No. 21-1454

In the Supreme Court of the United States

THE OHIO ADJUTANT GENERAL'S DEPARTMENT, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the adjutant general of a state National Guard unit, and the unit itself, are subject to the requirements of the Federal Service Labor-Management Relations Act, 5 U.S.C. 7101 *et seq.*, when they act in their capacities as supervisors of dual status technicians, who are "[f]ederal civilian employee[s]," 10 U.S.C. 10216(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 21 F.4th 401. The decision and order of the Federal Labor Relations Authority (Pet. App. 17a-33a) is reported at 71 F.L.R.A. 829. The decision of the administrative law judge (Pet. App. 34a-167a) is unreported but is available at 2018 WL 3344946.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2021. A petition for rehearing was denied on February 14, 2022 (Pet. App. 168a-169a). The petition for a writ of certiorari was filed on May 13, 2022, and granted on October 3, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

A. Statutory Background

1. Congress adopted the Federal Service Labor-Management Relations Act (Act), 5 U.S.C. 7101 *et seq.*, in 1978. The Act "declar[ed] that 'labor organizations and collective bargaining in the civil service are in the public interest'" and "significantly strengthened the position of public employee unions while carefully preserving the ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983) (quoting 5 U.S.C. 7101(a) and (b)). The Act provides generally for collective bargaining between federal agencies (and their components) and the union representatives of their employees. See 5 U.S.C. 7102, 7103(a)(12), 7106. The Act defines "'employee'" to include any individual who is "employed in an agency." 5 U.S.C. 7103(a)(2)(A). And it defines "'agency'" to include "Executive agenc[ies]," 5 U.S.C. 7103(a)(3), a term that in turn includes "Executive department[s]," 5 U.S.C. 105. The Department of Defense (DOD) is an executive department. 5 U.S.C. 101.

The Act bars both agencies and unions from engaging in unfair labor practices. See 5 U.S.C. 7116(a) and (b). As relevant here, the Act makes it an unfair labor practice for an agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Act; refuse to "negotiate in good faith" with a union; or "otherwise fail or refuse to comply with any provision" of the Act. 5 U.S.C. 7116(a)(1), (5), and (8).

The Federal Labor Relations Authority (FLRA) administers the Act. See 5 U.S.C. 7104, 7105. The FLRA is responsible for certifying "appropriate unit[s]" of federal employees for collective bargaining. 5 U.S.C. 7111(a); see 5 U.S.C. 7112. "If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice," the FLRA's General Counsel investigates and, following that investigation, "may issue and cause to be served upon the agency or labor organization a complaint." 5 U.S.C. 7118(a)(1). The FLRA is also responsible for "conduct[ing] hearings and resolv[ing]" such complaints. 5 U.S.C. 7105(a)(2)(G); see 5 U.S.C. 7105(a)(2). If the FLRA determines that an agency or a union has engaged in unfair labor practices, it "may require" the entity "to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate." 5 U.S.C. 7105(g)(3).

2. This case concerns the application of the Act to a unique class of federal civilian employees: dual status military technicians working for the National Guard.

a. The Militia Clauses of the Constitution give Congress and the States shared authority over the National Guard. Congress has the authority "[t]o provide for calling forth the Militia" and "for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. Const. Art. I, § 8, Cls. 15, 16. Pursuant to that authority, Congress requires members of state National Guards to swear an oath to obey orders from both their Governor and the President. See *Perpich* v. *Department of Def.*, 496 U.S. 334, 343 (1990); 32 U.S.C. 304, 312. Congress also requires members to simultaneously enlist or be appointed into both their

state National Guard units and the federal reserves. See *Perpich*, 496 U.S. at 343; see also, *e.g.*, 10 U.S.C. 12107(b)(1) and (2). When "a member of the Guard * * * is ordered to active duty in the federal service," he generally is "relieved of his * * * status in the State Guard for the entire period of federal service." *Perpich*, 496 U.S. at 346; see 32 U.S.C. 325(a). Congress imposes discipline and training requirements on state National Guards through the National Guard Bureau, a federal entity within DOD. See 10 U.S.C. 10501, 10503.

The Constitution grants States the authority to "Appoint[] * * * Officers" and "train[] the Militia according to the discipline prescribed by Congress." U.S. Const. Art. I, § 8, Cl. 16. When not on active federal duty, members of state National Guards are called the nonfederalized National Guard, and their day-to-day activities are controlled by the States, although their positions, equipment, and operations are funded and regulated by the federal government. See 10 U.S.C. 10107; 32 U.S.C. 106. And States supervise their National Guard members on the occasions when they are called up for state active-duty service—for example, when a State activates the Guard for local disaster relief. But state National Guards are always required to comply with federal discipline and training requirements. See U.S. Const. Art. I, § 8, Cl. 16.

b. Congress first authorized the use of civilian technicians by the National Guard in 1916. Specifically, Congress permitted States to employ the predecessors of modern dual status technicians by providing that federal funding could be used "for the compensation of competent help for the care of the material, animals, and equipment." National Defense Act of 1916, ch. 134, § 90, 39 Stat. 205-206.

By 1968, States employed approximately 42,000 such technicians, who were "full-time civilian employees of the National Guard." S. Rep. No. 1446, 90th Cong., 2d Sess. 1 (1968) (1968 Senate Report); see H.R. Rep. No. 1823, 90th Cong., 2d Sess. 1 (1968) (1968 House Report). Approximately 95% of those technicians were "required to hold concurrent National Guard membership as a condition for their civilian employment." 1968 House Report 1-2. In 1968, Congress converted those technicians from state employees to federal civilian employees, provided them with federal retirement and fringe benefits, and granted them coverage under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for acts or omissions that occur within the scope of their federal employment—while permitting the States to continue to supervise the technician program. National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755; see 1968 House Report 1; 1968 Senate Report 1.

c. Under current federal law, a dual status military technician is "a federal civilian employee who provides technical or administrative assistance to the National Guard" by "'organizing, administering, instructing,' 'training,' or 'maintenance and repair of supplies.'" *Babcock* v. *Kijakazi*, 142 S. Ct. 641, 643-644 (2022) (quoting 10 U.S.C. 10216(a)(1)(C)); see 32 U.S.C. 709(a)(1) and (2). "A technician * * * is an employee of the Department of the Army or the Department of the Air Force * * * and an employee of the United States." 32 U.S.C. 709(e); see 10 U.S.C. 10216(a)(1) ("For purposes of * * * any * * * provision of law, a military technician (dual status) is a Federal civilian employee."); cf. 10 U.S.C. 10503(9). For work done in the technician role, dual status technicians receive civil service pay and benefits

from the federal government under Title 5 of the United States Code—just like other members of the federal civil service. See 5 U.S.C. 2105, 5105, 5332, 5342, 8332(b)(6), 8401(30); see also *Babcock*, 142 S. Ct. at 644.

Dual status technicians are "required as a condition of" their federal civilian employment "to maintain" National Guard membership. 10 U.S.C. 10216(a)(1)(B). But, as this Court recently confirmed, their military role is "separate" from their civilian role. *Babcock*, 142 S. Ct. at 644. As part of their military role, technicians—like all members of a state National Guard unit—enlist or are appointed simultaneously in that unit and the federal reserves, swearing an oath to obey orders from both their Governor and the President. See pp. 3-4, *supra*. And, like all members of a National Guard unit, technicians "must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time." *Perpich*, 496 U.S. at 348. An individual who is a dual status technician wears his state militia hat when he participates in weekend drills, annual training, and active-duty status on behalf of the State. He wears his Army (or Air Force) hat when called to federal active-duty status. And he wears his civilian hat when he works as a dual status technician in the federal civil service.

Because of the civilian nature of the technician role, dual status technicians possess a variety of "characteristically civilian rights." *Babcock*, 142 S. Ct. at 646. For example, with some exceptions, if a dual status technician is the victim of a discriminatory practice while acting in his civilian capacity, he can file a complaint with the Equal Opportunity Employment Commission (EEOC), and, if the EEOC does not take action, file a civil suit. 32 U.S.C. 709(f)(5); see 42 U.S.C. 2000e-16.

