ORAL ARGUMENT NOT YET SCHEDULED
Nos. 20-1322 & 1332

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, et al.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE
FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

These consolidated Petitions for Review ("Petitions") arise from a request by the National Right to Work Legal Defense Foundation (the "Foundation") for a general statement of policy or guidance from the Federal Labor Relations Authority (the "Authority") pursuant to 5 C.F.R. § 2427.2(a). In response, the Authority asked for public comment on the issues raised by the Foundation's request. *See Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Off. Time for Certain Lobbying Activities*, 85 Fed. Reg. 16,915 (March 25, 2020). After thoroughly and carefully considering the Foundation's request, the public comments it received, its own precedent, and authoritative guidance from the U.S. Department of Justice Office of Legal Counsel, the Authority issued its decision in *National Right to Work Legal Defense Foundation*, 71 FLRA 923 (2020) (Member DuBester dissenting). The National Treasury Employees Union and American Federation of Government Employees (collectively, the "Unions"), who were not parties below, have filed these Petitions for Review of that decision. In this Court proceeding, the Unions are the petitioners and the Authority is the respondent.

B. Ruling Under Review

The Unions seek review of the Authority's decision in *National Right to Work Legal Defense Foundation*, 71 FLRA 923 (2020) (Member DuBester dissenting).

C. Related Cases

This case was not previously before this Court or any other court, nor is the Authority aware of any related cases currently pending before this Court or any other court.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

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2005 Opinion	U.S. Department of Justice, Office of Legal Counsel, *Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives*, 29 Op. O.L.C. 179 (2005)
The Act	The Anti-Lobbying Act, 18 U.S.C. § 1913
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioners' opening brief
DOJ	The U.S. Department of Justice
Foundation	The National Right to Work Legal Defense Foundation
JA	The Joint Appendix
NTEU	The National Treasury Employees Union
OLC	The U.S. Department of Justice's Office of Legal Counsel
Policy Statement	*National Right to Work Legal Defense Foundation*, 71 FLRA 923 (2020) (Member DuBester dissenting)
Request	The Foundation's Request for a General Statement of Policy or Guidance Concerning Whether Union Officials Can Use Official Time to Lobby the Government, dated August 19, 2019
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Unions	Petitioners, the National Treasury Employees Union and American Federation of Government Employees

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Authority had subject matter jurisdiction to issue *National Right to Work Legal Defense Foundation*, 71 FLRA 923 (2020) (Member DuBester dissenting) (the "Policy Statement") pursuant to § 7105(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2018) (the "Statute."), which states that the Authority "shall provide leadership in establishing policies and guidance relating to matters under this chapter," as well as § 7105(a)(2)(I) of the Statute, providing that the Authority "shall . . . in accordance with regulations prescribed by the Authority . . . take such other actions as are necessary and appropriate to effectively administer" the Statute.

The Policy Statement was issued after receipt and review of comments from interested parties, and is published at 71 FLRA (No. 178) 923 (2020). A copy of the Policy Statement is included in the Joint Appendix ("JA") at JA 180-86. The Policy Statement is a "final order of the Authority" that is reviewable in circuit court under 5 U.S.C. § 7123(a). *See Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 750 F.2d 143, 144 (D.C. Cir. 1984) ("*AFGE 1984*").

STATEMENT OF THE ISSUES PRESENTED

1. Was it arbitrary, capricious, an abuse of discretion, or otherwise unlawful for the Authority to find that a) the Anti-Lobbying Act, 18 U.S.C. § 1913 ("Act"), prohibits unions from using taxpayer-funded official time to engage in "indirect" or

"grassroots" lobbying campaigns wherein they urge their members to contact government officials under their own names in support of, or opposition to, "any legislation, law, ratification, policy, or appropriation," and b) the Statute does not "expressly authorize" taxpayer-funded official time for such "indirect" or "grass roots" lobbying?

2. Was it arbitrary, capricious, an abuse of discretion, or otherwise unlawful for the Authority to find that the Statute does not "expressly authorize" unions to use taxpayer-funded official time for lobbying-related training?

3. Was it arbitrary, capricious, an abuse of discretion, or otherwise unlawful for the Authority to find that the Nation Right to Work Legal Defense Foundation (the "Foundation") was a "lawful association not qualified as a labor organization," 5 C.F.R. § 2427.2(a), and consider the Foundation's request for a general statement of policy or guidance ("Request") on that basis?

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. (Add. 1.)

STATEMENT OF THE CASE

The Foundation asked the Authority, pursuant to Part 2427 of its regulations, to issue a general statement of policy or guidance holding that the Statute does not permit unions to bargain for or receive official time for lobbying activities that are subject to the Act. (JA1-5.) In response, the Authority issued a thorough and well-

reasoned Policy Statement that examined the interplay between the Act (18 U.S.C. § 1913) and two different parts of the Statute: § 7131(d) and § 7102(1).

