No. 21-1454

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

REPLY BRIEF FOR 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?

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This case began when a union representing dual-status technicians—federal employees who perform civilian and military work for state national guards—filed an unfair-labor-practices complaint against Ohio's National Guard. The Federal Labor Relations Authority found violations and issued an order to the Guard, the Ohio Adjutant General, and the Adjutant General's Department. (Collectively, "Ohio.") Two of the Authority's three members doubted that the Reform Act empowered the Authority to issue orders to state guards or adjutants general. But the decisive vote believed circuit-court precedent tied the Authority's hands. Pet.App.26a–27a (Abbott, M., concurring); Pet.App.28a–33a (Kiko, Ch., dissenting).

After the Sixth Circuit affirmed, this Court granted certiorari to decide a single question: Does the Reform Act vest the Authority with the power to issue orders to state guards and adjutants general? Pet.i, 13–20; 143 S. Ct. 83 (2022). The answer is "no." Under the Reform Act, the Authority may issue orders to "labor organization[s]" and "agenc[ies]." 5 U.S.C. §§7105(g)(3); 7116(a) & (b); 7118(a). Neither state guards nor adjutants general are labor organizations. They are not agencies, either. "Agency," with exceptions not relevant here, "means an Executive agency." §7103(a)(3). And "'Executive agency' means an Executive department, a Government corporation, and an independent establishment." §105. Neither state guards nor adjutants general qualify. "The Executive departments are" fifteen specifically enumerated federal agencies, none of which include state guards or adjutants general. §101. A government corporation is a "corporation" (which guards and adjutants general are not) "owned or controlled by" the

federal government (which guards and adjutants general are not). §103. Finally, "independent establishment[s]" are parts of "the executive branch," which guards and adjutants general, as state entities, are not. §104.

In sum, state guards and state adjutants general are neither "labor organizations" nor "agencies" to which the Authority can issue orders. Even if the statute were ambiguous on this point, the federalism canon prohibits reading ambiguous legislation as empowering a federal agency (like the Authority) to direct the conduct of state officers and state entities. Ohio Br.28–33.

Neither the Authority nor the intervenor (the "Union") expends much effort briefing the question presented. They focus primarily on a different question: whether dual-status technicians have collective-bargaining rights. Even assuming technicians have such rights, the question remains how those rights are enforced. This case does not involve—and Ohio does not contest—technicians' ability to have their rights enforced by the National Guard Bureau, or by the Authority through orders issued to the Department of Defense. Ohio Br.33–34. The only dispute is whether the Authority can enforce those rights by issuing orders to state guards and adjutants general. That depends entirely on whether state guards and adjutants general are "agencies" under the Reform Act. They are not, and neither the Authority nor the Union justifies a contrary conclusion.

I. The Reform Act does not empower the Authority to issue orders to state national guards and state adjutants general.

The Authority and the Union barely engage with the statutory text. Instead, to the extent they address the question presented, they stress practical concerns and arguments concerning Congress's high-level goals. Indeed, the Authority's brief reveals—sometimes implicitly, sometimes explicitly—eight key issues on which it agrees with Ohio. Those agreements substantially narrow the dispute. It helps to begin by laying them out:

First, the Reform Act empowers the Authority to issue orders only to "labor organization[s]" and "agenc[ies]." 5 U.S.C. §§7105(g)(3); 7116(a) & (b); 7118(a).

Second, neither state guards nor adjutants general are labor organizations. Thus, the Authority can issue orders to guards and adjutants general *only if* they are "agencies."

Third, "agency," for purposes of the Reform Act, means "an Executive agency … the Library of Congress, the Government Publishing Office, and the Smithsonian Institution." §7103(a)(3).

Fourth, state guards and adjutants general are not "the Library of Congress, the Government Publishing Office, [or] the Smithsonian Institution." *Id.* This means the Authority can issue orders to state guards and adjutants general only if they qualify as "Executive agenc[ies]."

Fifth, "Executive agency" "means an Executive Department, a government corporation, and an independent establishment." §105.

