No. 21-1454

**In the Supreme Court of the United States**

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

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
*Respondents.*

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

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# BRIEF OF PETITIONERS

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## QUESTION PRESENTED

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?

## 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.

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## INTRODUCTION

Federal agencies "possess only the authority that Congress has provided" them. *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (*per curiam*). Thus, 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).

Did Congress empower the Federal Labor Relations Authority to issue direct orders to state national guards and state adjutants general? The question arises because the Authority, in this case, issued an order to the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department. It had no right to do so. Congress empowered the Authority to regulate the labor practices of *federal* agencies—executive departments, government corporations, and certain other "[e]stablishments within the executive branch." 5 U.S.C. §§7103(a)(3), 7105(g); 5 U.S.C. §§101–105. That limited grant of power over statutorily defined *federal* entities does not confer any power over *state* entities and *state* officers. So the Authority has no power over state national guards or state adjutants general.

A majority of the Authority's three members agreed. *See* Pet.App.26a–27a. (Abbott, M., concurring); Pet.App.28a–33a (Kiko, Ch., dissenting). Nonetheless, the agency issued the orders in question; the member who cast the decisive vote felt "bound" by circuit-court decisions interpreting federal law to vest the Authority with the power to issue orders to state national guards and state adjutants general. Pet. App.27a (Abbott, M., concurring).

That precedent does not bind this Court. So, now that the case is here, one might assume the Authority's lawyers would confess error and defend the legal reasoning that a majority of the Authority's members embraced. Alas, the Solicitor General is instead defending an order the Authority doubted it could lawfully issue. That is a mistake. No statute empowers the Authority to regulate state guards and state adjutants general. Because the Sixth Circuit held otherwise and upheld the Authority's order, this Court should reverse.

## 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 Federal Labor Relations Authority issued the order on review here on June 30, 2020. Pet.App.18a. The Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department timely petitioned for review in the United States Court of Appeals for the Sixth Circuit on August 28, 2020. JA.1; Pet.App.8a. The Sixth Circuit had jurisdiction to review the Federal Labor Relations Authority's order under 5 U.S.C. §7123(a).

The Sixth Circuit denied the petition on December 21, 2021, and denied *en banc* review on February 14, 2022. The Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's

Department timely petitioned for a writ of certiorari on May 13, 2022. This Court, which has jurisdiction to review the Sixth Circuit's judgment under 28 U.S.C. §1254(1), granted the petition for a writ of certiorari on October 3, 2022. *Ohio Adjutant Gen.'s Dep't v. FLRA*, 21-1454, 2022 WL 4651277, at *1 (U.S. Oct. 3, 2022).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions most relevant to this case are included in the petition appendix starting at page 170a. They include:

U.S. Const. art. I, §8, cls. 15, 16

5 U.S.C. §101

5 U.S.C. §102

5 U.S.C. §103

5 U.S.C. §104

5 U.S.C. §105

5 U.S.C. §7103

5 U.S.C. §7105

32 U.S.C. §709

## STATEMENT

May the Federal Labor Relations Authority issue direct orders to the Ohio National Guard, the Ohio Adjutant General's Department, and the Ohio Adjutant General? That is the question this case presents. Understanding the question requires some background regarding the Guard, the Department, the Adjutant General, and the Authority. This brief begins there, before discussing the dispute in this case.

One note before proceeding. For ease of reference, this brief will sometimes use "Ohio" when referring collectively to the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department.

**1.** The Ohio National Guard, like the national guard in every other State, is a descendant of the militia that various constitutional provisions address. *See, e.g.*, U.S. Const. 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; Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 182–210 (1940) (tracing history). Those provisions, along with statutes regulating the Guard, "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). To this day, they do.

Because the state and federal governments share responsibility for state national guards, these entities are "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." *Id.* "At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law." *Id.*; *accord Tirado-Acosta v. Puerto Rico Nat'l Guard*, 118 F.3d 852, 852–53 (1st Cir. 1997). Thus, national guards are *state* entities subject to *federal* influence.

One way the federal government influences the operation of state national guards is through its purse-string power. The government pulls those strings

through the National Guard Bureau. The Bureau is the government's "channel of communications on all matters pertaining to the National Guard." 10 U.S.C. §10501(b). Federal law tasks the Bureau 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). In furtherance of this mission, the Bureau supervises state guards in their use of federal property and funds. *See* 10 U.S.C. §10503(7). Of critical importance here, it may withdraw federal recognition of state guards and set in motion a process to withhold federal funds. *See* 10 U.S.C. §10503(8); 32 U.S.C. §108. Through its control of the purse strings, the Bureau can influence state officials' management of state national guards.

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 "administered" and "trained" by their respective adjutants general. *See* 10 U.S.C. §10107; 32 U.S.C. §709(d). The Bureau may not "take over a state National Guard's daily administrative duties," even if the state guard "has failed to comply with" Bureau-issued regulations. *Ass'n of Civilian Technicians*, 603 F.3d at 993. The Bureau exercises control through funding and recognition, not through direct commands.

**2.** State national guards are staffed in part by the members that come most readily to mind—the men and women who devote a weekend a month and at least two weeks a year to military duties. A second group of members, known as "technicians," are perhaps less well-known. They are the subject of this case.

Technicians are full-time employees charged with providing support services for the state national guards. They "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. For example, technicians might train pilots, maintain equipment, or work in human resources and information technology.

Technicians trace their lineage to 1916, when Congress authorized "caretakers" to maintain the guards' equipment. Maj. Michael J. Davidson and Maj. Steve Walters*, Neither Man nor Beast: The National Guard Technicians, Modern Day Military Minotaur,* 1995 Army Lawyer 49, 51 (Dec. 1995). Until 1968, these caretakers (then renamed 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.