Under § 7131(d), parties may negotiate amounts of official time that are "reasonable, necessary, and in the public interest" and that may be used "in connection with any . . . matter covered by this chapter." Section 7102(1) states that employees have the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities."

The Act (18 U.S.C. § 1913) provides, in relevant part, that:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation[.]

Monies "appropriated by . . . enactment of Congress" within the meaning of the Act "include funds used to pay the salaries of representatives of federal employees' unions insofar as they devote official time to their representational activities." U.S. Dep't of Justice, Office of Legal Counsel ("OLC"), *Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives*, 29 Op. O.L.C. 179, 180 (2005) (the "2005

Opinion"); *see also U.S. Dep't of the Army Corps of Eng'rs Memphis Dist. Memphis, Tenn.*, 52 FLRA 920, 930 (1997) (Member Armendariz concurring, in part, and dissenting, in part) ("*Army*") ("[t]he allotment of official time results in use of Federal funds to 'pay for' wages or salary.").

Thus, to the extent appropriated funds are "used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation," that expenditure is unlawful unless there is "express authorization by Congress." 2005 Opinion, 29 Op. O.L.C. at 180–81. Because the Act is a federal criminal statute, the U.S. Department of Justice ("DOJ") is primarily responsible for enforcing it. DOJ delegated to OLC the task of providing advice to executive departments on questions of law within its jurisdiction. *See* 28 U.S.C. § 512; 28 C.F.R. §§ 0.25(a), (c), (k).

In its Policy Statement, the Authority carefully considered the text of the Statute and the Act, as well as relevant guidance issued by the OLC, and concluded that federal unions may use official time for "direct" lobbying (that is, a union member presenting "the views of the labor organization" to government officials directly "in the capacity of a representative," *see* 5 U.S.C. § 7102(1)), but not for "indirect" or "grassroots" lobbying (that is, encouraging members of the public to

contact government officials in support of, or opposition to, "any legislation, law, ratification, policy or appropriation," 18 U.S.C. § 1913).

Shortly after the Authority issued its Policy Statement, the Unions filed these Petitions for Review.

STATEMENT OF THE FACTS

I. The Authority's Policy Statement Procedure

Section 7105(a)(1) of Statute "directs the [Authority] to 'establish [] policies and guidance relating to matters' arising under the [S]tatute." *AFGE 1984*, 750 F.2d at 143 (quoting 5 U.S.C. § 7105(a)(1)). Part 2427 of the Authority's regulations sets forth the procedures under which parties may request general statements of policy or guidance. Under those regulations, an agency head, union president, or "[t]he head of any lawful association not qualified as a labor organization" may ask the Authority to issue a policy statement. 5 C.F.R. § 2427.2(a). Before issuing a policy statement, the Authority will, "as it deems appropriate," give "interested parties" an opportunity to comment. *Id.* § 2427.4.

II. The Anti-Lobbying Act

The Act (18 U.S.C. § 1913) provides, in relevant part:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or

> appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation[.]

Monies "appropriated by . . . enactment of Congress" within the meaning of the Act "include funds used to pay the salaries of representatives of federal employees' unions insofar as they devote official time to their representational activities." 2005 Opinion, 29 Op. O.L.C. at 179 (citing 5 U.S.C. § 7131(d)); *accord Army,* 52 FLRA at 930. To the extent appropriated funds are "used directly or indirectly to pay for" activities covered by the Act (that is, "any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation"), that expenditure is unlawful unless there is "express authorization by Congress." 2005 Opinion, 29 Op. O.L.C. at 180–81.[1]

The Act was originally passed in 1919. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300 (1989) ("1989 Opinion"). It was amended in 2002, broadening its

[1] The Act's exception for communications made through "proper official channels" has been interpreted by OLC to permit only communications that are cleared through agency officials' supervisors and that represent the official views of the agency. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Applicability of Antilobbying Statute (18 U.S.C. § 1913)—Federal Judges*, 5 Op. O.L.C. 30, 32 (1981); *Army*, 52 FLRA at 931.

coverage. *See* Pub. L. No. 107-273, § 205(b), 116 Stat. 1758 (2002). Because the Act is a federal criminal statute, DOJ is primarily responsible for enforcing it. DOJ, in turn, has delegated to OLC the task of providing advice to executive departments on questions of law within its jurisdiction (including interpreting the Act). *See* 28 U.S.C. § 512; 28 C.F.R. § 0.25(a).

Commenting on the pre-2002 version of the Act, OLC said that the Act does not apply to "direct communications" between agency officials and members of Congress, but it "may prohibit substantial 'grass roots' lobbying campaigns . . . designed to encourage members of the public to pressure Members of Congress to support Administration or Department legislative or appropriations proposals." 1989 Opinion, 13 Op. O.L.C. at 301.