Dual status technicians also can earn compensatory time off for working additional hours; receive workers' compensation pursuant to the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, for on-the-job injuries; and obtain disability benefits under Title 5. See 5 U.S.C. 8337(h), 8451; 32 U.S.C. 709(h); Nat'l Guard Bureau, U.S. Dep't of Def., *Chief National Guard Bureau Instruction: National Guard Technician Injury Compensation Program*, CNGBI 1400.25, Vol. 800 (Aug. 9, 2018), https://perma.cc/Z9J7-3BP9.

Dual status technicians are likewise treated in the same manner as other federal civilian employees with respect to their National Guard service. If, for example, it is necessary for a technician to fulfill his National Guard service requirements during his civilian workweek—for state or federal active or inactive duty—he must take military leave, annual leave, or leave without pay like any other federal civilian employee who is a member of the National Guard. See 5 U.S.C. 6323(a) and (b); Nat'l Guard Bureau, U.S. Dep't of Def., *Chief National Guard Bureau Instruction: National Guard Technician Absence and Leave Program*, CNGBI 1400.25, Vol. 630 (Aug. 6, 2018), https://perma.cc/YJE5-D267.[1]

d. Federal law requires each State to have an adjutant general, 32 U.S.C. 314(a), who is responsible for overseeing both the military members of a state

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[1] Congress previously provided for a small number of non-dual status technicians who were required to comply with some of the mandates applicable to dual status technicians but were not required to maintain National Guard membership. See 10 U.S.C. 10217(a). All non-dual status technicians have now been converted to other types of federal civilian employees. See 10 U.S.C. 10217(e) (2018 & Supp. II 2020).

National Guard and its federal civilian employees. Adjutants general, like other members of state National Guard units, are simultaneously appointed into both their state National Guard unit and the federal reserves, and they swear an oath to obey orders from both their Governor and the President. See 32 U.S.C. 312; cf. 10 U.S.C. 12215. Adjutants general likewise may be called up for federal duty; when that occurs, they receive federal pay and benefits—just like other federalized members of the National Guard. See Ohio Rev. Code Ann. § 141.02(C) (LexisNexis 2019); *id.* § 5913.021(A) (LexisNexis 2017).

Federal law gives adjutants general specific authority over dual status technicians. Congress directed the Secretary of the Army and the Secretary of the Air Force to "designate the adjutants general * * * to employ and administer" dual status technicians. 32 U.S.C. 709(d); see, *e.g.*, Stanley R. Resor, Sec'y of the Army, Headquarters, U.S. Dep't of the Army, *Delegation of Authority Under the National Guard Technicians Act of 1968*, Gen. Order 85 (Dec. 31, 1968), https://perma.cc/V73T-ZZ23. An adjutant general who has been so designated acts on behalf of the federal government and hires individuals into the federal civil service when he hires them into their technician roles. See 5 U.S.C. 2105(a)(1)(F) (providing that a federal civilian employee for Title 5 purposes includes an individual "appointed in the civil service by" "an adjutant general" "acting in an official capacity"); see also 10 U.S.C. 10216(a)(1)(A); 32 U.S.C. 709(b) and (d). Federal law authorizes an adjutant general to "separate[]" dual status technicians "from [their] technician employment for cause" and discharge technicians for other reasons. 32 U.S.C. 709(f)(2); see 32 U.S.C. 709(f)(3). And, if a dual status technician

is separated from the National Guard, federal law requires the adjutant general to discharge him from his technician role. 32 U.S.C. 709(f)(1).

Federal law likewise gives adjutants general specific authority over other federal civilian employees attached to state National Guard units. Congress has authorized the National Guard Bureau to designate adjutants general "to appoint, employ, and administer" other federal employees who work in state National Guard units, and the Bureau has done so. 10 U.S.C. 10508(b)(2); see 5 U.S.C. 2105(a)(1)(F); Nat'l Guard Bureau, U.S. Dep't of Def., *Chief of the National Guard Bureau Instruction: National Guard Technician and Civilian Personnel*, CNGBI 1400.25A, at A-2, B-1 (May 11, 2020), https://perma.cc/L635-RR7M.

3. Dual status technicians, including those in Ohio, have had the right to participate in collective bargaining for over 50 years. Before the Federal Service Labor-Management Relations Act was adopted, "labor-management relations in the federal sector were governed by a program established" by Executive Orders, "under which federal employees had limited rights to engage in" collective bargaining. *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 91-92; see Exec. Order No. 11,491, 3 C.F.R. 505 (1972); Exec. Order No. 10,988, 3 C.F.R. 130 (Supp. 1962). Those Executive Orders granted technicians the right to collectively bargain. See Pet. App. 35a, 39a, 98a; see also J.A. 7, 17, 23, 28. By the time Congress adopted the Act in 1978, there were 57 National Guard bargaining units in 37 States (plus the District of Columbia), and 63,000 technicians had the right to collectively bargain. H.R. Rep. No. 894, 95th Cong., 2d Sess. Pt. 2, at 4-7 (1978) (1978 House Report); U.S. Office of Pers. Mgmt., *Union Recognition in*

the Federal Government As of January 2001, OWR-58 (Mar. 2002).

In 1971, the Ohio National Guard and its adjutant general recognized the predecessor of the dual status technicians' current union, and, in 1990, the FLRA certified the current union, American Federation of Government Employees, Local 3970, AFL-CIO (the Union), as the exclusive representative of Ohio's technicians. Pet. App. 39a; J.A. 7, 17, 23, 28; see *In re Adjutant Gen. Dep't*, A/SLMR No. 44, at 234 (1971). From 1971 to 2016, the Ohio National Guard and its adjutant general bargained with the technicians' union representatives. Pet. App. 3a, 35a, 39a, 96a-98a; see, *e.g.*, *In re Ohio Air Nat'l Guard*, 77 FSIP 36, 1977 WL 5332 (Dec. 8, 1977). And after Congress adopted the Act and created the FLRA, the Ohio National Guard and its adjutant general complied with FLRA orders without challenging the FLRA's jurisdiction for nearly four decades. Pet. App. 96a-97a; see, *e.g.*, *In re Adjutant Gen.*, 21 F.L.R.A. 1062 (1986).

Today, federal records indicate that all but one State (Mississippi) and multiple territories have certified bargaining units that include dual status technicians and that more than 32,000 technicians are covered by a collective bargaining agreement. In Ohio, more than 900 technicians are covered by a collective bargaining agreement.

B. Procedural History

1. In 2011, petitioners (the Ohio National Guard, the Ohio Adjutant General, and the Ohio Adjutant General's Department) and the Union executed a collective bargaining agreement that expired in 2014. Pet. App. 3a; J.A. 7-8, 23, 39. That agreement was approved by DOD before it went into effect. Pet. App. 43a-44a; see

5 U.S.C. 7114(c)(1) (providing that a collective bargaining agreement "between any agency and [union] shall be subject to approval by the head of the agency"); Sec'y of Def. for Pers. & Readiness, DOD, *DOD Civilian Personnel Management System: Labor-Management Relations*, DOD Instruction 1400.25, Vol. 711, at 8-10 (Feb. 26, 2020), https://perma.cc/CT2T-WDFU.

Petitioners and the Union did not reach a new collective bargaining agreement before the 2011 agreement expired. Pet. App. 3a-4a. But in January 2014, petitioners informed the Union that they "intend[ed] to continue to honor those agreements that are mandatory subjects of bargaining," J.A. 49, as required by the Act, see 5 U.S.C. 7116(a)(1) and (5). And in March 2016, petitioners and the Union adopted a memorandum of understanding; as part of that agreement, petitioners pledged that they would continue certain practices required by the expired agreement that were "a mandatory subject of bargaining under the" Act. J.A. 51, 53.

In September 2016, however, petitioners changed course. See Pet. App. 45a-54a. In a memorandum issued by the Ohio Adjutant General's Department and sent to dual status technicians, petitioners asserted that they are "not bound by any provision of the [collective bargaining agreement] between the parties that expired in 2014." J.A. 36; see Pet. App. 4a-5a, 49a-54a. More broadly, the memorandum declared that petitioners "do[] not consider [themselves] obligated to abide by the" Act when dealing with dual status technicians. J.A. 36.