The "basic purpose" of the Technicians Act is to provide "a uniform and adequate retirement and fringe benefit program," while also "provid[ing] for statutory administrative authority at the State level." 114 Cong. Rec. 23,251 (July 25, 1968) (remarks of Sen. Stennis). That is precisely what the Act does. Thus, although technicians are federal employees, the state and federal governments both play a role in managing their work.

Consider first the States' role. The Technicians Act gives adjutants general, "who are State officers," "the statutory function of employing Federal employees." S. Rep. No. 90-1446, at 15 (1968). Adjutants general have the "full power to hire, fire, promote and assign federal as well as state employees" in the national guards. *Taylor v. Jones*, 653 F.2d 1193, 1206 (8th Cir. 1981). In statutory terms, adjutants general "employ and administer" the technicians. 32 U.S.C. §709(d). Adjutants may fire technicians "for cause" at "any time." 32 U.S.C. §709(f)(2). And technicians have no right to appeal "beyond the adjutant general" any terminations based on "fitness for duty in the reserve components." 32 U.S.C. §709(f)(4). For that reason, the federal government has "consistently maintained that" it "lack[s] the authority to compel a State to reinstate [these] members to the State's National Guard." *Ass'n of Civilian Technicians, Inc. v. United States*, 601 F. Supp. 2d 146, 161 (D.D.C. 2009), *aff'd*, 603 F.3d 989 (D.C. Cir. 2010).

The federal government plays its own role in technicians' management. First, the federal government may influence the state national guards' management of technicians through the Bureau's purse-string power, which Ohio discussed above. Further, the Technicians Act empowers the Secretary of the Army and the Secretary of the Air Force to promulgate regulations governing the roles in which technicians may serve. 32 U.S.C. §709(a). And Congress has decided that technicians must be members of the National Guard, hold a "military grade," and wear a military uniform while at work. 32 U.S.C. §709(b). The secretary of the appropriate military department may "exempt technicians from the requirement of membership in the Guard." *Tennessee v. Dunlap*, 426 U.S.

312, 313 n.1 (1976); 32 U.S.C. §709(c). But that exemption is capped at less than 2,000 technicians nationwide. *See* 10 U.S.C. §10217(c)(2). The vast majority of technicians hold dual status, and the exemption is being phased out over time. 10 U.S.C. §10217(e).

All told, technicians hold "a unique position in federal employment." *Babcock v. Kijakazi*, 142 S. Ct. 641, 644 (2022). It is, as one court said, a "sui generis" employment status. *N.J. Air Nat'l Guard*, 677 F.2d at 279. Their role 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); *accord Davis v. Vandiver*, 494 F.2d 830, 832 (5th Cir. 1974); *Am. Fed'n of Gov't Emps., Local 2953 v. Fed. Labor Relations Auth.*, 730 F.2d 1534, 1536–37 (D.C. Cir. 1984). The Technicians Act "divides authority in a manner compatible with the National Guard's dual role." *Ass'n of Civilian Technicians*, 603 F.3d at 994 (internal quotation marks omitted). Whereas the federal government pays technicians and promulgates regulations governing their work, it has "chosen to defer to the state authorities on matters of daily operations, including individual membership." *Id.*

**3.** Turning from state national guards to the federal government, the "Reform Act," confers labor-relations obligations on many federal agencies. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111; *see* 5 U.S.C. §7103(a)(2)(A), (a)(3). The Reform Act gives federal employees of federal agencies "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," along with 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 to "require" that those entities take "any remedial action it considers appropriate." 5 U.S.C. §7105(g)(3); *see also* §7118.

When the Act gives the Authority power to issue orders to "agenc[ies]," it "means an Executive agency." 5 U.S.C. §7103(a)(3). The phrase "Executive agency" is defined in Title 5 of the U.S. Code as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. §105. Each of these definitional categories has a definition of its own. The phrase "Executive department" captures fifteen expressly enumerated federal departments. 5 U.S.C. §101. A "Government corporation" is a corporation owned or controlled by the federal government. 5 U.S.C. §103(1). And the phrase "independent establishment" refers to federal agencies that are "in the executive branch" but that do not qualify as an "Executive department, military department, Government corporation, or part thereof." 5 U.S.C. §104(1). "Military departments" are the departments of the Army, Navy, and Air Force. 5 U.S.C. §102.

Putting all this together, the Reform Act empowers the Authority to issue orders to labor organizations, and to three categories of federal agencies: (1) executive departments; (2) government corporations; and (3) agencies that are part of the executive branch but not executive departments, government corporations, or military departments. (The Act further empowers the Authority to issue orders to certain specifically identified agencies, *see* 5 U.S.C. §7103(a)(3), but none of those agencies is implicated here.)

**4.** The Technicians Act and the Reform Act give rise to the following question: Are the Ohio National Guard, the Ohio Adjutant General, or the Ohio Adjutant General's Department federal agencies over which the Authority has regulatory 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 Authority. The union alleged that the Ohio National Guard committed unfair labor practices. For example, the union faulted the Guard for not deducting union dues from paychecks, for failing to recognize the union as the exclusive bargaining representative, and for recommending an end to union-dues deductions. *See* JA.8–12, 18–19; *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 Authority can enforce the Reform Act against state actors. *See* JA.9.

Following an investigation, the Authority 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 Guard, the Adjutant General, and the Department are "agencies" covered by the Reform Act. Pet.App.117a–18a. Second, with one exception, the judge ruled that Ohio violated the substantive aspects of the Reform Act in dealings with union officials and union members. *See* Pet.App.118a–54a. The judge ordered Ohio 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 about these actions to all union members and managers. Pet.App.162a–64a.