III. The Statute's Provisions Relating to Official Time

Section 7131 of the Statute creates a "distinct third category of time" for federal employees, in addition to duty time and non-duty time: official time, which is "when an employee is performing representational functions for the union while receiving compensation from the agency." *Ass'n of Civilian Technicians Old Hickory Chapter*, 55 FLRA 811, 813 (1999). "Unlike regular duty time, an employee's activities on official time are not directed by the agency." *Id.* And "[u]nlike annual leave, an employee's activities on official time are restricted by the Statute." *Id.*; *accord Ass'n of Civilian Technicians, Tony Kempenich Memorial Chapter 21 v. FLRA* ("*Tony Kempenich*"), 269

F.3d 1119, 1122 (D.C. Cir. 2001). Like duty time, and unlike annual leave, official time is "considered hours of work." *Id.* (quoting 5 C.F.R. § 551.424(b)).

Under § 7131(d) of the Statute, parties may negotiate amounts of official time that are "reasonable, necessary, and in the public interest" and that may be used "in connection with any . . . matter covered by this chapter." 5 U.S.C. § 7131(d). Section 7102(1) of the Statute, in turn, states that employees have the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." The Authority has on "several occasions" held that "official time may only be granted to the extent that it is consistent with all applicable laws and regulations." *Tony Kempenich*, 269 F.3d at 1122 (citing *Nat'l Fed'n of Fed. Emps. Local 2015*, 41 FLRA 1158, 1185 (1991)). To the same effect, § 7117(a) of the Statute says that the duty to bargain does not extend to matters that are "inconsistent with federal law."

IV. OLC's 2005 Opinion

In the 2005 Opinion, OLC addressed a question similar to that raised by the Foundation in its Request: "[W]hether federal employees who are union representatives may use their official time to engage in 'grass roots' lobbying in which, on behalf of their unions, they ask members of the public to communicate with government officials in support of, or opposition to, legislation or other measures."

2005 Opinion, 29 Op. O.L.C. at 179. OLC concluded that the Act barred this activity.

"Central to" OLC's analysis was "the distinction between direct and 'grass roots' lobbying." *Id.* "This distinction," OLC noted, "has been extensively applied in decisions of our Office and the Government Accountability Office ('GAO') dealing with lobbying by government officials." *Id.* "Direct lobbying" would be "direct communications" with government officials on "any legislation, law, ratification, policy or appropriation." *Id.* The essence of a "grass roots" (or "indirect") lobbying campaign, on the other hand, "is the use of telegrams, letters, and other private forms of communication expressly asking recipients to contact" government officials. *Id.* (internal quotation marks omitted). For example, it might involve "a clear appeal . . . to the public to contact congressional members in support of" pending legislation. *Id.* at 180.

In its 2005 Opinion, OLC noted that monies "appropriated by . . . enactment of Congress" within the meaning of the Act "include funds used to pay the salaries of representatives of federal employees' unions insofar as they devote official time to their representational activities." *Id.* Thus, the lobbying activities of union representatives on official time are subject to the Act to the extent that they involve directly or indirectly preparing, sending, or otherwise facilitating "any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device" that is "intended or designed to influence in any manner a member of Congress, a

jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation." *Id.* at 180–81 (quoting 18 U.S.C. § 1913). It further held that the Act's prohibition was not limited to "lobbying on behalf of a federal agency[,]" and rejected a passage from the Authority's decision in *Army* that may have implied such a limitation. *Id.* at 183–84 (discussing *Army*, 52 FLRA at 930).

OLC went on to reject the argument that the Statute provides "express authorization by Congress" within the meaning of the Act for "indirect" or "grass roots" lobbying. It held that the guarantee of § 7102(1) that union representatives may "present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities" is "confined to direct lobbying" and "does not mention the presentation of views to members of the public, let alone a request that the public contact government officials." *Id.* at 185. Thus, § 7102(1) "does not amount to the 'express authorization' that would create an exception to" the Act for "grass roots" or "indirect" lobbying. *Id.* Moreover, § 7131(d) of the Statute "is derivative of [S]ection 7102." *Id.*

In so holding, OLC dismissed the notion that "communicating with the public to encourage others to make common cause with the employees' collective bargaining representatives is merely a logical extension of a [u]nion's Section 7102 rights," and thus that § 7102(1) expressly authorizes such communications. *Id.* at 185 (internal

formatting omitted). Such an argument, OLC explained, would "go astray from the statutory text," as § 7102(1) cannot "reasonably be said to give an 'express authorization' for urging the public to communicate with government officials." *Id.* at 186. OLC rejected the reasoning of several previous Authority decisions to the extent they suggested otherwise. *Id.* at 185 & n.7 (citing *Dep't of the Air Force, 3d Combat Support Grp., Clark Air Base, Republic of the Phil.*, 29 FLRA 1044, 1062–63 (1987) ("*Clark AFB*"), *Dep't of the Air Force, Scott Air Force Base, Ill.*, 34 FLRA 1129, 1135 (1990), *U.S. Marine Corps Base Camp Smedley T. Butler, Okinawa, Japan*, 29 FLRA 1068, 1080 (1987) ("*Smedley T. Butler*"), and *Dep't of the Air Force, 18th Combat Support Wing, Kadena Air Base, Okinawa, Japan*, 29 FLRA 1085, 1097 (1987) ("*Kadena AFB*").)