Sixth, state guards and adjutants general are neither "government corporation[s]" nor "independent establishment[s]." So whether the Authority can issue orders to state guards and adjutants general depends on whether they are "Executive departments."

Seventh, the "Executive departments are" the fifteen departments enumerated in §101. This seventh point of agreement provides the last bit of narrowing: it means the Authority can issue orders to state guards and adjutants general *only if* they are among the listed departments.

Finally, state guards and adjutants general are *not* among the listed departments.

These eight points should have led the Authority to confess error. Instead, it argues that guards and adjutants general can be regulated *as though they were* Executive departments. That is incorrect. And the Union's arguments fare no better.

A. Neither the Authority nor the Union offers a sound textual argument.

To prevail, the Authority and the Union would need to show that state guards and adjutants general are "agencies." They cannot, and do not, make that showing.

1. The representative-or-agent theory fails.

The Authority's primary argument rests on the claim that, when state guards and adjutants general employ dual-status technicians, they act as the "representative," "agent," or designee of the Department of Defense. Fed.Br.21, 27, 31, 33. The Department of

Defense is an "Executive department," to which the Authority may issue orders. *See* 5 U.S.C. §101. "Accordingly," the argument goes, Fed.Br.18, 21, 22, the Authority may issue orders to the Guard and the Adjutant General.

a. This argument breaks down at "accordingly." Even if the Guard and the Adjutant General are representatives or agents or designees of an agency that the Authority can regulate, what gives the Authority the power to regulate the Guard and the Adjutant General? Nothing. The Act empowers the Authority to issue orders to statutorily defined "agencies." It gives the Authority no power to issue orders to *non*-agencies simply because they represent or work on behalf of agencies that *are* subject to the Authority's oversight.

In over eighty pages of combined briefing, the respondents never identify a statutory basis for concluding otherwise. The Authority attempts to ground its theory in 32 U.S.C. §709(d), which says that the Army and Air Force Secretaries may "designate the adjutants general" to "employ and administer" technicians. Fed.Br.20; *accord* Union Br.15. But this shows, at most, that adjutants general serve as designees of a federal agency. (And it may establish only that the Secretaries are responsible for identifying the adjutants general for whom technicians will work.) It does not mean that adjutants general who employ technicians *become* "agencies" all their own. And the Authority offers nothing but *ipse dixit* to justify its contrary assertion.

The Authority gestures at one other textual basis for the representative-or-agent theory, observing that the Reform Act "defines 'collective bargaining' as 'the

performance of the mutual obligation of *the representative of an agency* and the exclusive representative of employees in *an appropriate unit in the agency* … to consult and bargain.'" Fed.Br.27–28 (quoting 5 U.S.C. §7103(a)(12)) (emphases and alterations in original). The Authority thinks this statute shows that representatives and agents "of a covered agency may be required to engage in collective bargaining and otherwise comply with the Act." Fed.Br.27.

That argument is dubious and irrelevant. It is dubious because, while the statute recognizes that agencies and employees are represented in collective-bargaining, it never imposes collective-bargaining obligations on every entity that represents the agency in any manner at all. The argument is irrelevant because it does not fix the fundamental defect in the representative-or-agent theory. While the statute recognizes that agencies are sometimes represented, it neither says nor implies that those representatives are Reform Act "agencies."

If anything, the Act's express references to representatives, *see, e.g.*, 5 U.S.C. §§7103(a)(12), 7114(a)(2), *weaken* any argument that the Act's definition of "agency" includes representatives by implication. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Congress included "representative" in some sections of the Act, but not in the definition of "agency." That bolsters the inference that "representatives" are not "agencies" for Reform Act purposes.

Ultimately, the "statute says what it says—or perhaps better put here, does not say what it does not say." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1069 (2018). And it does not say the Authority can regulate representatives, agents, or designees of agencies.

b. The Authority says Ohio's argument would nullify whatever collective-bargaining rights technicians might have. Fed.Br.22.