The Authority's adjudicatory wing affirmed in a few short paragraphs. Pet.App.18a–19a. But two of its three members concluded that they lacked the power to issue the order. The Authority's Chair argued that it was "wrong" to treat state national guards and state adjutants general as federal agencies subject to the Reform Act. Pet.App.28a (Kiko, Ch., dissenting). A second member agreed with the Chair, but concurred in the judgment on the ground that "current judicial precedent" from courts of appeals required treating state national guards and state adjutants general as "agencies" subject to the Reform Act. *See* Pet.App.27a (Abbott, M., concurring).

The members' legal concerns tracked a practical problem. The administrative orders commanded actions that neither the Guard nor the Adjutant General has the power to take. The orders directed the Adjutant General and the Guard 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 and the Guard 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* Pet. App.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. JA.58–60; *see also* Dep't of Defense Reg. 7000.14-R, Vol. 8, Chap. 11,

¶2.2.1. 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. JA.59. That audit led to a halt of dues deductions that were not authorized by a verifiable form completed by the technician. JA.77–78; *cf. Janus v. Am. Fed'n of State, Cnty, and Mun. Emps.*, 138 S. Ct. 2448, 2486 (2018). The federal employee then told Ohio that deducting dues would be "illegal." *See* JA.62. In short, Ohio cannot command that dues again be deducted without contradicting a federal officer in charge of federal payroll.

**5.** Ohio petitioned for review in the Sixth Circuit. The Circuit upheld the order. It concluded that the Ohio National 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. Pet.App.11a. Ohio sought rehearing *en banc*, but the Sixth Circuit denied the petition. Pet.App.168a–69a.

**6.** Ohio timely petitioned for a writ of certiorari. Its petition presented two questions. The first asked whether federal law empowers the Authority to regulate the labor practices of state militias. The second asked whether a law empowering the Authority to regulate state militias in this way would violate the Constitution. This Court granted certiorari but limited review to the first of Ohio's two questions. *Ohio Adjutant Gen.'s Dep't v. FLRA*, 21-1454, 2022 WL 4651277, at *1 (U.S. Oct. 3, 2022).

## SUMMARY OF ARGUMENT

**I.** The Reform Act vests the Federal Labor Relations Authority with the power to issue orders to

"labor organization[s]" and "agenc[ies]." *See* 5 U.S.C. §§7105(g)(3); 7116(a) & (b); 7118(a). So the order the Authority issued in this case is valid *only* if the Ohio National Guard, the Ohio Adjutant General, or the Ohio Adjutant General's Department are labor organizations or federal agencies. All parties agree that these entities are not labor organizations. Are they "agencies" for purposes of the Reform Act?

No, and the question is not close.

**A.** The word "agency," as it appears in the Reform Act, "means an Executive agency." 5 U.S.C. §7103(a)(3). The phrase "Executive agency" means "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. §105.

Neither the Guard, the Adjutant General, nor the Department is any of these things.

*Executive department.* "The Executive departments are" the fifteen departments listed by name in 5 U.S.C. §101. Neither the Guard, the Adjutant General, nor the Department is listed. So none of these entities is an "Executive department."

*Government corporation.* "'Government corporation' means a corporation owned or controlled by the Government of the United States." 5 U.S.C. §103(1). Neither the Guard, the Adjutant General, nor the Department is a corporation. Further, none of these entities is owned or controlled by the United States government. So none is a government corporation.

*Independent establishment.* An "independent establishment" is "an establishment in the executive branch … which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." 5

U.S.C. §104. The Guard, the Adjutant General, and the Department are each either a *state* entity or a *state* officer. Accordingly, none is "an establishment in the executive branch." None, in other words, is an independent establishment.

*Conclusion*. Neither the Guard, the Adjutant General, nor the Department is an executive department, a government corporation, or an independent establishment. Thus, none is an "agency" to whom the Authority may issue orders.

**B.** The foregoing comports with other areas of federal law, all of which recognize that state national guards and state adjutants general are state entities and officers, not federal entities and officers. For example, because state national guards are state entities, they cannot be sued for discrimination under laws permitting suits against the federal agencies. *See, e.g.*, *Blong v. Sec'y of Army*, 877 F. Supp. 1494, 1496 (D. Kan. 1995). And because adjutants general are state officers, they can be sued under 42 U.S.C. §1983—a statute that imposes liability for actions taken "under color of" *state* law. Finally, because adjutants general and state national guards are state entities and officers, they are not "Federal agenc[ies]" over which the Merit System Protection Board can exercise power under 5 U.S.C. §1204(a)(2). *See, e.g.*, *Singleton v. Merit Sys. Prot. Bd.*, 244 F.3d 1331, 1336 (Fed. Cir. 2001); *DiManni v. R.I. Army Nat'l Guard*, 62 F. App'x 937, 942 (Fed. Cir. 2003).

**C.** The federalism canon requires resolving any lingering ambiguity against the Authority. That canon requires Congress to speak with "exceedingly clear language" if it wishes to intrude upon traditional state prerogatives or to upset the usual balance of

state and federal power. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)).

Any law empowering a federal agency to issue orders to state entities implicates the federalism canon. The federal government generally regulates individuals, not States. *See New York v. United States*, 505 U.S. 144, 166 (1992); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). Thus, even in contexts where Congress has authority to regulate the States directly, its doing so constitutes the sort of significant legal change that one would expect to see communicated clearly. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1000–01 (2020). It follows that the Reform Act, if it empowered the Authority to issue orders to state guards and state adjutants general, would accomplish the sort of major legal change that must be clearly articulated.