Then, OLC rejected the notion that § 7102(1) expressly authorizes "grass roots" or "indirect" lobbying on the theory "that such lobbying may enable the public to serve as the conduit by which union representatives present their views to government officials." *Id.* at 186. "[A]ny such argument would require a strained and unnatural reading of the phrase 'to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.'" *Id.* (quoting 5 U.S.C. § 7102(1)). That is because "[i]n the communications that are intended to result from 'grass roots' lobbying, members of the public, not the union representatives, would be making the presentation," and "the views that government officials receive would be presented as the public's views, rather than 'the views of the labor organization.'" *Id.* at 186–87.

Thus, OLC concluded, "when a union representative engages in 'grass roots' lobbying of the sort that 18 U.S.C. § 1913 may bar—an appeal to the public to communicate with government officials—the federal labor laws offer no protection." *Id.* at 187. It rejected *Army* to the extent that that decision held otherwise. *Id.* at 186.

In a footnote, OLC observed that, in some previous cases, the Authority had held that § 7102 "protected union requests for members of the public to write to their Senators and Representatives." *Id.* at 187 n.9 (citing *Clark AFB*, *Kadena AFB*, and *Smedley T. Butler*.) But OLC noted that the version of the Act that was then in effect would not have applied to the specific lobbying activity at issue in those decisions, and thus they did not discuss the Act's applicability. *Id.* In addition, OLC noted that those Authority decisions did not discuss an earlier Authority case, *U.S. Air Force, Lowry Air Force Base, Denver, Colo.* ("*Lowry AFB*"), where a letter drafted by a union "was intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union." *Id.* (quoting *Lowry AFB*, 16 FLRA 952, 964 (1984).)

V. The Authority's Policy Statement

On August 19, 2019, the Foundation asked the Authority to issue a policy statement holding that the Statute does not permit unions to bargain for or receive official time for lobbying activities that are subject to the Act. (JA 1-5.) The Foundation explained that it is a "not a labor organization, but a 'bona fide, independent legal aid organization'" and thus may request such guidance under 5

C.F.R. § 2427.2(a), which allows "[t]he head of any lawful association not qualified as a labor organization" to request a policy statement. (JA 1.)

On March 25, 2020, the Authority asked for public comment on the issues raised by the Foundation's Request. *See Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Off. Time for Certain Lobbying Activities*, 85 Fed. Reg. 16,915 (Mar. 25, 2020). After thoroughly and carefully considering the Foundation's Request, the public comments it received, its own precedent, and authoritative guidance from OLC, the Authority issued its Policy Statement.

Relying on OLC's 2005 Opinion, the Authority held that "'[i]ndirect' or 'grassroots' lobbying by union representatives on official time is prohibited by the Act." (JA 181.) Like OLC, the Authority held that the Statute does not provide "express authorization" for such "indirect" or "grassroots" lobbying: that is, "'encouraging members of the public,' including other union members, 'to pressure Congress,' or other government officials, with respect to 'any legislation, law, ratification, policy or appropriation.'" (JA 182) (quoting 2005 Opinion, 29 Op. O.L.C. at 179-180) (internal formatting.) Instead, § 7102(1) expressly authorizes only "direct lobbying": that is, directly "present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." (JA 182) (quoting 5 U.S.C. § 7102(1).)

As the Authority put it, "the Statute's guarantee of the right to directly 'present the view of [a] labor organization to heads of agencies and other officials of the

executive branch of the Government, the Congress, or other appropriate authorities"' in § 7102(1) cannot "reasonably be said to give an 'express authorization' for urging the public to communicate with government officials." (JA 182) (quoting 5 U.S.C. § 7102(1) and 2005 Opinion, 29 Op. O.L.C. at 185-86.) "In the communications that are intended to result from 'grass roots' lobbying," the Authority explained, "members of the public, not the union representatives would be making the presentation, and the views that government officials would receive would be presented as the public's views, rather than 'the views of the labor organization.'" (*Id*) (quoting 2005 Opinion, 29 Op. O.L.C. at 185–86). Holding that the Statute expressly authorizes "indirect lobbying" would thus "go astray from the statutory text." (*Id.*)

Having "adopt[ed] the analysis set forth" in the 2005 Opinion, the Authority overruled *Army* and two other Authority decisions issued before the 2005 Opinion to the extent those decisions "may be read to suggest that *any* union lobbying on official time is expressly authorized by Congress under the Statute." (*Id*) (emphasis in original.)