That would be irrelevant if it were true. Only Congress, not the courts, can "rewrite the statute" to fix perceived flaws. *Hall v. United States*, 566 U.S. 506, 523 (2012).

In any event, Ohio's position does not leave technicians without recourse. First, if the state guards and adjutants general are agents of the Defense Department, then the Authority could potentially issue orders to the principal (the Defense Department), which would then bear responsibility for ensuring compliance by its agents (state guards and adjutants general). Second, and more obviously, the technicians can take their grievances to the National Guard Bureau, a federal agency that wields immense power over state guards through funding and federal recognition. Ohio.Br.33. The "Bureau can impose its view of union-management relations on the Ohio National Guard by issuing directives imposing the technicians' sought-after requirements." Ohio Br.33–34. "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." *Id*. at 34. So Ohio's argument does not nullify the technicians' rights. It simply routes disputes over technicians' labor rights through a military agency (the Bureau)

instead of through a body (the Authority) composed of labor lawyers lacking military expertise.

c. Embracing the representative-or-agency theory will sow confusion in other areas of federal law. That is because state and private actors often serve as representatives, agents, and designees of federal agencies—to use the Authority's language—without *becoming* federal agencies themselves. Consider, for example, private contractors. Or consider what this Court has said about state guards: the "maintenance of federal equipment allocated to" state guards—equipment that state guards would not have but for the federal government's allocating it to them and charging them with caring for—is "a state function." *Maryland v. United States*, 381 U.S. 41, 49 (1965), *reh'g granted, judgment vacated on other grounds,* 382 U.S. 159.

The Intergovernmental Personnel Act provides another illustration. Under that law, a federal employee may be assigned to work for a state, local, or tribal government. 5 U.S.C. §3373(a); *see, e.g.*, *Lewis v. U.S. Dep't of Lab., Admin. Rev. Bd.*, 368 F. App'x 20, 22 n.3 (11th Cir. 2010). The loaned worker "remains an employee" of the federal government, but may be supervised by the state, local, or tribal government. 5 U.S.C. §3373(a). In such an arrangement, a state, local, or tribal government may be in charge of a federal employee's "workweek, hours of duty, [and] holidays." *Anderson v. Gov't of the Virgin Islands*, 199 F. Supp. 2d 269, 271 (D.V.I. 2002). That control, though, does not transform state, local, or tribal authorities into federal agencies. In fact, presumably because borrowing governments do not become federal agencies, the federal government will step in to represent *only* the

employee—not the borrowing government—if both are sued for the employee's actions. *See id.* at 271 n.2.

Ohio previously identified two other laws in which state officials or agencies are designated to perform federally assigned tasks. Ohio Br.28. First, under the National Voter Registration Act, States must "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. Second, States must "provide for the establishment or designation of a single State agency to administer or to supervise the administration of" their Medicaid plans. 42 U.S.C. §1396a(a)(5).

The Authority concedes that neither law transforms the designated state officers or state agencies into federal agencies. Fed.Br.32. And it never argues that state guards and adjutants general, by using technicians, transform into federal agencies. But it says that adjutants general (and perhaps state guards, too) can nonetheless be *treated* as though they were federal agencies. Why? Because, as designees of the Army and Air Force Secretaries, they hold "a unique role under the auspices of the Executive Branch," in that they "'employ[] and administer[]' dual status technicians when those technicians are working as federal civil servants." *Id.* at 32–33 (quoting 32 U.S.C. §709(d)); *see also* Union Br.16. That is hardly a distinction: state agencies charged with administering Medicaid plans, for example, also serve "a unique role under the auspices of the Executive Branch." The Authority's distinction apparently rests on the fact that adjutants general manage federal employees, while Medicaid administrators (and others who perform federally assigned tasks) may not. That distinction "happens to fit this case precisely, but it needs

more than that to recommend it." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 394 (2015). The Authority offers no reason to think this employment relationship justifies treating adjutants general, the designees of a federal "agency," as an "agency" all their own.