A dual status technician—like any other federal employee with collective bargaining rights—normally files a Standard Form 1187 to request payroll deductions for union dues; if he later wishes to cancel those deductions,

he must file a different form, Standard Form 1188. Pet. App. 5a. In 2014 or 2015, it became apparent that petitioners lacked 1187 Forms that they should have had on file for some technicians who had opted to have union dues withheld. *Id.* at 66a; see J.A. 61-62. In November 2016, after petitioners distributed the 2016 memorandum, the Ohio National Guard sent letters to those technicians, asking them to submit 1187 Forms; if the technicians did not promptly do so, the Guard completed 1188 Forms on their behalf and signed the forms without asking for their consent. Pet. App. 5a, 39a; see J.A. 10, 24. That resulted in the termination of union dues withholding for 89 technicians. Pet. App. 5a-6a. The Guard also sent letters to technicians who had valid 1187 Forms on file, informing them that it was recommending that their union dues deductions be terminated because there was no longer a collective bargaining agreement. *Id.* at 6a; see *id.* at 66a-80a.

2. The Union filed unfair labor practice charges against the Ohio National Guard with the FLRA's General Counsel. Pet. App. 6a, 37a-38a. The General Counsel consolidated the cases and issued complaints alleging that the Ohio National Guard (1) "refus[ed] to negotiate in good faith," and (2) "interfer[ed] with, restrain[ed], and coerc[ed] employees in the exercise of" their rights under the Act by its treatment of technicians' union dues deductions. J.A. 12, 18; see J.A. 6-21; see also 5 U.S.C. 7116(a)(1), (5), and (8). After the complaints were filed, the Ohio Adjutant General and the Ohio Adjutant General's Department intervened on the side of the Ohio National Guard. Pet. App. 40a.

a. An FLRA Administrative Law Judge (ALJ) held a hearing and concluded that the FLRA had jurisdiction and that petitioners had engaged in unfair labor

practices. Pet. App. 34a-167a. The ALJ found that dual status technicians "are employees within the meaning of the" Act and that petitioners "are agencies within the meaning" of the Act. *Id.* at 117a-118a; see *id.* at 96a-118a. The ALJ determined that petitioners had committed multiple unfair labor practices, including by failing to bargain in good faith and in their treatment of union dues withholding. *Id.* at 118a-154a; see *id.* at 10a-11a. The ALJ ordered petitioners to follow the mandatory terms of the 2011 collective bargaining agreement, bargain in good faith going forward, and reinstate union dues withholding. *Id.* at 162a-167a; see *id.* at 11a.

b. On appeal, the FLRA adopted the ALJ's findings, conclusions, and remedial order. Pet. App. 19a; see *id.* at 17a-34a. Then-Member Abbott concurred, noting that under "current judicial precedent" the FLRA was "bound to assume jurisdiction" but stating that he had "concerns regarding existing judicial and [FLRA] precedent which applies the [Act] to the Adjutant General." *Id.* at 26a-27a. Then-Chairman Kiko dissented; in her view, the "treatment of state Adjutants General as federal 'Executive agencies' is wrong." *Id.* at 28a (brackets and citation omitted); see *id.* at 28a-33a.

c. The court of appeals denied petitioners' petition for review. Pet. App. 1a-16a.

The court of appeals explained that "while each state unit of the National Guard is a state agency, under state authority and control, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law." Pet. App. 11a (brackets, citation, and internal quotation marks omitted). The court also explained that dual status technicians "receive 'the benefits and rights generally provided for federal employees in the civil service.'" *Ibid.* (citation omitted). The court

therefore concluded that "state national guards are executive agencies" "in their capacity as employers of" technicians. *Ibid.* The court noted that "[e]very other circuit that has considered this issue has similarly found that state national guards constitute executive agencies in their capacity as employers and supervisors of technicians." *Id.* at 11a-12a.

The court of appeals also found that because dual status technicians "are 'federal civilian employees,' not uniformed services employees[,] * * * they have collective bargaining rights under the" Act. Pet. App. 14a (quoting 10 U.S.C. 10216(a)(1)). And the court concluded that "because the FLRA is tasked with enforcing" collective bargaining rights, "it follows that technicians fall under the FLRA's jurisdiction." *Id.* at 13a. The court also noted that "[t]he legislative history of 10 U.S.C. § 976, which prohibits military unions," supported its reading because "[t]he House Committee specifically rejected the idea that civilian technicians were members of the military." *Ibid.* (citing 1978 House Report 7).

The court of appeals rejected petitioners' argument that the Militia Clauses, U.S. Const. Art. I, § 8, Cls. 15, 16, bar Congress from conferring collective bargaining rights on dual status technicians. Pet. App. 14a-15a. The court again noted that, in their "capacit[ies] as employer[s] of dual-status technicians," petitioners "were not acting as state agencies, but instead as federal executive agencies." *Id.* at 15a. The court therefore determined that "[i]t is not unconstitutional for the FLRA to enforce the [Act] by issuing orders to state national guards and their adjutants general * * * when the labor dispute at hand is related to the civilian aspects of a technician's job." *Ibid.*

Finally, the court of appeals rejected petitioners' assertion that they were unable to comply with the FLRA's order to the extent it required them to reinstate union dues withholding. Pet. App. 16a. The court found that "[i]t is neither unlawful nor impractical for the Guard to comply with" an order to "restore" dues withholding that the Guard itself had "erroneously cancelled" by "submitt[ing] Form 1188s on behalf of numerous technicians without their consent." *Ibid.*

d. The court of appeals denied rehearing en banc. Pet. App. 168a-169a.

SUMMARY OF ARGUMENT

I. The Federal Service Labor-Management Relations Act confers collective bargaining rights on dual status technicians because they are employees of a covered federal agency. And Congress has required the Secretaries of the Army and Air Force to "designate" adjutants general "to employ and administer" technicians. 32 U.S.C. 709(d). That designation is the sole basis for petitioners' authority to oversee technicians performing work in their federal civilian roles, which means that petitioners act on behalf of—and exercise the authority of—a covered federal agency when they supervise dual status technicians. The Act therefore requires petitioners to collectively bargain with dual status technicians, comply with FLRA orders, and otherwise act in conformance with the Act's requirements.

A contrary reading would contradict the text and structure of the relevant statutes, including the plain meaning of "designate." And it would make the collective bargaining rights that the Act explicitly confers on technicians effectively unenforceable. That would violate the basic principle that one statutory provision should not be read to invalidate another.

The Act's context confirms that petitioners are required to comply with the Act. Technicians enjoyed the right to collectively bargain under Executive Orders that predated Congress's adoption of the Act, and the Act specifically provided that bargaining rights granted under Executive Orders broadly survived the Act's adoption. When Congress enacted a related statute that generally prohibited members of the military from engaging in collective bargaining, it permitted technicians to continue to bargain over their federal civil service. And Congress has conferred a variety of civilian employment rights on technicians, so its continuation of technicians' bargaining rights accords with its consistent treatment of technicians.

II. Petitioners' assertion that they are neither required to comply with the Act nor subject to the FLRA's authority is incompatible with the statutory text and context.

Petitioners primarily argue that they need not comply with the Act because they are not covered agencies. But other entities that employ and supervise an agency's covered employees likewise fall within the Act's coverage. Notably, the Act is clear that components of a federal agency—even components that do not themselves fall within the statutory definition of an "agency"—must comply with the Act. Adjutants general stand in the same posture. They are not required to employ dual status technicians at all. But if they choose to do so, they assume a distinct federal role and act on behalf of a covered agency because Congress has expressly authorized them to "employ and administer" a unique class of federal civilian employees on DOD's behalf. 32 U.S.C. 709(d). In assuming that distinct federal role and accompanying federal authority, adjutants

general also assume the accompanying federal-law obligation to comply with the Act.

In arguing otherwise, petitioners invoke statutory provisions that are not directly relevant to the question presented and lower-court decisions addressing technicians' treatment in other contexts. But those provisions and decisions do not address the Act's coverage or otherwise suggest that petitioners need not comply with the Act. And petitioners' remaining arguments—a case-specific objection to a portion of the FLRA's remedial order and an assertion that the government has forfeited a purely legal argument squarely encompassed by the question presented—provide no reason to depart from a straightforward reading of the applicable statutory provisions.