The Policy Statement then proceeded to respond to the two primary arguments raised by the dissenting Member. It distinguished its previous opinion in *U.S. Department of Transportation, Federal Aviation Administration Great Lakes Region, Des Plaines, Illinois*, 64 FLRA 1184 (2009) ("*DOT*") because the remedy upheld in that case directed the agency to "permit [u]nion representatives to 'ask employees to support the [u]nion's views and positions on legislative issues during *nonworking* times'" and

thus did not involve official time at all. (JA 182-83 (emphasis added) (quoting *DOT*, 64 FLRA at 1186).) "In plain terms, the remedy in *DOT* concerned union representatives' and union members' right to lobby Congress while in an *unpaid* and non-work status," and "[n]othing in the Act, or this policy statement, affects federal employees' ability to lobby Congress — whether it be directly or indirectly — during their unpaid time." (JA 183 (emphasis in original).)

Then, the Authority rejected the dissent's argument that appeals by a union to its members to contact government officials under their own names should be regarded as "direct" lobbying, as opposed to "grass roots" lobbying. (JA 183.) It noted that the 2005 Opinion approvingly cited the Authority's decision in *Lowry AFB*, where the Authority held that an agency's direction to an employee not to send a union-drafted letter to a congresswoman did not interfere with § 7102(1) rights because "although the proposed letter was drafted by the Union, it was intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union." (JA 183 (citing 2005 Opinion, 29 Op. O.L.C. at 187 n.9 (citing, in turn, *Lowry AFB*, 16 FLRA at 964)).) As the 2005 Opinion noted, *Lowry AFB* held that § 7102(1) "did not cover the presentation of individual views that the union was trying to generate." 2005 Opinion, 29 Op. O.L.C. at 187 n.9. And, as the Authority noted, "[t]here is simply no logical reason why communications to or from individual union members under their own names that are not presented as 'the views of the labor organization' by an

employee acting for a union 'in the capacity of a representative' should be treated any different from any other communications from a member of the public." (JA 183.) The Authority overruled *dicta* from *DOT* that held otherwise. (JA 183.)

The Unions, who were not parties below, filed Petitions for Review of the Policy Statement.

SUMMARY OF ARGUMENT

In its Policy Statement, the Authority carefully considered the text of the Statute and the Act, as well as guidance issued by the OLC (namely, its 2005 Opinion) that spoke directly to the question raised by the Request, and came to the correct conclusion: Unions may only use official time for "direct" lobbying (that is, a union member presenting "the views of the labor organization" to government officials directly "in the capacity of a representative," *see* 5 U.S.C. § 7102(1)), and not for "indirect" or "grassroots" lobbying (that is, encouraging members of the public to contact government officials in support of, or opposition to, "any legislation, law, ratification, policy or appropriation," 18 U.S.C. § 1913). (JA 181-83.)

The Unions object to the Authority's conclusion that the Statute does not provide "express authorization" for efforts by federal unions to urge their members to contact government officials under their own names in support of, or opposition to, "any legislation, law, ratification, policy, or appropriation." (Pet'r Br. 20-21.) They contend that such efforts do not constitute "indirect lobbying," because (in their view) "indirect lobbying" only occurs when an entity appeals to "the people as a

whole," not a "narrow subset of people, i.e. people who are members within an organization." (*Id.*)

The Unions' interpretation of the Act, and related OLC guidance, defies logic. Under the Unions' view, an appeal by an agency official (or a union representative using taxpayer-funded official time) to "all cab drivers," "all farmers" or "all iPhone users" to contact their member of Congress would not violate the Act because appeals to "subset[s] of people" do not constitute appeals to "members of the public." (*Id.*) Or, if the Act permitted—as the Unions claim—appeals to "people who are members of an organization," this would mean that an appeal by an agency official or a union representative to "all National Rifle Association members," "all Planned Parenthood members" or "all Democrats" would be permitted by the Act, so long as the agency official or union representative in question was also a member of the National Rifle Association, Planned Parenthood, or the Democratic Party.

Those examples, however, describe *precisely* the sorts of taxpayer-funded lobbying that the Act prohibits. *See* 1989 Opinion, 13 Op. O.L.C. at 304 n.6 ("By 'grass roots' lobbying we mean communications by executive officials directed to members of the public at large, *or particular segments of the general public*, intended to persuade them in turn to communicate with their elected representatives on some issue of concern[.]") (emphasis added); 2005 Opinion, 29 Op. O.L.C. at 179 ("The essence of a 'grass roots' campaign is the use of telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of

Congress."). It would make no sense to hold that, under the Act, government officials can use taxpayer money to conduct lobbying campaigns targeted at membership organizations of which they happen to be a member, but not other sorts of lobbying campaigns. (*Cf.* Pet'r Br. 24.)