Federal intrusion would be especially significant given the Constitution's explicit division of federal and state authority in the militia context. In this context, the States have long, well-established, constitutionally recognized roles to play. Beyond that, commanding a military unit requires leaders to make "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which are "essentially professional military judgments." *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)). For that reason, "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) (internal quotation

marks omitted). The Reform Act should not be casually read to do so.

From all this, it follows that the question whether the Authority can regulate state guards and state adjutants general implicates the federalism canon. Because the Reform Act does not *clearly* vest the Authority with the power to issue direct orders to these entities, it must be understood not to do so at all.

**II.** The Sixth Circuit, in its decision below, upheld the Authority's order based largely on circuit precedent. Pet.App.11a. Because that precedent is not controlling in this Court, neither is the bulk of the Circuit's reasoning.

Beyond relying on precedent, the Sixth Circuit suggested that the Reform Act applies to the Ohio National Guard on the ground that the Guard is an executive agency "in its capacity as the employer of" dual-status technicians, who are federal employees. Pet.App.12a. The Solicitor General echoed this argument in her certiorari-stage briefing, where she argued that the Guard is subject to the Reform Act because it acts as a "representative[]" or "agent[]" of an executive agency (the Defense Department) when it works with technicians. U.S. BIO.8, 10, *cf. id.* 13 n.2.

These arguments get the Authority nowhere. The Reform Act empowers the Authority to issue orders to federal agencies. Assuming for argument's sake that the Guard acts in the "capacity" of a federal agency (whatever that means), or as the "representative" or "agent" of a federal agency, the Guard is not *itself* an "agency" as the Reform Act defines that term. Thus, the Authority has no power over the Guard.

## ARGUMENT

The Reform Act cannot be read to empower the Federal Labor Relations Authority to issue orders to Ohio. Because the Sixth Circuit held otherwise—because it affirmed an order that the Authority issued to the Guard, the Adjutant General, and the Ohio Adjutant General's Department—it erred. This Court should reverse.

### I. The Authority lacked the power to issue an order to Ohio.

Congress empowered the Federal Labor Relations Authority to issue orders *only* to labor organizations, to several specific federal entities not relevant here, and to three categories of federal agencies: executive departments, government corporations, and executive-branch agencies that are neither executive departments, government corporations, nor military departments. *See* 5 U.S.C. §7105(g)(3). The Ohio Adjutant General is none of these. The same is true of the Ohio Adjutant General's Department and the Ohio National Guard. Thus, the Authority unambiguously lacked the power to issue an order to the Adjutant General, the Department, or the Guard. As a result, this Court's analysis can both begin and end with the statutory text. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). To the extent the text contains any ambiguity, the federalism canon requires interpreting the statute not to give the Authority any power over state officials and entities.

### A. The Reform Act empowers the Authority to issue orders only to labor organizations and certain federal entities.

The Reform Act empowers the Authority to issue orders "requir[ing] an agency or a labor organization to cease and desist from violations" of the Act and to take "remedial action." 5 U.S.C. §7105(g)(3). Another section defines conduct that would qualify as an unfair labor practice if carried out by "an agency" or a "labor organization." 5 U.S.C. §7116(a) & (b). And a related provision specifically gives the Authority the power to investigate and punish unfair labor practices by "any agency or labor organization." 5 U.S.C. §7118(a). Thus, as all parties here concede, the Authority's regulatory authority extends *only* to labor organizations and agencies.

The definition of "labor organization" is straightforward. It includes "an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment …." 5 U.S.C. §7103(a)(4).

The definition of "agency" is a bit more complicated. The Act defines "agency" as follows:

> (3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Publishing Office, and the Smithsonian Institution[,] but does not include—

> (A) the Government Accountability Office;
>
> (B) the Federal Bureau of Investigation;
>
> (C) the Central Intelligence Agency;
>
> (D) the National Security Agency;
>
> (E) the Tennessee Valley Authority;
>
> (F) the Federal Labor Relations Authority;
>
> (G) the Federal Service Impasses Panel; or
>
> (H) the United States Secret Service and the United States Secret Service Uniformed Division.

5 U.S.C. §7103(a)(3). Breaking this down, the statute specifically identifies some federal entities that qualify as "agencies" (the Library of Congress, for example) and others that do not qualify (like the Government Accountability Office). None of those specific inclusions and exclusions is relevant to this case. More important here is the fact that the statute defines "agency" to include "Executive agenc[ies]." That term is defined elsewhere in Title 5: "'Executive agency' means an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. §105.

Thus, setting aside the specific inclusions and exclusions, the phrase "agency" encompasses three categories of entities: executive departments, government corporations, and independent establishments.

Title 5 further defines each of these categories.

***Executive departments.*** "The Executive departments are" the fifteen departments listed by name in 5 U.S.C. §101. Namely:

> The Department of State.
>
> The Department of the Treasury.
>
> The Department of Defense.
>
> The Department of Justice.
>
> The Department of the Interior.
>
> The Department of Agriculture.
>
> The Department of Commerce.
>
> The Department of Labor.
>
> The Department of Health and Human Services.
>
> The Department of Housing and Urban Development.
>
> The Department of Transportation.
>
> The Department of Energy.
>
> The Department of Education.
>
> The Department of Veterans Affairs.
>
> The Department of Homeland Security.

This list identifies by name the entities that "are" executive departments. It contains no catch-all for other entities, and it nowhere suggests that its list is inclusive. These "enumerated" terms, therefore, set forth an "exclusive list." *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 303 (2015); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007); *United States v. Smith*, 499 U.S. 160, 167

(1991). As a result, entities the statute does not mention do not qualify as executive departments.