Finally, petitioners assert that requiring them to engage in collective bargaining with technicians and comply with the FLRA's orders distorts the normal balance of federal and state powers. That argument stumbles out of the gate because technicians are federal employees, so there is no federalism problem with the federal government regulating the conditions of their federal employment. Petitioners' related invocation of the Militia Clauses and the principle that courts should be cautious when interfering with military matters likewise fails because technicians are civilian employees. And federal law carefully cabins technicians' bargaining rights, ensuring that petitioners are only required to bargain over certain conditions of technicians' civil service—and not their separate state National Guard service. Petitioners and their counterparts in other States have collectively bargained with dual status technicians for more than half a century; requiring them to

continue to do so will not alter the balance of power between the federal and state governments.

ARGUMENT

I. THE ACT REQUIRES PETITIONERS TO COLLECTIVELY BARGAIN OVER CERTAIN CONDITIONS OF DUAL STATUS TECHNICIANS' EMPLOYMENT AND COMPLY WITH THE FLRA'S ORDERS

Dual status technicians are employees of DOD, a federal agency covered by the Act. The Act therefore clearly confers collective bargaining rights on technicians. Petitioners act on DOD's behalf, and exercise DOD's authority, when they employ dual status technicians working in their federal civilian roles. Petitioners accordingly must collectively bargain with dual status technicians, obey the FLRA's orders, and otherwise comply with the Act's requirements. Reading the Act otherwise would make the collective bargaining rights that the Act undoubtedly confers on technicians effectively unenforceable.

The Act's context confirms that petitioners are subject to the Act's requirements. The Act explicitly incorporated Executive Orders that granted technicians collective bargaining rights. And 10 U.S.C. 976, which generally prohibits military unions, was carefully crafted to ensure that technicians retained the right to collectively bargain over their civilian service. The fundamentally civilian nature of the technician role, along with the various hats worn by adjutants general, further support the conclusion that petitioners must comply with the Act's requirements.

A. Dual Status Technicians Are Employees Of A Federal Agency Covered By The Act

The Act provides that it is an unfair labor practice for a covered agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under" the Act. 5 U.S.C. 7116(a)(1). The Act in turn defines "'employee'" to include any individual who is "employed in an agency." 5 U.S.C. 7103(a)(2)(A).

Petitioners no longer dispute that dual status technicians are employees of an agency covered by the Act. Compare Pet. C.A. Br. 40-48, with Pet. Br. 37. In any event, the relevant statutory text is clear: a "technician * * * is an employee of the Department of the Army or the Department of the Air Force." 32 U.S.C. 709(e); see 10 U.S.C. 10216(a)(1)(A). And a series of nesting statutory definitions provides that those Departments are part of an agency for purposes of the Act. The Act defines "'agency'" to include "Executive agenc[ies]," 5 U.S.C. 7103(a)(3), and the term "'Executive agenc[ies]'" includes "Executive department[s]," 5 U.S.C. 105. DOD—of which the Department of the Army and the Department of the Air Force are parts, 10 U.S.C. 111(b)(6) and (8)—is an executive department and thus an executive agency. 5 U.S.C. 101. In short, dual status technicians are "employed in an agency"—DOD—for purposes of the Act, and, like other civilian employees of that agency, are covered by the Act. 5 U.S.C. 7103(a)(2)(A).

Other statutory provisions confirm that dual status technicians are federal civilian employees. Had Congress wished to exempt dual status technicians from the Act's coverage, it could have excluded them from the definition of "employee" or listed the Act among the provisions of Title 5 that do not apply to technicians. See 5 U.S.C. 7103(a)(2) (excluding various categories of

federal employees from the definition of "employee"); see also 32 U.S.C. 709(g) (excluding technicians from coverage under various Title 5 provisions). Congress did not do so. Instead, it specified in one of the two primary provisions governing dual status technicians that technicians are "[f]ederal civilian employee[s]" "[f]or purposes of * * * *any* * * * provision of law." 10 U.S.C. 10216(a)(1) (emphasis added). That includes the Act. Accordingly, as even petitioners now appear to concede, Congress has unambiguously directed that dual status technicians are entitled to the Act's protections, including the right to collectively bargain.

B. Petitioners Act On Behalf And Exercise The Authority Of A Federal Agency Covered By The Act When Supervising Dual Status Technicians

Petitioners supervise dual status technicians because the Secretary of the Army and the Secretary of the Air Force have "designate[d]" the Ohio Adjutant General "to employ and administer the technicians." 32 U.S.C. 709(d). That federal-law designation is the sole basis for the Ohio Adjutant General's authority to supervise technicians when they perform work in their technician roles; absent it, he would have no part in overseeing technicians' federal civilian work. Such designation permits an adjutant general to appoint dual status technicians into the federal civil service when he hires them, see *ibid.*, and to terminate technicians' federal employment "for cause," 32 U.S.C. 709(f)(2). And, to the extent that an adjutant general has additional authority over dual status technicians when they perform work in their civilian roles, such authority likewise comes solely from federal law and as a result of the designation by the Secretaries of the Army and the Air Force. See, *e.g.*, 32 U.S.C. 709(f)(4).

The relationship between petitioners and dual status technicians who are performing work in their federal civilian roles is therefore solely the result of a federal statute granting petitioners a federal role and federal authority over federal employees. By providing that the Secretary of the Army and the Secretary of the Air Force shall designate adjutants general to "employ" technicians who are statutorily defined as "employee[s] of the Department of the Army or the Department of the Air Force," 32 U.S.C. 709(e), Section 709(d) makes clear that petitioners wield the authority of the Department of the Army or the Department of the Air Force when they supervise dual status technicians. Because those Departments fall within DOD, a covered agency under the Act, petitioners must comply with the Act's collective bargaining requirements.

The plain meaning of "designate" confirms that petitioners act as agents and representatives of a federal agency and exercise that agency's federal authority when overseeing dual status technicians—and, accordingly, must obey the Act's requirements. Designate means "[t]o select for a particular duty, office, or purpose; appoint." *The American Heritage Dictionary of the English Language* 357 (1970) (*American Heritage*); see *Webster's Third New International Dictionary of the English Language* 612 (1968) (*Webster's*) ("to decide upon: nominate, delegate, appoint" and "to assign officially by executive or military authority") (capitalization omitted). The Secretaries of the Army and the Air Force have therefore "appoint[ed]" adjutants general for the "particular duty" and "purpose," *American Heritage* 357, of "employ[ing] and administer[ing]" technicians, 32 U.S.C. 709(d). Or, put a slightly different way, the Secretaries have "assign[ed] officially," *Webster's*

612, to adjutants general the authority "to employ and administer" technicians on behalf of the Departments, 32 U.S.C. 709(d). Accordingly, like other officials who supervise the Departments' employees, adjutants general must comply with the Act.

If this Court were to hold that petitioners are not required to comply with the Act, that would effectively invalidate Congress's unambiguous decision to include dual status technicians within the definition of "employees." See pp. 19-20, *supra*; cf. Pet. App. 33a (noting that, "in order for any remedial order to be meaningful," it would be necessary "to enlist the cooperation of the Ohio Adjutant General"). There is no plausible reason why Congress would confer collective bargaining rights on technicians but then gut those rights by allowing their supervisors to ignore the Act. To the contrary, such a construction "would contravene the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (citation omitted). As this Court has admonished, such "inconsistency" must be avoided because "'[t]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.'" *Maracich* v. *Spears*, 570 U.S. 48, 68 (2013) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)).

C. The Act's Context Supports The Conclusion That Dual Status Technicians Have The Right To Collectively Bargain With Petitioners

The "plain meaning" of the relevant statutory provisions "'becomes even more apparent when viewed in' the broader statutory context" governing dual status technicians. *Babcock* v. *Kijakazi*, 142 S. Ct. 641, 645

(2022) (citation omitted). That broader context includes the history of the Act and its predecessor Executive Orders; the text and history of Section 976, the statutory provision that prohibits military unions; the fundamentally civilian nature of the technician role; and the nature of the various roles held by adjutants general.

The Act's history confirms that Congress intentionally included dual status technicians within the Act's ambit. When Congress enacted the Act in 1978, dual status technicians had already enjoyed the right to federally supervised collective bargaining for many years. That right was granted by Executive Orders, including Executive Order 11,491. See p. 9, *supra*. In the Act, Congress instructed that "[p]olicies, regulations, and procedures established under and decisions issued under Executive Order[] 11491 * * * or under any other Executive order, as in effect" on the Act's effective date "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); see 5 U.S.C. 7103(a)(16)(B), 7135(a). Because petitioners were 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. See *In re The Kennedy Ctr. for the Performing Arts*, 45 F.L.R.A. 835, 851 (1992) ("Congress intended the term 'agency' * * * [in] the Statute to apply in the same manner as under Executive Order[] No[]. 11491[,] * * * except where Congress specifically included agencies not covered under the Executive Orders.").