Contrary to the Unions' charge, the Authority accurately described the holding in *DOT* and provided a reasoned and reasonable basis for departing from *dicta* in that decision. (JA 182-83.) The Authority properly noted that the discussion of the Act in *DOT* was *dicta*, because the remedy that the Authority upheld in *DOT* "direct[ed] an agency to 'permit union representatives to 'ask employees to support the union's views and positions on legislative issues during nonworking times," and "the Act is triggered only when appropriated funds are being used." (*Id.* (quoting *DOT*, 64 FLRA at 1186).)

More broadly, the Authority correctly found that *DOT* failed to provide any reasoned basis for its conclusory statement that "[w]hen a union is communicating with those whom it represents, it is dealing with persons with whom it has a special relationship -- a relationship that distinguishes those persons from "members of the public." *DOT*, 64 FLRA at 1187. As the OLC's 2005 Opinion noted, and the Authority's Policy Statement reiterated, there is no textual basis in the Act for reading into it an implicit exemption for "communications within a membership organization." (Pet'r Br. 24.) As OLC observed, the Act's "language on its face applies to the use of appropriated funds for *any* communications designed to influence

members of Congress or other officials with respect to any legislation, law, ratification, policy, or appropriation." 2005 Opinion, 29 Op. O.L.C. at 183 (emphasis added.)

Next, the Unions take issue with the Authority's conclusion "that the type of training at issue in *SSA* – training union representatives *how* to lobby – does not constitute 'direct' lobbying and is not expressly authorized by § 7102(1) of the Statute." (JA 182 (citing *Soc. Sec. Admin., Balt., Md.*, 54 FLRA 600 (1998) ("SSA").) However, *SSA* contained no reasoned discussion supporting a conclusion that lobbying-related training is "expressly authorized" by § 7102(1) of the Statute. And the Authority was unquestionably correct in finding "that the type of training at issue in *SSA* – training union representatives *how* to lobby – does not constitute 'direct' lobbying and is not expressly authorized by § 7102(1) of the Statute." (JA 182 (emphasis in original).) Indeed, the Unions effectively concede both points in admitting that "[t]raining . . . does not constitute lobbying at all." (Pet'r Br. 32.)

Finally, the Unions argue that the Foundation lacked standing to request a policy statement. This argument is without merit. The Authority's regulations allow "[t]he head of any lawful association not qualified as a labor organization" to request a policy statement. 5 C.F.R. § 2427.2(a). The Foundation is a "lawful association not qualified as a labor organization" and thus had standing under the Authority's regulation to make its request. Nothing in 5 C.F.R. § 2427.2(a) indicates that the term "lawful association not qualified as a labor organization" was meant to have the

hyper-technical definition urged by the Unions. (*See* Pet'r Br. 41-43 (arguing that the Foundation is not a "lawful association" because it filed as a "corporation" on its most recent tax return and does not have "individual members" who are "involved in" its governance).)

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) ("*BATF*"); *Ass'n of Civilian Technicians., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). This Court defers to the Authority's construction of the Statute, which Congress entrusted to the Authority's administration. *U.S. Dep't of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991). The Authority is entitled to "considerable deference" when it exercises its "special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF*, 464 U.S. at 97 (internal quotation marks omitted).

Courts uphold Authority decisions unless they are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). In determining whether a disputed agency action is "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), the party challenging the action bears the burden of proof, *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271 (D.C. Cir. 2002) (citation omitted). "Under this highly deferential standard of review, the court presumes the validity of agency action and must affirm unless the [Authority] failed to consider relevant factors or made a clear error in judgment." *Cellco P'ship v. Fed. Commc'n Comm'n*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (internal quotation marks and citations omitted).

The Authority, like other agencies, "is free to alter its past rulings and practices even in an adjudicatory setting" so long as it provides a "reasoned explanation" for doing so. *Local 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985 ("*AFGE 1985*"). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]" *Id.* (internal quotation marks omitted). The reason for this flexibility is that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . *must* consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863–64 (emphasis added). Indeed, in *Chevron* itself, the Supreme Court deferred to an agency interpretation that was a recent reversal of agency policy. *Id.* at 857–58.

Similarly, this Court defers to OLC's interpretation of the Act. Because the Act is a criminal statute applying primarily to federal government officials, DOJ is responsible not only for enforcing it, but also providing binding guidance to

Executive Branch agencies on its meaning. *See* 28 U.S.C. § 512; OLC Memorandum for Attorneys of the Office RE: Best Practices for OLC Opinions (July 16, 2010) ("OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government."). DOJ has delegated to OLC the task of providing binding opinions to executive departments on laws (like the Act) within its jurisdiction. 28 C.F.R. § 0.25.