In addition to being illogical, this distinction could greatly expand federal power. As noted above, state, local, and tribal entities routinely "employ and administer," Fed.Br. 32, federal employees under the Intergovernmental Personnel Act. One *amicus* observes that tribal entities often oversee federal employees permanently. *See* Am. for Fair Treatment Br.6. Thus, accepting the Authority's argument means treating many tribes as federal "agencies" and subjecting them to enhanced federal control, at least in some contexts.

2. The "components" argument fails.

a. The Authority also makes arguments pertaining to agency "components." Fed.Br.27–31. Ohio is not sure what precisely the Authority means to argue. The Authority could be arguing that state guards and adjutants general *become* components of a federal agency when they act as representatives, agents, or designees. That restatement of the representative-or-agent theory would be wrong for the reasons already addressed. And it does not seem to be what the Authority means; rather than arguing that guards and adjutants general *are* agency components, the Authority says they are "*like* components of an agency," that principles relating to components apply "*by extension*" to "entities like petitioners," and that guards and adjutants general act "*on behalf of*" an agency. *Id*. at 30, 27, 8 (emphases added).

Ohio understands the Authority to be arguing by analogy. The argument rests on cases from this Court involving orders issued to subunits of Reform Act "agencies." One case, for example, involved "the United States Geological Survey," which is a "subagency of the Department of the Interior." *Nat'l Fed'n of Fed. Emps. v. Dep't of Interior*, 526 U.S. 86, 90 (1999).

From these cases, the Authority constructs a syllogism:

> (1) the Authority has issued orders to components of agencies, such as subagencies;
>
> (2) components themselves do not "fit" the Reform Act's definition of "agency," Fed. Br.28;
>
> *Therefore*: the Authority may issue orders to other types of non-agencies, including representatives and agents.

This argument is doubly flawed.

First, the second premise is probably false; components of covered agencies likely "fit" within the Reform Act's "agency" definition. The Authority's contrary suggestion seems to rest on the definition of "Executive department." 5 U.S.C. §101. Because that definition enumerates the entities that meet its definition, unenumerated entities *do not* meet the definition. Ohio Br.20–21. But the Authority seems to assume, without explanation, that §101's enumeration captures *only* the parent departments and not their constituent parts. That undefended (and unmentioned) assumption is doubtful. References to organizations and entities naturally encompass organizations' and entities' constituent parts. When the

Eleventh Amendment makes each "of the United States" immune from certain suits, it makes arms of those States immune from the same. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). And a statute that prohibits vandalizing "any church" would naturally prohibit vandalizing church doors. 18 Pa. Stat. §3307(a)(1).

This whole-includes-the-parts reading is especially natural here because of the way Title 5 defines "independent establishment." Recall that Title 5 defines "Executive agency" to include Executive departments, government corporations, and independent establishments. §105. And it defines "independent establishment" to mean "an establishment in the executive branch … *which is not* an Executive department, military department, Government corporation, *or part thereof* …" §104(1) (emphasis added). Why exclude "parts" of these entities from this definition? One possibility is that Congress meant to entirely exclude subcomponents of Executive departments, military departments, and government corporations from Title 5. A likelier possibility is that the "independent establishment" definition excludes these subcomponents because they are already captured by the definitions that capture their parent organizations.

Second, and perhaps more fundamentally, the Authority's conclusion follows only if one accepts a third premise. That premise is: once the Authority is allowed to exceed its power with respect to one category of non-agencies (subagencies), it should be allowed to do the same for other categories of non-agencies (representatives of agencies). The Court should reject that premise and, with it, the Authority's argument. When this Court's holdings improperly expand government power, the Court properly refuses to extend those

holdings any further. *See, e.g.*, *Egbert v. Boule*, 142 S. Ct. 1793, 1803, 1807 (2022); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020). Here, there is not even a *holding* on point—the Court has implicitly assumed, without explanation or objection, that the Reform Act empowers the Authority to issue orders to components of covered agencies. *See, e.g.*, *NASA v. FLRA*, 527 U.S. 229 (1999). If that assumption is wrong, decisions resting upon it provide no justification for permitting the Authority to exceed its statutory authority with respect to still more categories of entities, such as non-agencies that act on behalf of agencies.