***Government corporation.*** "'Government corporation' means a corporation owned or controlled by the Government of the United States." 5 U.S.C. §103(1). These federally controlled corporations are "neither wholly in the public sphere nor wholly in the private sphere." *McCauley v. Thygerson*, 732 F.2d 978, 981 (D.C. Cir. 1984). Examples include the Federal Prison Industries and the Government National Mortgage Association. *See Sprouse v. Fed. Prison Indus., Inc.*, 480 F.2d 1, 3 (5th Cir. 1973); *DRG Funding Corp. v. Sec'y of Hous. & Urb. Dev.*, 76 F.3d 1212, 1219 (D.C. Cir. 1996) (Williams, J., concurring); *see also Keifer & Keifer v. Reconstruction Fin. Corp.,* 306 U.S. 381, 390 n.3 (1939) (listing dozens more).

***Independent establishment.*** The phrase "'independent establishment means":

> (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; …

5 U.S.C. §104. Most of the terms the definition incorporates are laid out above. One is not: "military department." But that phrase is defined in 5 U.S.C. §102. It says:

> The military departments are:
>
> The Department of the Army.
>
> The Department of the Navy.

The Department of the Air Force.

Putting all this together, the phrase "independent establishment" includes executive-branch establishments (other than the Postal Service and the Postal Regulatory Commission) that are *not*: (1) executive departments; (2) government corporations; (3) the Department of the Army; (4) the Department of the Navy; (5) the Department of the Air Force; or (6) parts of these entities. Put more simply, the phrase refers exclusively to "independent entit[ies] within the executive branch." *Scott v. Fed. Rsrv. Bank of Kansas City*, 406 F.3d 532, 535 (8th Cir. 2005). Examples include the Equal Employment Opportunity Commission and the Office of Personnel Management. *Huynh v. O'Neill*, No. CIV. A. 3:01CV00445, 2002 WL 237439, at *5 (E.D. Va. Feb. 11, 2002) (report and recommendation); *Ricci v. Merit Sys. Prot. Bd.*, 953 F.3d 753, 758 n.3 (Fed. Cir. 2020). (Section 104 also defines the Government Accountability Office to qualify as an independent establishment. *See* 5 U.S.C. §104(2). But since the Reform Act expressly excludes the Office from its definition of "agency," *see* 5 U.S.C. §7103(a)(3)(A), the Office is not an "independent establishment" for purposes of the Reform Act.)

*

In sum, the Authority may issue orders to five categories of entities. *First*, labor organizations—in essence, unions. *Second*, the select few entities that the Reform Act's definition of "agency" expressly includes. *Third*, any of the fifteen "Executive departments" listed in 5 U.S.C. §101. *Fourth*, corporations that the federal government owns or controls. *Finally*, some independent executive-branch entities that do not

qualify as "Executive departments," "government corporations," or "military departments."

### B. The Guard, Adjutant General, and Department are state entities over which the Authority has no power.

**1.** The just-discussed definitions compel the conclusion that Ohio is not subject to the Reform Act. Again, the Act permits the Authority to issue orders *only* to labor organizations, certain federal entities specifically named in the Reform Act's definition of "agency," executive departments, government corporations, and independent establishments. 5 U.S.C. §§7103(a)(3); 105. The Ohio National Guard, its Adjutant General, and his Department are not labor organizations, and the Authority has never claimed otherwise. Nor are these entities specifically identified as "agencies" by the Reform Act. So the propriety of the Authority's order turns on whether these entities are executive departments, government corporations, or independent establishments.

Neither the Guard, the Adjutant General, nor the Department is any of these things. They are not "Executive departments" because they are not among the fifteen departments identified in the definition of that term. *See* 5 U.S.C. §101. They are not government corporations because they are not "corporations," and also because they are neither "owned" nor "controlled by the Government of the United States." 5 U.S.C. §103(1). And they are not "independent establishments" because, as state entities and state officers, they are not part of "the executive branch." 5 U.S.C. §104.

Indeed, because the definitions of executive department, government corporation, and independent

establishment *all* apply exclusively to federal entities, none of these terms captures the Adjutant General, the Department, or the Guard, each of which is either a state official or a state entity. No doubt, the state national guards and their members have a close relationship with the Army and the Air Force. But they are part of "distinct organizations." *See Perpich v. Dep't of Def.*, 496 U.S. 334, 345 (1990). That is why, when a dual-status technician is called to active federal duty, he is "relieved from duty" in his state national guard. 32 U.S.C. §325(a).

Consider first the Adjutant General, who unambiguously qualifies as a state officer. The Ohio Adjutant General is appointed by Ohio's Governor, not the President. Ohio Const. art. IX, §3. The Adjutant General's role, qualifications, and pay are set by Ohio statute. Ohio Rev. Code §§5913.01, 5913.021(A), 141.02(A), 124.15(B), (H). What is more, federal law recognizes that adjutants general "perform the duties prescribed by the laws" of their home States. 32 U.S.C. §314(a). And Ohio's Adjutant General—Major General Harris—does just that. He is in charge of all military property in Ohio. *See* Ohio Rev. Code §5913.01(A)(8). He also issues all orders of the Governor related to military matters. Ohio Rev. Code §5913.01(B). In addition, Major General Harris administers Ohio's code of military justice. *See* Ohio Rev. Code §5924.36 (procedure for military courts); §5924.56 (maximum punishments); §5924.66 (appointing judges). That code applies to "dual-status technicians during their normal duty hours." Ohio Rev. Code §5924.02(A).

