S. 334;

Gilligan, 413 U.S. 1; *Maryland v. United States*, 381 U.S. 41 (1965); *Selective Draft Law Cases,* 245 U.S. 366 (1918); *Houston*, 5 Wheat. 1. Perhaps because the Court has paid the clause so little attention, the circuit courts sometimes fail to "mention this very relevant provision of the Constitution" even when it directly relates to the cases pending before them. *Gilligan*, 413 U.S. at 6. This neglected clause, just like every other clause governing the division of state and federal power, is of "manifest importance." *Perpich*, 496 U.S. at 339. This case provides the Court with an opportunity to say something about its meaning.

The Reform Act also implicates vertical separation-of-powers questions because discerning its meaning requires application of the federalism canon. "[A] federal court must 'respect ... the place of the States in our federal system.'" *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1011 (2022) (citation omitted). And as noted above, one way that federal courts respect the States' role in the federal system is through application of the federalism canon: courts require that Congress use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)). Allowing the Federal Labor Relations Authority to regulate the labor practices of state militias under the Reform Act contravenes the principle that statutes must be interpreted, where possible, not to interfere with state sovereignty or to upset the balance of state and federal power.

Given all this, it is no surprise that the Federal Labor Relations Authority doubts its own power to do

what it did here. Recall that two of the Authority's three members had serious reservations regarding the conclusion that Congress empowered the agency to issue orders to a state militia. *See* Pet.App.26a–27a. (Abbott, M., concurring); *id.* at 28a–33a (Kiko, Ch., dissenting). Those reservations stand out, as "no government official is tempted to place restraints upon his own freedom of action." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) (internal quotation marks omitted). If courts are to respect an agency's views of its own power, *City of Arlington,* 569 U.S. at 301, they should be especially mindful when a majority of an agency's members believe the agency *exceeded* its lawful authority.

All told, the question whether Congress can and did authorize the Federal Labor Relations Authority to police state militias' labor practices raises important statutory and constitutional questions that this Court should resolve.

2. All this establishes that the question whether the Authority can regulate state militias' labor practices presents a question of immense importance. That question deserves this Court's review because the courts of appeals have uniformly resolved it incorrectly, often failing to even address it. *See, e.g.*, Pet. App.12a; *N.Y. Council v. Fed. Labor Relations Auth.*, 757 F.2d 502, 504–06 (2d Cir. 1985); *N.J. Air Nat'l Guard v. Fed. Labor Relations Auth.*, 677 F.2d 276, 286 (3d Cir. 1982); *Lipscomb*, 333 F.3d at 616–18; *Fed. Labor Relations Auth. v. Mich. Army Nat'l Guard*, 878 F.3d 171, 178 (6th Cir. 2017); *Ind. Air Nat'l Guard v. Fed. Labor Relations Auth.*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *Nebraska v. Fed. Labor Relations Auth.*, 705 F.2d 945, 947–48 (8th Cir. 1983); *Cal. Nat'l*

Guard v. Fed. Labor Relations Auth., 697 F.2d 874, 879 (9th Cir. 1983); *Ass'n of Civilian Technicians,* 230 F.3d at 378. In other words, the law is ossifying around a rule that degrades the Constitution's separation of powers. This Court should grant certiorari and review the matter before that happens.

The fact that courts of appeals have unanimously resolved a legal issue is no guarantee that they have resolved it correctly. That is why this Court sometimes adopts positions that "[n]o Court of Appeals has ever" embraced. *Alexander v. Sandoval*, 532 U.S. 275, 295 n.1 (2001) (Stevens, J., dissenting); *see also*, *e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) & *id.* at 2201 (Alito, J., dissenting); *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) & *id.* at 192 (Stevens, J., dissenting).

The Court's willingness to examine and reject positions universally held by the lower courts makes sense. As noted at the outset, the nature of the judicial task—and in particular, the emphasis our system places on precedent—sometimes causes courts to work themselves into "grooves" that they cannot get out of. *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1122 (D.C. Cir. 2003) (Roberts, J., writing for the court) (citation omitted). When that happens, this Court (and the circuits themselves) should "confirm that the current, nearly uniform standard … is the correct one." *United States v. Jeffries*, 692 F.3d 473, 486 (6th Cir. 2012) (Sutton, J., concurring *dubitante*), *abrogated by Elonis v. United States*, 575 U.S. 723 (2015). Even in the face of "consensus," this Court "should be certain that" the consensus position "is what the law demands" "before [it] close[s] the door" on the question. *Doe v. Facebook, Inc.*, 142 S. Ct. 1087, 1088 (2022) (Thomas, J.,

respecting the denial of certiorari) (citation omitted). It is especially important for this Court to intervene when an error is widespread and widely accepted. At that point, it is the only body with any realistic chance to correct course.

B. The circuits are divided over whether a federal executive agency can issue direct commands to state militias.

While the circuits agree that state national guards are federal agencies for purposes of the Reform Act, that interpretation conflicts with the Federal Circuit's interpretation of a related law.

The Merit System Protection Board is "an independent adjudicator of federal employment disputes." *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012). It has the power to "order any Federal agency or employee to comply with" its decisions. 5 U.S.C. §1204(a)(2). The Federal Circuit has interpreted that statutory grant of authority to mean that the Board lacks power to issue orders to either a state adjutant general, who is "not a federal employee," *Singleton v. Merit Sys. Prot. Bd.*, 244 F.3d 1331, 1336 (Fed. Cir. 2001), or a state national guard, which is "a state entity" rather than a federal agency, *DiManni v. R.I. Army Nat'l Guard*, 62 F. App'x 937, 942 (Fed. Cir. 2003); *see also Asatov v. Merit Sys. Prot. Bd.*, 595 F. App'x 979, 982 (Fed. Cir. 2014); *Asatov v. Merit Sys. Prot. Bd.*, 513 F. App'x 984, 986 (Fed. Cir. 2013).

The reasoning of these cases, if applied to the Reform Act, would require a result different from the one the Sixth Circuit reached below. Ohio's National Guard and Adjutant General are no more a federal agency under the Reform Act than they are under the

analogous provisions governing the Merit System Protection Board. *See* 5 U.S.C. §7103(a)(3). Just as the Merit System Protection Board's power over federal agencies does not entitle it to regulate Ohio's militia, the Federal Labor Relations Authority's power to regulate the labor practices of federal agencies does not extend to Ohio's militia.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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