b. A group of *amici* press an entirely different component-related argument. *See* Br. of AFL-CIO, et al., 22–25. They observe that a long series of definitions defines the Department of Defense to include the Army and Air Force National Guards of the United States. *See* 10 U.S.C. §§111(b)(6) & (8); 7062(b) & (c)(1); 9062(d)(1); 10105(1); 10111(1); 32 U.S.C. §101(4) & (6). Those entities are defined to include "federally recognized units and organizations of the" Army and Air Force National Guards. 10 U.S.C. §§10105(1); 10111(1). The *amici* say that state guards are federally recognized in the relevant sense. Thus, the *amici* conclude, state guards are part of the Army and Air Force National Guards of the United States, and ultimately part of the Defense Department.

The Court should not consider this novel argument, which the Authority's decision did not rely upon, *Michigan v. EPA*, 576 U.S. 743, 758 (2015); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), and which no party advanced, *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013); *see also Babcock v. Kijakazi*, 142 S. Ct. 641, 645 n.3 (2022). The Court

should hold that neither adjutants general (whom the argument does not even address) nor state guards automatically qualify as Reform Act agencies, even when they employ technicians. It can leave for another day the question whether and for what purposes state guards or state-guard components might, through federal recognition, be taken from the States and placed within the Department.

Notwithstanding the hazards of addressing a novel argument in the final brief of a years-long case, Ohio offers two observations.

First, the relevant definition captures "federally recognized *units and organizations*" of the state guards. 10 U.S.C. §§10105(1) & 10111(1) (emphasis added). So, to bring the Ohio National Guard within this definition, the Authority would need to find that the Guard—rather than specific units or wings within the Ohio Army National Guard or Ohio Air National Guard —"is itself a *federally recognized* Army [or Air Force] National Guard *unit*." *In re Sealed Case*, 551 F.3d 1047, 1055 (D.C. Cir. 2009) (Kavanaugh, J., concurring in the judgment) (quotation marks omitted). It never did. And because neither the Authority nor the Union ever raised this argument, Ohio had no chance to raise legal or factual counterarguments.

Second, the *amici*'s argument requires reading an elephant into a mousehole. If entire state guards have been federally recognized in the relevant sense, *but see id.*, then a long series of definitions quietly transformed state guards into permanent arms of the federal government. And the guards would be converted for *all* purposes—not only for purposes of their dealings with technicians. Thus, the *amici*'s argument reintroduces the constitutional question the Authority

said was not presented and the Court declined to hear. *See* Fed.BIO.13–15.

c. The Union asserts in passing that Congress … surely understood that adjutants general and state national guards were 'agencies'" for Reform Act purposes "when it [comes] to the civilian aspects of technician employment." Union Br.33. But it never makes an argument to support this claim; the Union just cites a string of statutes. The Court can ignore this undeveloped non-argument, which the Union did not raise below and which neither the Sixth Circuit nor the Authority considered.

Regardless, the argument the Union might be gesturing at fails. It points to 10 U.S.C. §111(b)(11). That statute defines the Defense Department to include "offices, agencies, activities, and commands under the control or supervision of" one of the Department's enumerated subcomponents, such as the Army and Air Force Departments. State guards and adjutants general do not qualify. They are *state* entities and officers, at least until being called into federal service. While they may face consequences if they fail to abide by Defense Department regulations, *see* Ohio Br.4–5, the phrase "under the control or supervision" must require something beyond influence and oversight. Otherwise, it would sweep military contractors into the Defense Department. And, given the influence the National Guard Bureau wields over state guards, this reading would include state guards even with respect to conduct unrelated to technicians. Those oddities (and the constitutional doubts they provoke) are easily avoided. The relevant language—"offices, agencies, activities, and commands under the control or supervision of" enumerated subcomponents—naturally comprises entities over whom Defense subcomponents

have direct authority. *See Webster's Third New Int'l Dictionary* 2296 (1993) ("to supervise" means "to coordinate, direct, and inspect continuously and at first hand the accomplishment of"). Neither the Defense Department nor its subcomponents wields that sort of direct authority over state guards and adjutants general. *See* Ohio Br.4–5; *cf.* Fed.Br.30 (state guards may choose not to hire technicians at all).