What is true of the Adjutant General is true of the department he heads. As the foregoing shows, the Ohio Adjutant General's Department is managed by a

state officer—namely, the Adjutant General. And both the Adjutant General and the Department may be sued in Ohio's Court of Claims, which is a court with "exclusive, original jurisdiction of all civil actions against" Ohio. Ohio Rev. Code §2743.03(A)(1); *see, e.g.*, *Cent. Allied Ents., Inc. v. Adjutant Gen.'s Dep't*, 2011-Ohio-4920 ¶1 (Ohio Ct. App.).

The Guard is also a component of Ohio's state government. As is true of its counterparts in other States, the Ohio National Guard is "a state agency, under state authority and control." *N.J. Air Nat'l Guard v. Fed. Labor Relations Auth.,* 677 F.2d 276, 279 (3d Cir. 1982); *Knutson v. Wisconsin Air Nat'l Guard,* 995 F.2d 765, 767 (7th Cir. 1993); *Bowen v. Oistead*, 125 F.3d 800, 802 n.1 (9th Cir. 1997). Indeed, the Constitution itself recognizes the state national guards as distinct entities subject to state control, except in cases where they are pressed into federal service. U.S. Const. art. II, §2, cl. 1. Further, 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 the consent of governors. *See, e.g.*, 10 U.S.C. §§252 (calling up to enforce federal authority); 12301(b) (gubernatorial consent needed for certain calls to duty); 32 U.S.C. §325 (call to federal status excuses duties to state national guard). Put differently, state national guards are state entities over which the federal government may exercise direct control in limited circumstances.

**2.** Treating the petitioners as state entities and officials is consistent with the manner in which federal law, in other contexts, treats state national guards and state adjutants general.

For example, because state national guards and adjutants general are state entities, they cannot be sued under statutes permitting discrimination suits against the federal government. Over two decades ago, one court went to the heart of the matter when—applying an anti-discrimination statute that uses the same definitions of "agency"—it observed that the Kansas National Guard is "not an 'Executive department,' 'Government corporation,' or "independent establishment.'" *Blong v. Sec'y of Army*, 877 F. Supp. 1494, 1496 (D. Kan. 1995); *see also James v. Day*, 646 F. Supp. 239, 240 (D. Me. 1986); *cf. Melendez v. Puerto Rico Nat'l Guard,* 70 M.S.P.R. 252, 253–54 (1996), *appeal dismissed* 152 F.3d 943 (Fed. Cir. 1998).

The many cases holding that adjutants general can be sued under 42 U.S.C. §1983 provide further support for the conclusion that these officers are state officials. That statute permits suits against individuals who, acting "under color of" *state* law, deprive others of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. As a result, §1983 "does not apply to allegedly unlawful acts of *federal* officers." *United States v. Acosta*, 502 F.3d 54, 60 (2d Cir. 2007) (emphasis added); *see Wheeldin v. Wheeler*, 373 U.S. 647, 650 n.2 (1963). Courts treat state adjutants general as state officers who may be sued under §1983. *See, e.g.*, *Schultz v. Wellman*, 717 F.2d 301, 304–05 (6th Cir. 1983); *Johnson v. Orr*, 780 F.2d 386, 390–91 (3d Cir. 1986) (cataloging cases). As these cases explain, neither the Technicians Act nor any other law had "the effect of rendering the National Guard more federal in character." *Johnson*, 780 F.2d at 390–91. The Technicians Act instead left state adjutants general and their national guards as they were—state actors. If adjutants general are state

actors under §1983, they are not federal agencies. So they cannot be subject to the Reform Act.

The Federal Circuit's treatment of state guards and adjutants general under a similar statute provides further support for this conclusion. The Merit System Protection Board may "order any Federal agency" to comply with its decisions. 5 U.S.C. §1204(a)(2). The Federal Circuit has repeatedly held that, because state national guards and state adjutants general are not federal agencies, this statute gives the Board no power to order their compliance with the Board's commands. *See Asatov v. Merit Sys. Prot. Bd.*, 595 F. App'x 979, 980 (Fed. Cir. 2014); *Asatov v. Merit Sys. Prot. Bd.*, 513 F. App'x 984, 985–86 (Fed. Cir. 2013); *DiManni v. R.I. Army Nat'l Guard*, 62 F. App'x 937, 942 (Fed. Cir. 2003); *Singleton v. Merit Sys. Prot. Bd.*, 244 F.3d 1331, 1336–37 (Fed. Cir. 2001). The Board agrees, and very recently explained that it "does not have authority to compel [a] state adjutant general to perform an ordered act." *Bradley v. Dep't of the Air Force*, No. DA-1221-22-0365-W-1, 2022 WL 4011898 (M.S.P.B. Aug. 31, 2022).

Federal law, it is true, regulates adjutants general and state national guards. One statute, for example, requires each State to have an adjutant general. 32 U.S.C. §314(a). Another directs adjutants general to report to the Secretary of the Army or the Secretary of the Air Force. 32 U.S.C. §314(d). But the federal government's regulation of state officers does not turn those officers into federal officers, let alone federal *agencies*. Indeed, the Authority itself recently acknowledged that adjutants general's obligations to comply with federal regulations "do not alter the status of Adjutants General as state officers." *Nat'l Guard Bureau Air Nat'l Guard Readiness Ctr.*

*(Agency) & Ass'n of Civilian Technicians (Lab. Org.)*, 72 F.L.R.A. 350, 352 (F.L.R.A. June 17, 2021).