The statutory provision that generally prohibits military unions, Section 976, likewise indicates that

petitioners are required to collectively bargain with the Union. The initial draft of Section 976 would have entirely prohibited dual status technicians from bargaining over the conditions of their federal civilian employment. See H.R. Rep. No. 894, 95th Cong., 2d Sess. Pt. 1, at 5 (1978); 1978 House Report 2-3, 7. Congress ultimately rejected that approach, instead choosing language that made clear that technicians are barred only from bargaining over their military training and service. See Act of Nov. 8, 1978, Pub. L. No. 95-610, § 2(a), 92 Stat. 3085-3087 (prohibiting "a member of the armed forces who is serving on active duty" or "a member of a Reserve component while performing inactive-duty training" from joining a union). That language continues in Section 976 to this day, confirming that Congress intended to permit dual status technicians to collectively bargain. See 10 U.S.C. 976(a)(1) (including the same prohibitions as the original Section 976, as well as prohibiting "a member of the National Guard who is serving on full-time National Guard duty" from joining a union). In adopting Section 976, Congress rejected arguments that permitting technicians to collectively bargain would hamper the National Guard's preparedness and injure the relationships between technicians and their military supervisors. See 1978 House Report 6-7, 15-16.

The fundamentally civilian nature of the dual status technician role also supports the conclusion that technicians are entitled to collectively bargain over aspects of their technician service. Congress made technicians federal employees in 1968 to ensure that they would receive federal civilian employee benefits. See p. 5, *supra*; see also 1968 House Report 1-2, 4-7. And, as this Court recently recognized, "the role, capacity, or function in

which a technician serves" remains "that of a civilian, not a member of the National Guard." *Babcock*, 142 S. Ct. at 645. "The statute defining the technician job makes that point broadly and repeatedly"—including by providing technicians with a host of "characteristically civilian" employment "rights." *Id.* at 645-646. For example, technicians can generally file complaints with the EEOC, earn compensatory time off, receive workers' compensation, and obtain disability benefits—all under provisions broadly applicable to federal civil servants. See pp. 6-7, *supra*. Congress's extension of collective bargaining rights possessed by other federal civil servants to dual status technicians comports with its consistent treatment of technicians as federal civilian employees.

The nature of the various roles held by adjutants general supports the requirement that they must collectively bargain with technicians. Adjutants general, like other members of state National Guards, wear different "hats" at different times. *Perpich* v. *Department of Def.*, 496 U.S. 334, 348 (1990). Although an adjutant general primarily operates in his state role—overseeing his National Guard's state operations—he also may be called up for federal duty. See p. 8, *supra*. And, when an adjutant general supervises dual status technicians (and other federal civilian employees performing work for his National Guard unit, see p. 9, *supra*), he wears another hat: he oversees those federal employees because he has received specific designations of federal authority from the Secretary of the Army and the Secretary of the Air Force.

Given the clear text of the Act, as reinforced by its context, it is unsurprising that dual status technicians have engaged in collective bargaining with their state

National Guards and adjutants general for decades—and that today tens of thousands of technicians are covered by collective bargaining agreements. And it is likewise unsurprising that all courts of appeals that have considered the question have held that adjutants general and state National Guards are required to collectively bargain with dual status technicians over certain conditions of their civilian employment.[2]

II. STATUTORY TEXT AND CONTEXT REFUTE PETITIONERS' CONTRARY INTERPRETATION

Petitioners do not seriously engage with the textual, contextual, and historical bases for dual status technicians' bargaining rights. They do not address the statutory provisions that make technicians federal employees and give adjutants general authority over technicians in the federal civil service system. See 32 U.S.C. 709(d) and (e). They sideline this Court's recent decision in *Babcock*, citing it just once. And petitioners all but ignore that they have bargained with the technicians' union for over 50 years—and fail to identify any concrete negative repercussions that have resulted from their longstanding bargaining relationship.

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[2] See, *e.g.*, *New Jersey Air Nat'l Guard* v. *FLRA*, 677 F.2d 276, 285-286 (3d Cir.), cert. denied, 459 U.S. 988 (1982); *Lipscomb* v. *FLRA*, 333 F.3d 611, 617-618 (5th Cir. 2003), cert. denied, 541 U.S. 935 (2004); *FLRA* v. *Michigan Army Nat'l Guard*, 878 F.3d 171, 174 (6th Cir. 2017); *Indiana Air Nat'l Guard* v. *FLRA*, 712 F.2d 1187, 1190 n.3 (7th Cir. 1983); *Nebraska* v. *FLRA*, 705 F.2d 945, 952-953 (8th Cir. 1983); *California Nat'l Guard* v. *FLRA*, 697 F.2d 874, 879 (9th Cir. 1983); *Association of Civilian Technicians* v. *FLRA*, 230 F.3d 377, 378 (D.C. Cir. 2000); cf. *American Fed'n of Gov't Emps.* v. *FLRA*, 239 F.3d 66, 69-71 (1st Cir. 2001); *New York Council* v. *FLRA*, 757 F.2d 502, 506 (2d Cir.), cert. denied, 474 U.S. 846 (1985).

Petitioners' primary argument (Br. 36-37) is that although they are representatives and agents of DOD when they supervise dual status technicians, they are not required to collectively bargain because they are not themselves a federal "agency." But the obligations that the Act imposes on an "agency" extend to other entities that act on the agency's behalf—a result that is especially clear here because Congress provided for the Secretary of the Army and the Secretary of the Air Force to "designate" adjutants general to "employ" dual status technicians. And petitioners' federalism argument is facially implausible, as it suggests that the federal government may not regulate the labor conditions of federal civilian employees.

A. Petitioners Misconstrue The Principles That Require Them To Collectively Bargain With Dual Status Technicians

1. Petitioners primarily contend (Br. 37) that because they are "representatives" and "agents" of DOD—but not themselves explicitly listed as covered agencies—they are not required to comply with the Act. But that argument fundamentally misunderstands the obligations that the Act imposes. The Act does not merely require compliance by the highest-level executive agency; rather, it requires compliance by all of an agency's components, and, by extension, entities like petitioners that exercise the authority of the agency and oversee its employees.

a. Various provisions in the Act confirm that components, representatives, and agents of a covered agency may be required to engage in collective bargaining and otherwise comply with the Act. Most notably, the 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." 5 U.S.C. 7103(a)(12) (emphases added). The Act relatedly requires the FLRA to determine which units of employees are appropriate for collective bargaining and certify the exclusive representative of each unit; the appropriate component of the agency must then bargain with the unit's representative. See 5 U.S.C. 7111, 7112; see also 5 U.S.C. 7112(a) ("[T]he appropriate unit should be established on an agency, plant, installation, functional, or other basis," and a unit is appropriate only if it "will ensure a clear and identifiable community of interest * * * and will promote effective dealings with * * * the agency involved."). Indeed, the Union in this case was certified to represent a unit that includes all technicians "employed in the Air National Guard and the Army National Guard in the State of Ohio," J.A. 7, and bargains with petitioners—the entities that set those technicians' working conditions.

Relatedly, in *National Aeronautics & Space Administration* [(NASA)] v. *FLRA*, 527 U.S. 229 (1999), this Court held that it was "appropriate" that the FLRA order both NASA's Office of Inspector General and NASA—"the parent agency to which" the Office of the Inspector General "reports and for which it acts"—to comply with the Act when both entities were responsible for compliance. *Id.* at 246. The Court made such a finding even though the Office of the Inspector General was not itself an agency under the Act. And the Court has repeatedly decided cases in which a component of an agency was primarily responsible for complying with the Act, even though the component itself would not fit the Act's definition of "agency." See, *e.g.*, *National Fed'n of Fed. Emps.* v. *Department of the Interior*, 526

U.S. 86, 90 (1999) (case involving "the United States Geological Survey, a subagency of the Department of the Interior"); *FLRA* v. *Aberdeen Proving Ground*, 485 U.S. 409, 411 (1988) (per curiam) (case involving Aberdeen Proving Ground, a U.S. Army facility); *United States Dep't of Def.* v. *FLRA*, 510 U.S. 487, 490 n.2 (1994) (case involving, *inter alia*, components of DOD in Gulfport, Mississippi, and Dallas, Texas).