3. Statutory analogues support Ohio's reading.

Ohio's opening brief bolstered its plain-meaning argument by identifying other contexts in which courts found state guards and adjutants general not to satisfy similar definitions of "agency." For example, courts have held that guards and adjutants general are not "agenc[ies]" under 42 U.S.C. §2000e-6(c), which is part of Title VII of the Civil Rights Act, or 5 U.S.C. §1204(a)(2), which addresses the entities to whom the Merit System Protection Board can issue orders. Ohio Br.26–27 (collecting cases).

The Authority and the Union stress that a recent statutory amendment allows technicians to press Title VII complaints (before the Equal Employment Opportunity Commission and in court) and certain merit-system complaints (before the Merit System Protection Board). Fed.Br.34–35; Union Br.40–41. Even if this amendment weakened Ohio's argument, that would only strip the gilding off the lily; the Reform Act's meaning is clear without the analogues. But the amendment is irrelevant, because it did not alter the definitions of "agency" that courts had interpreted to exclude state guards and adjutants general. Instead, the amendment made the change more directly: it said that Title VII and provisions relating to

the Board "shall apply" to technicians. 32 U.S.C. §709(f)(5); *see* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, §512, 130 Stat. 2112 (2016). Thus, the amendment does not contradict the cases concluding that state guards and adjutants general are not "agencies" under these laws.

The Union notes another amendment. This one says that guards "shall be considered the employing agency," and that adjutants general "shall be considered the head of the agency," in some administrative actions, including some actions before the Merit System Protection Board. Union Br.42 (citing 10 U.S.C. §10508(b)(3)(A)). This is triply irrelevant. First, it does not contradict cases saying that, *in the absence* of such language, neither state guards nor adjutants general are "agencies." Second, this statute did not amend the Reform Act's "agency" definition. Finally, this language has no bearing on dual-status technicians because it applies only to "other federal civilian employees." Fed.Br.9. More precisely, it applies to disputes involving federal employees who, by order of the Chief of the National Guard Bureau, are "appointed, employed, or administered by an adjutant general *under this subsection*." §10508(b)(3) (emphasis added). "[T]his subsection" means subsection (b) of §10508. Dual-status technicians, however, are not appointed, employed, or administered under that subsection. Instead, they are "employ[ed] and administer[ed]" by adjutants general under an entirely different law. 32 U.S.C. §709(d).

B. The history the Authority and Union stress does not help their case.

The Authority and the Union wrongly insist that past practice and statutory history support their interpretation.

1. The Authority and the Union observe that state guards "have bargained with the technicians' union for over 50 years." Fed.Br.26; *accord id.* 9–10; Union Br.17–19. That is unilluminating. For decades, courts have uniformly misconstrued the Reform Act as empowering the Authority to issue orders to state guards and adjutants general. Their opinions are hardly indicative of the Act's proper construction—they rest primarily on precedential inertia and contain little statutory analysis. *See, e.g.*, *Lipscomb v. FLRA*, 333 F.3d 611, 617 & n.6 (5th Cir. 2003). The "magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020). And the guards' acquiescence in this legal wrong is equally irrelevant. It might suggest resignation, disinterest, or an aversion to litigation. It says little about the meaning of "agency."

The Authority and the Union also place special emphasis on labor practices carried out under Executive Order 11,491. *See Labor-management relations in the Federal Service*, 34 Fed. Reg. 17605 (Oct. 29, 1969). That order, which predated the Reform Act, gave collective-bargaining rights to federal employees.