That makes sense, as many federal laws require a state officer to take some federal-law action without converting the officer into a part of the federal executive branch. Consider the National Voter Registration Act. It instructs each State to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the Act. 52 U.S.C. §20509. That does not transform state elections officers into federal agencies. Similarly, 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. Along the same lines, the States act "as the federal government's agent for collecting and dispersing" unemployment benefits. *Paschal v. Jackson*, 936 F.2d 940, 943 (7th Cir. 1991). Yet the States do not, in that role, become federal agencies. Instead, they retain key aspects of statehood, such as their sovereign immunity. *See id.* at 945.

**3.** The foregoing shows that the Reform Act cannot be interpreted as empowering the Authority to issue orders to state national guards and state adjutants general. But even if the Act were susceptible of such an interpretation, the Act does not *clearly* confer this power upon the Authority. And the federalism canon prohibits the Court from interpreting an ambiguous law as empowering the Authority to regulate state national guards and state adjutants general.

The federalism canon requires Congress to 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). In truth, the canon is just a specific application of the rule that Congress should not be presumed to make major legal changes through vague or ancillary provisions. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). After all, our Constitution limits federal power and leaves the States largely free to govern themselves. *See* U.S. Const. amends. IX, X. As a result, every federal encroachment upon traditional state prerogatives constitutes a significant legal change. Such changes can be accomplished only with "exceedingly clear language." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (*per curiam*) (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)). Put simply, laws should not be interpreted "to embrace the sovereign power or government, unless expressly named or included by necessary implication." *United States v. Greene*, 26 F. Cas. 33, 34 (C.C.D. Me. 1827) (Story, J.).

A law empowering a federal agency to regulate a state entity unquestionably intrudes on state sovereignty and greatly alters the usual balance of state and federal power. One key feature of our constitutional system is that the States "entered the Union with their sovereignty intact." *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 751 (2002) (internal quotation marks omitted). They did not "consent to become mere appendages of the Federal Government."

*Id.* As a result, the Constitution they ratified gives "Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). Of course, the federal government's regulation of private actors may "impose[] restrictions or confer[] rights" that the Supremacy Clause requires States to respect. *Murphy*, 138 S. Ct. at 1480. And subsequent amendments to the Constitution *do* empower Congress to directly regulate the States in limited circumstances. Through Section 5 of the Fourteenth Amendment, for example, Congress may abrogate the States' sovereign immunity for violations of the Amendment's substantive guarantees. *See Allen v. Cooper*, 140 S. Ct. 994, 1003–04 (2020).

But even in contexts where Congress may lawfully restrain the States in the exercise of sovereign authority, federal laws limiting or invading the States' sovereign authority deviate from the norm. Accordingly, Congress must speak clearly if it wishes to preempt state laws. *See, e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Arizona v. Inter Tribal Council of Az., Inc.*, 570 U.S. 1, 21 (2013) (Kennedy, J., concurring in part and concurring in judgment). Congress must speak clearly when it aims to abrogate state sovereign immunity. *Allen*, 140 S. Ct. at 1000; *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 35 (2012). And it must speak clearly if it offers the States money in exchange for their waiving sovereign immunity. *See, e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 284 (2011); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999). All these cases draw on the reality that federal regulation of the States upsets "the usual constitutional

balance of federal and state powers." *Bond*, 572 U.S. at 858 (internal quotation marks omitted).

The same insight applies here. A law empowering an agency to issue direct orders to a state entity would alter the usual federal-state balance. The Reform Act can be read to alter this balance only if it does so clearly. It does not.

The Court should be especially careful to demand a clear statement before reading federal law to regulate the labor practices of state national guards.

For one thing, the States have primary authority over the operation of their national guards—their modern-day militias. To be sure, the Constitution gives Congress some power to regulate these entities. Congress may "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const. art. I, §8, cl. 15. And it may "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." Art. I, §8, cl. 16. But Article I specifically "reserv[es] to the States" the power of appointing officers, and of "training the Militia according to the discipline prescribed by Congress." *Id.* And the Tenth Amendment contains a general reservation of state authority, confirming that all militia-related authority "not taken away by the Constitution" is "retained by the States or the people." *Houston v. Moore*, 5 Wheat. 1, 51 (1820) (op. of Story, J.). This division of authority 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). And the preservation of the States' authority, in particular,

protects them from the risk that would arise from "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).

Accordingly, laws diminishing state authority over the operation of their militias implicate significant interests with respect to which Congress must speak clearly if it wishes to interfere. The principle carries particular weight here because, in order to make the state national guards federal entities, Congress would have had to alter the centuries-old *status quo*, which treated state militias as state entities. There is no evidence the Technicians Act, the Reform Act, or any other law was intended or originally understood to do that. *See Johnson*, 780 F.2d at 390–92.

The military context heightens the significance of the intrusion on state sovereignty. "As the Court has long emphasized, … the 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.'" *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)). For that reason, "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) (internal quotation marks omitted). Put differently, rules limiting military commanders' control over military personnel—for example, laws governing labor relations within military units—are the sort of elephant Congress is unlikely to hide in a mousehole. *Cf. N. J. Air Nat. Guard*, 677 F.2d at 284.

In sum, had Congress wished to empower the Authority to issue orders to state national guards and state adjutants general, it would have said so clearly. The Reform Act, however, does not clearly give the Authority such power. So it must be construed not to confer such power at all.

*

Before moving on, Ohio pauses to clarify the limits of its argument. This case presents only the question whether the Authority may issue orders to state national guards and to adjutants general and their departments. While the Authority may not issue such orders, the federal government retains other means of influencing the conduct of the States in their relations with technicians.

Most obviously, the federal government may indirectly regulate the national guards through the National Guard Bureau. *See above* 7–8. 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 can impose its 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 funding or federal recognition 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 Authority's attempt to do the same directly.