The FLRA's regulations and longstanding practice confirm that components of a federal agency that supervise employees with collective bargaining rights are required to comply with the Act, even if they themselves are not agencies. The regulations provide that "[a]ny person may charge an activity, agency, or labor organization with having engaged in, or engaging in, any unfair labor practice," 5 C.F.R. 2423.3(a), and define "[a]ctivity" as "any facility, organizational entity, or geographical subdivision or combination thereof, of any agency," 5 C.F.R. 2421.4 (emphasis omitted). In other words, components of agencies that are not themselves agencies may be required to engage in collective bargaining and charged with unfair labor practices. The FLRA's decisions confirm as much. See, *e.g.*, *In re Headquarters*, 22 F.L.R.A. 875, 880 (1986) (finding that the Defense Logistics Agency, a component of DOD, had a duty to bargain); *In re Boston Dist. Recruiting Command Bos.*, 15 F.L.R.A. 720, 722 (1984) (finding that the 94th U.S. Army Reserve Command, a "subordinate level[]" of DOD, had a duty to bargain).

b. Those statutory provisions, regulations, and decisions all indicate that, even if an entity does not fit within the definition of "agency" in the Act, it is required to comply with the Act if it is a component of an agency that employs covered employees. The same

principles subject petitioners to the Act's coverage. Congress has expressly provided that technicians are "employee[s]" of a covered federal agency. 32 U.S.C. 709(e). Petitioners could choose not to hire dual status technicians to work within Ohio's National Guard. See 32 U.S.C. 709(d), (f)(2), and (3). But when, as here, they have decided to do so, they "employ and administer the technicians" pursuant to a designation of authority from the Secretary of the Army and the Secretary of the Air Force. 32 U.S.C. 709(d). And when they employ and administer technicians, petitioners—like components of an agency—"report[]" to and "act[]" on behalf of a covered agency, DOD. *NASA*, 527 U.S. at 246.

Particularly in light of the Act's clear extension of collective bargaining rights to technicians, petitioners' Section 709(d) employment authority confirms that they are properly treated as a component of an agency. Indeed, that is the only way to reconcile Congress's unambiguous directives in adjacent statutory subsections that (1) a dual status technician is "an employee of the Department of the Army or the Department of the Air Force," 32 U.S.C. 709(e), and (2) the Secretaries of those departments shall designate adjutants general to "employ" those employees, 32 U.S.C. 709(d). Petitioners therefore are bound by DOD's employment-related obligation to engage in collective bargaining with technicians.

The role that adjutants general hold within the federal government is the result of Congress's choice to create the "rare bird[s]" that are dual status technicians. *Babcock*, 142 S. Ct. at 644. An adjutant general's status as a federal employer with federal employment obligations is undoubtedly a unique one. But the relevant statutory provisions are clear: Dual status

technicians are "employee[s]" of the Department of the Army and the Department of the Air Force, 32 U.S.C. 709(e), and the Secretaries of those Departments have "designate[d]" adjutants general to "employ and administer" those employees on the Departments' behalf, 32 U.S.C. 709(d).

Petitioners identify no other circumstance in which an entity that "employs" a covered federal employee on behalf of a covered agency is exempt from the Act. And petitioners are wrong to suggest (Br. 37) that agents or representatives of a covered agency need not comply with the Act or abide by the FLRA's orders. An agency or its components cannot directly engage in an unfair labor practice; rather, an employee, representative, or agent acting on behalf of the agency commits such a practice, which in turn is attributed to the agency (or relevant component). See *NASA*, 527 U.S. at 246 (attributing the actions of an investigator employed by NASA's Office of Inspector General to the Office and NASA). To the extent that petitioners are representatives and agents of DOD when they "employ and administer" technicians, they are therefore still required to comply with the Act. 32 U.S.C. 709(d).

If accepted, petitioners' assertion that components, agents, and representatives of an agency need not comply with the Act would make the Act ineffectual, because an agency can act only through its components, agents, and representatives. Petitioners' assertion also suggests that an agency could assign away duties that give rise to collective bargaining obligations—and thereby both evade those responsibilities at the agency level and ensure that the agency's components, agents, and representatives also need not comply. But the manner in which an agency divides and assigns its authority

or duties should not generally determine whether federal employees' bargaining rights are enforceable. That is particularly true where, as here, the division of authority has been made by Congress, which has specifically granted petitioners federal authority over federal civilian employees within a federal employment scheme.

2. Petitioners' reliance (Br. 27-28) on statutory provisions that do not directly address the question presented is misplaced. Petitioners claim (Br. 27) that federal law merely "regulates adjutants general and state national guards," noting that States are required to have adjutants general who report to the Secretary of the Army or Secretary of the Air Force. While it is certainly true that federal law imposes such requirements, see 32 U.S.C. 314(a) and (d), petitioners all but ignore the relevant provision: Section 709(d), which provides that "[t]he Secretary concerned shall designate the adjutants general * * * to employ and administer the technicians authorized by this section." 32 U.S.C. 709(d). It is that role—their federally designated role of employing and administering federal employees—that brings adjutants general within the Act's ambit.

Petitioners also claim (Br. 28) that two statutory provisions (from the National Voter Registration Act of 1993, 52 U.S.C. 20501 *et seq.*, and the Medicare and Medicaid Acts, 42 U.S.C. 1395, *et seq.*; 42 U.S.C. 1396, *et seq.*) indicate that state officers may be "require[d] * * * to take some federal-law action" without formally being a component of the Executive Branch. That is of course true. But the relevant federal statutes here provide that, in addition to his state role, an adjutant general holds a unique role under the auspices of the Executive Branch: he "employ[s] and administer[s]" dual status technicians when those technicians are working

as federal civil servants. 32 U.S.C. 709(d). Petitioners provide no example of another federal program involving individuals who hold a state office while simultaneously operating in a federal role and exercising designated federal authority to employ and administer federal employees.

3. Petitioners cite (Br. 25-27) lower-court decisions involving state National Guards and adjutants general in various contexts, such as actions under 42 U.S.C. 1983, antidiscrimination suits, and claims proceeding in front of the Merit Systems Protection Board (Board). None of those decisions—all of which predate *Babcock* and recent legislation amending Section 709—address the question presented. And they do not otherwise suggest that petitioners can skirt the Act's requirements when supervising dual status technicians on behalf of the Department of the Army and the Department of the Air Force.

Petitioners note (Br. 26-27) that some courts of appeals have treated adjutants general as acting under color of state law for purposes of Section 1983. But the pre-*Babcock* decisions petitioners cite in no way suggest that adjutants general act as state agents or representatives for all purposes. Indeed, the Third Circuit decision on which petitioners rely confirmed that an adjutant general acts "as a federal agent"—that is, "as an agent of the Secretary of the Air Force" or Army—when "administering the technician program generally and in * * * dismiss[ing] technicians specifically." *Johnson* v. *Orr*, 780 F.2d 386, 392, cert. denied, 479 U.S. 828 (1986). That an adjutant general "acts as an agent of" the federal government when he supervises and discharges technicians supports rather than undermines the conclusion that he must comply with the Act's

collective bargaining requirements. *Ibid.*; see pp. 27-32, *supra*.

Petitioners also cite (Br. 27) Federal Circuit decisions interpreting the statutory provisions governing the scope of the Merit Systems Protection Board's review. Petitioners are correct that the Federal Circuit once found that the Board could not adjudicate disputes between dual status technicians and adjutants general. See, *e.g.*, *Singleton* v. *MSPB*, 244 F.3d 1331, 1336-1337 (2001). But in 2016 Congress adopted 32 U.S.C. 709(f)(5) to "clarify that military technicians, under certain conditions, may appeal adverse employment actions to the * * * Board." National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 512, 130 Stat. 2112 (2017 NDAA); H.R. Rep. No. 840, 114th Cong., 2d Sess. 1017 (2016). That provision allows technicians to take an "appeal concerning any activity" not otherwise precluded by Section 709 under 5 U.S.C. 7513, which permits actions in front of the Board. 32 U.S.C. 709(f)(5); see 5 U.S.C. 7511 (2012 & Supp. IV 2016); 5 U.S.C. 7512, 7513(d). Since Congress adopted Section 709(f)(5), the Federal Circuit has recognized that dual status technicians have "a right of appeal to the Board under" Section 709(f) if their claims do not "fall[] within [the] exception[s]" to that provision. *Dyer* v. *Department of the Air Force*, 971 F.3d 1377, 1384 (2020). The outdated Federal Circuit decisions on which petitioners rely therefore are not dispositive of whether the Board has jurisdiction over certain disputes between dual status technicians and adjutants general—let alone whether the FLRA can require petitioners to comply with the Act's collective bargaining requirements.