The Authority argues that, because nothing in the Reform Act strips technicians of those rights, the Act necessarily *preserved* technicians' collective-bargaining rights. Fed.Br.23. Even if that is right, however, it establishes only that technicians have collective-

bargaining rights, not that the Authority may enforce those rights by issuing orders to state guards and adjutants general.

The Union advances a slightly different argument. Union Br.27. It notes that Executive Order 11,491 empowered the Federal Service Impasses Panel, the Federal Labor Relations Council, and the Assistant Secretary of Labor for Labor-Management Relations to address disputes between labor organizations and "agenc[ies]." The order defined "agency" using the very same Title 5 definitions relevant to this case: "'Agency' means an executive department, a Government corporation, and an independent establishment …." Executive Order 11,491, §2(a). The Panel, the Council, and the Assistant Secretary sometimes considered matters involving state guards and technicians. Therefore, the Union argues, state guards must have been considered "agencies" under the Executive Order's definition, which the Reform Act later used.

The Union's argument rests on a distorted version of the prior-construction canon. Under that canon, "[i]f a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction." Antonin Scalia & Bryan A. Garner, *Reading Law* §54, p.322 (2012).

For at least two reasons, the canon does not apply here. *First*, the Union never identifies an authoritative or widespread interpretation of the Executive Order's "agency" definition. *See* Union Br.18–22. Of the six matters it cites, two involve labor-dispute impasses in which the Panel participated without

considering whether state guards are "agencies." *See Mich. Nat'l Guard & Local R8-22 Nat'l Ass'n of Gov't Emps.*, 74 FSIP 26 (1975); *Tex. Air Nat'l Guard & Tex. Air Guard Council of Locals*, 72 FSIP 3 (1972). Three others were issued after the Reform Act's passage and never addressed the meaning of "agency." *In the Matter of Wis. Army Nat'l Guard Office of the Adjutant Gen.*, 83 FSIP 56 (1983); *Ass'n of Civilian Technicians, Granite State Chapter Ass'n & the Adjutant Gen.*, 7 FLRA 241 (1981); *Am. Fed'n of Gov't Emps., Local 2955 & the Adjutant Gen. of Iowa, the Nat'l Guard of Iowa*, 2 FLRA 322 (1979). In the remaining example, the Assistant Secretary declared that Executive Order 11,491 applied to state guards that employ technicians, but never interpreted (or even cited) the Order's definition of "agency." *Miss. Nat'l Guard, 172nd Airlift Group & Miss. Nat'l Guard*, Decisions and Reports on Rulings of the Assistant Sec'y of Labor for Labor-Management Relations Pursuant to Executive Order 11491, Vol. 1, pp.126–30 (April 2, 1971).

Second, the Reform Act's "agency" definition does not "use[] words or phrases" borrowed from the Executive Order. Scalia & Garner, *Reading Law* §54, at 322. The Act defines "agency" to mean (among other things) "Executive agency," 5 U.S.C. §7103(a)(3), which Title 5 had defined since 1966 to mean "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. §105; Pub. L. 89-554, 80 Stat. 378, 378–79 (1966). Also in 1966, Congress defined the phrases "executive department," "government corporation," and "independent establishment." *See* 5 U.S.C. §§101, 103, 104; Pub. L. 89-554, 80 Stat. 378, 378–79. Those Title 5 definitions, which Congress enacted in 1966, did not "use[] words or phrases" from Executive Order 11,491, which

President Nixon issued in 1969. The prior-construction canon thus has no bearing on the relevant statutory definitions.

In sum, the history shows, at most, that some members of Congress—had they considered the matter—might have assumed the Authority would issue orders to state guards and adjutants general under the Reform Act. But "assumptions are not laws." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2500 (2022).

2. Both the Authority and the Union point to the following language from the Reform Act:

> Policies, regulations, and procedures established under and decisions issued under Executive Order[] 11491 … shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

5 U.S.C. §7135(b). According to the Authority, because Ohio was "required to bargain with dual status technicians under Executive Order 11,491 and because no specific provisions of the Act altered that coverage, Congress continued that bargaining requirement" with the Reform Act. Fed. Br.23; *accord* Union Br.30–32.