## II. The Sixth Circuit and the Authority have offered no good reason to conclude that the Ohio National Guard, the Ohio Adjutant General, or his Department are federal agencies.

Neither the Sixth Circuit below, nor the Authority in briefing to this point, has offered any convincing response to the arguments laid out above.

### A. The Sixth Circuit largely ignored the statutory text.

The Sixth Circuit's opinion rests largely on circuit-court precedent, which it read to "dictate[]" the conclusion that the Authority may regulate the Ohio National Guard. Pet.App.11a. Now that the question is before this Court, that precedent no longer controls.

To the extent the Sixth Circuit offered additional reasoning, it was unpersuasive. The Circuit homed in on the Ohio National Guard in particular—it had little to say about the Adjutant General or the Adjutant General's Department. The Circuit suggested that the Guard is an executive agency "in its capacity as the employer of" dual-status technicians. Pet.App. 12a; *see also* Intervenor BIO.15–16. That conclusory assertion is no argument at all. Moreover, the Court

never grounded the relevance of this assertion in the statutory text, and it is hard to see how it could have. Remember, the Reform Act defines "Executive agency" to mean "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. §105. The Guard does not fit within those definitional categories. *See above* 23.

Focusing on the "capacity" in which the Guard supposedly acts cannot change the analysis. The Act defines "Executive agency" with reference to fixed statutory classifications. Only fifteen listed entities constitute the "Executive department[s]"; only corporations controlled or owned by the United States qualify as "government corporations"; and only "establishment[s] in the executive branch" qualify as "independent establishment[s]." *See above* 20–22. The "capacity" in which an agency acts has no bearing on the statutory inquiry.

Further, while it is unclear what the Sixth Circuit meant when it characterized the Guard as acting in a federal "capacity," Pet.App.12a, if it meant that the Guard *is* sometimes the federal government then it was simply wrong. The Ohio National Guard is never a federal entity. To be sure, the Ohio National Guard's *members* switch from state to federal service when called into active duty. But the Guard itself is not federalized. When a guard member is called to active duty, he is "relieved from duty" in his state national guard. 32 U.S.C. §325(a). When state guard members are so called, they "lose their status as members of the state militia" and become active members of the National Guard of the United States. *See Perpich*, 496 U.S. at 347. But the federal National Guard of the United States and each State's national guard remain "distinct organizations." *Id*. at 345.

### B. The Solicitor General has offered no plausible basis for affirmance.

In its briefing before the Sixth Circuit, the Authority urged that state national guards are "Executive agencies." *See, e.g.*, Br. for Resp. at 15, 35, 38, *Ohio Adjutant Gen.'s Dep't v. Fed. Labor Relations Auth.*, 21 F.4th 401 (6th Cir. 2021) (No. 20-3908). But it offered little in the way of statutory analysis. Instead, it cited circuit-court precedents that had adopted this reading of the Reform Act—cases that themselves contain little in the way of statutory analysis. *See, e.g.*, *Lipscomb v. FLRA*, 333 F.3d 611, 617 & n.6 (5th Cir. 2003).

When the case reached this Court, the Solicitor General adopted an entirely new tack. Her certiorari-stage brief appears to recognize that the Guard, the Adjutant General, and the Department are *not* executive agencies. Instead of resisting that conclusion, the Solicitor General embraced it, urging that these entities are subject to the Reform Act as "representatives" or "agents" of executive agencies. U.S. BIO.8, 10, *cf. id.* 13 n.2.

To start, the argument is forfeited. The Authority never raised this argument before the Sixth Circuit or in its order, and it may not do so now. *See California v. Texas*, 141 S. Ct. 2104, 2116 (2021); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 n.6 (2021); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

As for the argument's substance, its flaw depends on precisely what the Solicitor General means. If the argument is that the Ohio National Guard *is* the federal government, that is wrong for all the reasons explained above. If the Solicitor General means instead that the Ohio National Guard sometimes performs

tasks for the Department of Defense, that merely shines a brighter light on the errors below. If the Ohio National Guard is the Department of Defense's agent, then the Authority should issue an order to the Department, not to the Ohio National Guard. As detailed above (at 11–12), the Ohio National Guard lacks the power even to carry out the Authority's command that it restart union-dues withholding.

Whatever its meaning, the argument that the Ohio National Guard is a representative of the Department of Defense does not bring the Guard within the Reform Act's text. No reading of the Reform Act gives it the power to issue orders to non-federal entities. And no reading of the Act sweeps the Ohio National Guard within the meaning of federal "agency." 5 U.S.C. §7103(a)(3). The Reform Act empowers the Authority to regulate "Executive agenc[ies]," which it defines with reference to three statutory classifications: executive departments, government corporations, and independent establishments. The Act does not empower the Authority to regulate the representatives or agents of these entities. It empowers the Authority to regulate these entities only. The Guard is not among the identified entities, and thus is not subject to the Reform Act.

The Solicitor General further stressed that technicians are employed in the Department of Defense, which is an "Executive agency." BIO.9–10, 12; *see also* 5 U.S.C. §101; 32 U.S.C. §709(e). That is true. It is also irrelevant. The Authority may regulate the Ohio National Guard only if *the Guard* is an "Executive agency" as defined in the Reform Act. And the fact that the Guard accepts the benefit of technicians employed by an Executive agency has no bearing on the question whether the Guard itself is an executive

agency. Again, the Reform Act defines "Executive agency" to include three types of entities. None of those entities is defined with reference to the status of the individuals who perform work within them.

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Congress chose to vest the Authority with power to regulate federal agencies, not state entities. And "respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others." *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018). That principle refutes the arguments supporting the judgment below and demands reversal.

## CONCLUSION

The Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

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