Petitioners' sole authority related to the Board's jurisdiction that postdates the 2017 NDAA is a decision

by a Board ALJ involving an "appellant [who] [wa]s not a dual-status technician, and thus [wa]s not covered by the 2017 NDAA's extension of Board appeal rights." *Bradley* v. *Department of the Air Force*, No. DA-1221-22-365-W-1, 2022 WL 4011898 (MSPB Aug. 31, 2022). What is more, that decision both is designated as an "initial decision" that is "not precedential and cannot be cited as such in submissions to the Board or the federal courts" and conflicts with other nonprecedential decisions of Board ALJs. *Ibid.* (capitalization and emphasis omitted).

Petitioners' reliance (Br. 26) on district court decisions involving dual status technicians' ability to bring suit under federal antidiscrimination provisions is misplaced for similar reasons. The 2017 NDAA also clarified that, with some exceptions, if a dual status technician is the victim of a discriminatory practice while acting in his civilian capacity, he can file an EEOC complaint and file a federal suit if the EEOC does not take action. 32 U.S.C. 709(f)(5); see 42 U.S.C. 2000e-16. The decisions on which petitioners rely predate that amendment, and the EEOC has since considered an appeal in which an adjutant general was named as a defendant. See *Kip D* v. *Major Gen. Torrence Saxe*, No. 2022002762, 2022 WL 4546249 (EEOC Aug. 25, 2022). And even assuming that an adjutant general is not "the head of the department, agency, or unit" and therefore cannot be a named defendant in an antidiscrimination case, 42 U.S.C. 2000e-16(c), that does not imply that he is free to ignore the Act—a materially different statute that requires his compliance because he acts on behalf of the federal government and exercises its authority when he employs dual status technicians.

4. Petitioners assert (Br. 37) that the Court should excuse them from compliance with the Act because they "lack[] the power * * * to carry out the [FLRA's] command [to] restart union-dues withholding." But, as the court of appeals found, the Ohio National Guard was responsible for the terminations of union dues: it "completed" the 1188 Forms and "signed [them] on [employees'] behalf without asking for consent," in violation of "the statutory requirement that employees must submit Form 1188s." Pet. App. 5a, 16a; see J.A. 62-63. And, as the court found, "[i]t is neither unlawful nor impractical for the Guard to comply with the FLRA's order requiring it to restore the erroneously cancelled dues allotments." Pet. App. 16a.

To the extent that petitioners suggest (Br. 12) that they are barred from reinstating dues deductions because of guidance from a single federal employee, any such guidance has been overridden by the FLRA's determination that petitioners violated the Act when they terminated the deductions. And even if petitioners were somehow unable to reverse the termination, that case-specific wrinkle would not more broadly suggest that the FLRA is incapable of ordering petitioners to comply with the Act whenever it is within petitioners' power to comply.

5. Petitioners claim (Br. 36) that the government forfeited its argument that, when supervising dual status technicians, petitioners act on behalf of a federal agency covered by the Act and exercise federal authority. But the government's argument, which was previewed in its brief in opposition (at 8-13), is directly responsive to the question presented: whether petitioners are subject to the requirements of the Act when serving

in their capacities as supervisors of dual status technicians.

That the government's purely legal argument may vary somewhat from the legal arguments it advanced when litigating under Sixth Circuit precedent does not prevent the Court from affirming the judgment in this case on the basis of the argument presented in this brief. "[P]arties are not limited to the precise arguments they made below," *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted), and a respondent in particular "is entitled to rely on any legal argument in support of the judgment below," *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994). And petitioners are poorly positioned to argue otherwise, as they themselves relied on the same principle to pursue a variety of arguments they failed to raise before the FLRA. See Pet. App. 11a; see also Pet. C.A. Reply Br. 4.

B. Petitioners' Assertion That The Act Violates Federalism Principles Lacks Merit

Petitioners argue (Br. 28-34) that requiring them to engage in collective bargaining with dual status technicians distorts the normal balance of federal and state powers. But technicians are *federal* employees, which means that the federal government is responsible for regulating the conditions of their employment. To the extent petitioners' argument relies on the Militia Clauses and the principle that courts should be cautious when interfering with military matters, it fails because technicians are *civilian* employees. And federal law clearly cabins technicians' bargaining rights, so petitioners are only required to bargain over certain conditions of technicians' civil service, not their separate state National Guard service.

1. Contrary to petitioners' assertion (Br. 29), this case does not implicate "the usual constitutional balance of federal and state powers," *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (citation and internal quotation marks omitted), for the simple reason that dual status technicians are federal civilian employees. As this Court recently confirmed, a technician is a "federal employ[ee]," and "the role, capacity, or function in which a technician serves" when performing technician work "is that of a civilian, not a member of the National Guard." *Babcock*, 142 S. Ct. at 644-645. Thus, when the federal government regulates technicians' employment conditions, it merely regulates the employment conditions of its own civilian employees—which does not alter the relationship between state National Guards and the federal government.

Put a slightly different way, management of the labor conditions of federal employees is not a "matter[] traditionally left to the States" or a "traditional state prerogative[]." Pet. Br. 29. Rather, it falls within the core of federal authority. Cf. U.S. Const. Art. I, § 8; Art. II, § 2, Cl. 2. Petitioners have not challenged Section 709(d), under which the Secretaries of the Army and Air Force have "designate[d] the adjutants general * * * to employ and administer the technicians." 32 U.S.C. 709(d). And, in any event, petitioners could choose not to hire dual status technicians to work within Ohio's National Guard. See p. 30, *supra*. Where, as here, federal law gives petitioners the option to employ and supervise technicians in the federal employment system, an attendant requirement that petitioners engage in

collective bargaining over limited aspects of technicians' federal employment does not raise federalism concerns.[3]

2. In support of their federalism argument, petitioners also invoke (Br. 31-32) the Militia Clauses and the proposition that courts should be cautious when interfering with military matters. But neither supports petitioners' assertion that they are excused from complying with the Act.

The Militia Clauses provide that "[t]he Congress shall have Power" "[t]o provide for calling forth the Militia" and "for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const. Art. I, § 8, Cls. 1, 15, 16. Petitioners note (Br. 31) that the second Clause gives States control over appointing state National Guard officers and training the state National Guard pursuant to Congress's plan and assert (Br. 32) that applying the Act to them "diminish[es] state authority over the operation of [its] militia[]."

Petitioners fail to identify (Br. 32) any real-world indication that the collective bargaining requirement

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[3] To the extent that petitioners analogize (Br. 30) the collective bargaining requirement at issue here to the "preempt[ion of] state laws," it is notable that state employees of the Ohio National Guard and Ohio Adjutant General who are required as a condition of their state employment to maintain membership in the National Guard have the right to collectively bargain over their state service under state law. See *In re Ohio Civil Serv. Emps. Ass'n*, No. 90-REP-12-308, 1992 WL 12567606, at *1, *8-*13 (Ohio SERB June 12, 1992); see also Ohio Rev. Code Ann. §§ 4117.01, 4117.03 (LexisNexis 2015).

has "diminishe[d] state authority over the operation of" the Ohio National Guard in the past 50 years. Regardless, the Act does not impose any conditions on the terms of a technician's state National Guard or militia service and therefore does not implicate the Militia Clauses in any way. That is true for at least two reasons. First, as previously discussed, dual status technicians operate in a number of different roles, see pp. 5-7, *supra*, and, when they are engaged in technician work, they do not operate as members of a state National Guard. This Court explained as much in *Babcock*, finding that the "statute defining the technician job" "broadly and repeatedly" confirms that "the role, capacity, or function in which a technician serves is that of a civilian, not a member of the National Guard." 142 S. Ct. at 645. And second, petitioners' argument ignores the fact that dual status technicians are federal employees, *id.* at 643-644; see 10 U.S.C. 10216(a), which again means that Congress may provide them with federal collective bargaining rights without implicating a State's authority to oversee technicians' separate state National Guard service.[4]