The problem with the argument is familiar: this case does *not* ask whether technicians have collective-bargaining rights or whether Ohio must bargain with them. The question presented is whether the Authority may enforce any such rights by issuing orders to Ohio directly.

Section 7135 has no bearing on *that* question. First, neither the Authority nor the Union has shown that giving "agency" its natural meaning in this dispute, and in future disputes between technicians and state guards, would require denying force or effect to any policy, regulation, procedure, or decision issued under the Order. (Ohio's position does not, for example, speak to whether decisions issued under the Order continue to bind the parties to whom they issued.) Most important, they have identified no pre-Act policy or decision establishing that state guards and adjutants general are "agencies" in the relevant sense. *See above* 19–20.

Further, because the Authority did not exist until the Reform Act created it, no pre-Act policy, regulation, procedure, or decision could have empowered the Authority to do anything that Ohio's interpretation would bar it from doing.

Finally, even if there were pre-Act policies, regulations, procedures, or decisions establishing the Authority's power to issue orders to state guards and adjutants general, they were "superseded by specific provisions" of the Reform Act itself. §7135(b). In particular, the Act permits the Authority to issue orders *only* to labor organizations and agencies. Neither state guards nor adjutants general qualify, for reasons that are by now repetitive.

The Authority and the Union also stress that Congress affirmatively decided *not* to abrogate technicians' collective-bargaining rights when it enacted 10 U.S.C. §976—a law that generally prohibits military personnel from unionizing. Fed.Br.23–24; Union Br.23–25. But this argument again establishes at

most that technicians have collective-bargaining rights. It does not respond to the question presented.

* * *

The Authority and the Union eagerly discuss everything but the plain-text inquiry the question presented tees up. But no amount of misdirection can "expand the phrase" Executive agency so that the Reform Act means what the Authority and Union think "Congress really meant to say." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018).

II. The federalism canon requires resolving any ambiguity in Ohio's favor.

A. The federalism canon requires Congress to use exceedingly clear language if it wishes to alter "the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (quotation marks omitted). The canon applies to this case. Generally speaking, our Constitution gives "Congress the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). Thus, if the Reform Act were interpreted as empowering the Authority to directly command action by state guards and adjutants general, it would alter the usual state-federal balance. The militia context strengthens the point. Our Constitution reserves to the States the power to operate militias. The States' guards and adjutants general discharge that sovereign prerogative. In doing so, they must make "complex" and "subtle … military judgments," *Austin v. U.S. Navy Seals 1–26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring)—judgments that an agency composed of labor-law experts is not likely to grasp.

Because the federalism canon applies, and because the Reform Act does not *clearly* empower the Authority to issue orders to state guards and adjutants general, the Act must be interpreted not to give the Authority that power.

B. The Authority and the Union stress that, because "management of the labor conditions of federal employees is not a matter traditionally left to the States," reading the Reform Act to regulate those conditions "does not alter the relationship between state National Guards and the federal government." Fed.Br.38 (quotation marks and brackets omitted); *see also* Union Br.43–46.

This argument knocks down a straw man. Ohio is not arguing that regulating technicians' working conditions upsets the traditional state-federal balance. Instead, Ohio contends that allowing a federal administrative tribunal to issue commands to a state entity is the sort of alteration to the state-federal balance that Congress can make only through exceedingly clear language. Neither the Authority nor the Union addresses that argument.

The Authority additionally denies that its reading would interfere with the States' military prerogatives. It stresses that technicians have collective-bargaining rights *only* with respect to their federal civilian work, not their military work. Fed.Br.42; *accord id.* 39–41.

This argument proves the problem with letting labor lawyers regulate the military. While technicians' civil and military activities can be separated for accounting purposes, *Babcock*, 142 S. Ct. at 644, relations strained by labor disputes are not likely to cease once technicians don their military hats. Further, labor conflict relating to technicians' civilian roles will

impact military readiness, since technicians support readiness even in those roles.

CONCLUSION

The Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

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