OLC's interpretation of the Act, a criminal statute within DOJ's jurisdiction and on which OLC provides binding guidance for Executive Branch agencies, receives *Chevron* deference. *See Chevron,* 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[.]"); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 23–27 (D.C. Cir. 2019) (holding that *Chevron* deference applies to agency interpretations of criminal statutes that are intended to have the "force and effect of law").

But even if it is not formally subject to *Chevron* deference, OLC's interpretation of the Act represents the well-reasoned view of the agency charged with implementing it, and is entitled to deference on that basis. *See Bragdon v. Abbott*, 524 U.S. 624, 642 (1998). The Authority's application of OLC's guidance on the Act is reviewed *de novo*. *Nat'l Ass'n of Gov't Emps., Inc. v. FLRA*, 179 F.3d 946, 950 (D.C. Cir. 1999).

ARGUMENT

In resolving the Foundation's request for a policy statement regarding the interaction of the Statute and the Act, the Authority properly looked to guidance provided by OLC, which is responsible for providing binding guidance to Executive Branch agencies on the Act's meaning. *See* 28 U.S.C. § 512; 28 C.F.R. § 0.25. In its 2005 Opinion, OLC addressed a question similar to that raised by the Foundation in its Request: "whether federal employees who are union representatives may use their official time to engage in 'grass roots' lobbying in which, on behalf of their unions, they ask members of the public to communicate with government officials in support of, or opposition to, legislation or other measures." 29 Op. O.L.C. at 179.

In its Policy Statement, the Authority held, consistent with OLC's 2005 Opinion, that the Statute does not provide express authorization for "indirect" or "grass roots" lobbying by union representatives on official time (that is, encouraging members of the public to contact government officials in support of, or opposition to, "any legislation, law, ratification, policy or appropriation," 18 U.S.C. § 1913). Instead, unions may use official time only for "direct" lobbying—that is, a union member presenting "the views of the labor organization" to government officials directly "in the capacity of a representative." 5 U.S.C. § 7102(1); JA 181-83.

In their Opening Brief, the Unions do not take issue with this broad conclusion. In fact, they accept the holding of both OLC in its 2005 Opinion and the Authority in its Policy Statement that the Statute provides "express authorization" for

"direct lobbying" but not "indirect lobbying." (Pet'r Br. 10-11.) Instead, they make three primary arguments.

First, the Unions argue an appeal by a union to its members to contact government officials under their own names in support of, or opposition to, "any legislation, law, ratification, policy, or appropriation," 5 U.S.C. § 1913, is not "indirect lobbying" barred by the Act. (Pet'r Br. 22-31.) *Second*, they take issue with the Authority's conclusion that lobbying-related training is not "expressly authorized" by the Statute. (Pet'r Br. 31-32.) *Third*, they contend that the Authority should not have considered the Foundation's request for a policy statement in the first place because the Foundation is not a "lawful association not qualified as a labor organization" under 5 C.F.R. § 2427.2(a). (Pet'r Br. 38-48.) All three arguments are without merit.

I. The Authority Correctly Held That Unions May Not Use Appropriated Funds for "Grass Roots" Lobbying Campaigns Directed at Their Own Members

The Unions first object to the Authority's conclusion that the Act prohibits, and the Statute does "expressly authorize," the use of appropriated funds for "indirect" or "grass roots" lobbying campaigns by federal unions. (Pet'r Br. 20-21.) Such activities include urging the Unions' members to individually contact government officials under their own names in support of, or opposition to, "any legislation, law, ratification, policy, or appropriation." (*Id.*) The Unions argue that those efforts do not constitute "indirect" lobbying at all, because (in their view) "indirect lobbying" only occurs when an entity appeals to "the people as a whole,"

not a "narrow subset of people, i.e. people who are members within an organization." (*Id.*) The Unions' argument fails for several reasons.

A. The Unions' Interpretation of the Act Is Illogical

As an initial matter, the Unions' interpretation of the Act is illogical. Under the Unions' view, an appeal by an agency official (or a union representative using taxpayer-funded official time) to "all cab drivers," "all farmers" or "all iPhone users" to contact their member of Congress would not violate the Act because it is not an appeal to "members of the public" but only "a narrow subset of people." (Pet'r Br. 20-21.) Or, if the Act permitted—as the Unions claim—permits appeals to "people who are members of an organization," but that would mean that an appeal by an agency official to "all National Rifle Association members," "all Planned Parenthood members" or "all Democrats" would be permit by the Act, so long as the agency official in question was also a member of the National Rifle Association, Planned Parenthood, or the Democratic Party.