Petitioners also invoke (Br. 32) the principle that "courts must be careful not to 'circumscribe the

[4] Petitioners are wrong to assert that, as a general matter, state National Guards are only "subject to federal influence" and the federal government cannot "issue direct orders to state national guards." Pet. Br. 4-5 (emphasis omitted). The federal government has direct authority over "organizing, arming, and disciplining[] the Militia," and States must "train[] the Militia according to the discipline prescribed by Congress." U.S. Const. Art. I, § 8, Cl. 16; see *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1, 16 (1820) (explaining that the federal "power to provide for organizing, arming, and disciplining" state militias is generally "unlimited"); see also *Perpich*, 496 U.S. at 350-351.

authority of military commanders to an extent never intended by Congress.'" *Brown* v. *Glines*, 444 U.S. 348, 360 (1980) (citation omitted). But, as discussed, requiring petitioners to engage in cabined collective bargaining over the conditions of technicians' civilian service does not implicate the military aspect of technicians' separate military training and service. The principle that courts should defer to military judgments therefore has no application here.

3. Federal law draws careful limits to ensure that technicians may collectively bargain over only certain conditions of their federal technician service. Those limits ensure that petitioners are not required to collectively bargain over technicians' separate state National Guard service and confirm the absence of federalism issues in this case.

As an initial matter, Congress has explicitly provided that adjutants general may separate technicians from their employment "for cause" and that such removals may not be reviewed "beyond the adjutant general" when the removal "concerns activity occurring while the [technician] is in a military pay status, or concerns fitness for duty in the reserve components." 32 U.S.C. 709(f)(2) and (4); see 32 U.S.C. 709(f)(1), (3), and (4) (subjecting terminations and adverse employment actions taken for other reasons to the same limits on review). The courts of appeals have consistently recognized that Section 709 places substantive limits on technicians' collective bargaining rights under the Act. See *Lipscomb* v. *FLRA*, 333 F.3d 611, 614-615 (5th Cir. 2003) (collecting cases holding "that the matters explicitly reserved to the discretion of the adjutants general * * * are beyond the scope of bargaining under the" Act), cert. denied, 541 U.S. 935 (2004); see also, *e.g.*,

Nebraska v. *FLRA*, 705 F.2d 945, 948-953 (8th Cir. 1983); *New Jersey Air Nat'l Guard* v. *FLRA*, 677 F.2d 276, 286 (3d Cir.), cert. denied, 459 U.S. 988 (1982).

And the FLRA entirely lacks jurisdiction over the employment conditions of dual status technicians' separate service in the National Guard—including training or service in either state or federal status. That prohibition comes from Section 976, which bars members of the armed forces, including those performing National Guard duty or training, from joining a union. 10 U.S.C. 976(a) and (b). Courts and the FLRA have carefully policed that line. See, *e.g.*, *Association of Civilian Technicians* v. *FLRA*, 360 F.3d 195, 200 (D.C. Cir. 2004) (holding that a technicians' union was permitted to collectively bargain over duties "assigned during hours of civilian employment"); *Association of Civilian Technicians* v. *FLRA*, 230 F.3d 377, 380 (D.C. Cir. 2000) (holding that dual status technicians could not bargain over "how the technicians will be paid while on active duty"); *In re Association of Civilian Technicians Pa. State Council*, 28 F.L.R.A. 1042, 1046 (1987) (holding that an adjutant general was not required to collectively bargain over proposals that "concerned the military aspect of civilian technician employment," including military training, "and therefore did not concern conditions of employment that were bargainable under the Statute").

The Act accordingly does not upset any traditional balance between state and federal powers, either as a general matter or as applied in this case. And even if the Act changed the state-federal balance to some degree, it certainly did not bring about a "major legal change[]," as petitioners claim (Br. 29). The Act merely continued the collective bargaining requirements imposed by Executive Orders that predated its enactment,

and dual status technicians have enjoyed the right to collectively bargain for more than 50 years. See p. 9, *supra*. Nothing in the Act's text, context, or history provides any sound reason for this Court to upset that settled understanding.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2022

APPENDIX

1. 5 U.S.C. 101 provides:

Executive departments

The Executive departments are:

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.

2. 5 U.S.C. 105 provides:

Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

3. 5 U.S.C. 7103 provides in pertinent part:

Definitions; application

(a) For the purpose of this chapter—

* * * * *

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication

Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(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[1] 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.

* * * * *

(12) "collective bargaining" means 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 meet at reasonable times and to consult and bargain in a

[1] So in original. Probably should be followed by a comma.

good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

* * * * *

4. 5 U.S.C. 7105 provides in pertinent part:

Powers and duties of the Authority

(a)(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

* * * * *

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

* * * * *

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

* * * * *

5. 5 U.S.C. 7112(a) provides:

Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

6. 5 U.S.C. 7116(a) provides:

Unfair labor practices

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

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

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

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if

the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

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

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

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

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

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

7. 5 U.S.C. 7118(a)(1) provides:

Prevention of unfair labor practices

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

making the charge a written statement of the reasons for not issuing a complaint.

8. 5 U.S.C. 7135(b) provides:

Continuation of existing laws, recognitions, agreements, and procedures

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, 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.

9. 10 U.S.C. 111(a) and (b) provides:

Executive department

(a) The Department of Defense is an executive department of the United States.

(b) The Department is composed of the following:

(1) The Office of the Secretary of Defense.

(2) The Joint Chiefs of Staff.

(3) The Joint Staff.

(4) The Defense Agencies.

(5) Department of Defense Field Activities.

(6) The Department of the Army.

(7) The Department of the Navy.

(8) The Department of the Air Force.

(9) The unified and specified combatant commands.

(10) Such other offices, agencies, activities, and commands as may be established or designated by law or by the President.

(11) All offices, agencies, activities, and commands under the control or supervision of any element named in paragraphs (1) through (10).

10. 10 U.S.C. 976 provides in pertinent part:

Membership in military unions, organizing of military unions, and recognition of military unions prohibited

(a) In this section:

(1) The term "member of the armed forces" means (A) a member of the armed forces who is serving on active duty, (B) a member of the National Guard who is serving on full-time National Guard duty, or (C) a member of a Reserve component while performing inactive-duty training.

* * * * *

(b) It shall be unlawful for a member of the armed forces, knowing of the activities or objectives of a particular military labor organization—

(1) to join or maintain membership in such organization; or

(2) to attempt to enroll any other member of the armed forces as a member of such organization.

* * * * *

11. 10 U.S.C. 10216(a) provides:

Military technicians (dual status)

(a) IN GENERAL.—(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve; and

(C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

(3) A military technician (dual status) who is employed under section 3101 of title 5 may perform the following additional duties to the extent that the performance of those duties does not interfere with the performance of the primary duties described in paragraph (1):

(A) Supporting operations or missions assigned in whole or in part to the technician's unit.

(B) Supporting operations or missions performed or to be performed by—

(i) a unit composed of elements from more than one component of the technician's armed force; or

(ii) a joint forces unit that includes—

(I) one or more units of the technician's component; or

(II) a member of the technician's component whose reserve component assignment is in a position in an element of the joint forces unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

12. 32 U.S.C. 314 provides in pertinent part:

Adjutants general

(a) There shall be an adjutant general in each State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands. He shall perform the duties prescribed by the laws of that jurisdiction.

* * * * *

(d) The adjutant general of each State, the Commonwealth of Puerto Rico, the District of Columbia,

Guam, and the Virgin Islands, and officers of the National Guard, shall make such returns and reports as the Secretary of the Army or the Secretary of the Air Force may prescribe, and shall make those returns and reports to the Secretary concerned or to any officer designated by him.

13. 32 U.S.C. 709 provides:

Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in—

(1) the organizing, administering, instructing, or training of the National Guard;

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of—

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who—

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991[1] (42 U.S.C. 2000e-16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

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[1] See References in Text note below.

(g)(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(j) In this section:

(1) The term "military pay status" means a period of service where the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term "fitness for duty in the reserve components" refers only to military-unique service

requirements that attend to military service generally, including service in the reserve components or service on active duty.