But those examples describe *precisely* the sorts of taxpayer-funded lobbying that the Act prohibits. Over 1 million federal employees are represented by a union. *See* Federal Labor Relations Authority, *About the FLRA*, https://www.flra.gov/about. The National Treasury Employees Union ("NTEU"), for instance, has about 83,000 members and represents around 150,000 federal employees. *See* Wikipedia, *National Treasury Employees Union,* https://en.wikipedia.org/wiki/National_Treasury_Employees_Union. Its position is

that these 150,000 individuals are not "members of the public" simply because, by virtue of their federal employment, they are represented by NTEU. Even if only a fraction of those employees were to respond to a taxpayer-funded solicitation from NTEU to contact government officials about pending legislation, that would permit exactly what the Act was meant to forbid—"using appropriated funds to create artificially the impression that there is a ground swell of public support for the [union's] position on a given piece of legislation." 1989 Opinion, 13 Op. O.L.C. at 304 (internal quotation marks omitted.) The Unions' contention that the Act allows them to use taxpayer-funded official time to urge their members to contact government officials under their own names in favor of, or in opposition to, legislation, appropriations, or other policies finds no support in the Act or the OLC's guidance concerning the Act, and was properly rejected by the Authority here.

And, to be clear, this was *all* that the Authority held. The passage from the Policy Statement to which the Unions object states, in its entirety: "'indirect' or 'grass roots' lobbying would be a union representative 'encourag[ing] members of the public, including other union members, 'to pressure . . . Congress,' or other government officials, with respect to 'any legislation, law, ratification, policy or appropriation.'" (JA 182 (quoting 29 Op. O.L.C. at 179-80).) In accordance with OLC's 2005 Opinion, the Authority held that such activity was not "present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities"

"in the capacity of a representative," the activity "expressly authorized" by § 7102(1) of the Statute. (*Id.* (citing 29 Op. O.L.C. at 184-85).) This is not an "absurd result," as the Unions claim (Pet'r Br. at 22); it is the only result that the Authority could have rationally arrived at. There is simply no logical basis to conclude that being a "member of an organization" precludes an individual from also being a "member of the public."

B. The Unions' Interpretation of OLC's 1989 and 2005 Opinions to Exclude from the Act's Coverage Indirect Lobbying Campaigns Targeted at "People Who Are Members of an Organization" Is Incorrect

Moreover, OLC, in both its 1989 Opinion and 2005 Opinion, made clear that it was *not* using the definition of "the general public" that the Unions urge on pages 20-21 of their brief. That is, OLC made clear that it was *not* using the term "the general public" to refer to "the people as a whole," and thus to exclude appeals to a "narrow subset of people, i.e. people who are members within an organization" to contact government officials. *Id.* In its 1989 Opinion, OLC explained:

> By "grass roots" lobbying we mean communications by executive officials directed to members of the public at large, *or particular segments of the general public*, intended to persuade them in turn to communicate with their elected representatives on some issue of concern to the executive. *This type of activity is to be distinguished from communications by executive officials aimed directly at the elected representatives themselves*, no matter how much incidental publicity those communications may receive in the normal course of press coverage.

13 Op. O.L.C. at 304 n. 6 (emphasis added). Thus, the 1989 Opinion made clear that it was using the terms "the general public" and "the public at large" to contrast such

communications with *direct* communications to elected officials. That is, OLC was making the same distinction between "direct lobbying" and "indirect lobbying" that the Authority made in the portion of its Policy Statement to which the Unions object (JA 182)—*not* the distinction between appeals to "the people as a whole" versus appeals to a "narrow subset of people, i.e. people who are members within an organization" that the Unions urge. (Pet'r Br. 20-21.)

In addition, the 1989 Opinion quotes the Act's legislative history as follows:

> [The Act] will prohibit a practice that has been indulged in so often, without regard to what administration is in power — the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, *for this organization*, for this man, *for that company* to write his Congressman, to wire his Congressman, in behalf of this or that legislation.

13 Op. O.L.C. at 303 (emphasis added) (quoting 58 Cong. Rec. 403 (1919) (remarks of Rep. Good)). Once again, OLC's references to entreaties "for this organization" and "for that company" to contact government officials show that OLC understood the Act to apply to appeals to a "membership organization" and not simply appeals to "the people as a whole." (*See* Pet'r Br. 20-21, 23.) It would make no sense to hold that, under the Act, a government official could use appropriated funds to conduct lobbying campaigns targeted at membership organizations of which that official happened to be a member, but not other sorts of lobbying campaigns. (*See* Pet'r Br. 24.) As OLC and the Authority observed, the Act's language makes no such distinction. (JA 182 (citing the 2005 Opinion, 29 Op. O.L.C. at 185).) Thus, there is

no reason to treat unions different from any other membership organization, or from "members of the public" generally, for purposes of the Act's broad prohibition on taxpayer-funded lobbying.

The 2005 Opinion was equally clear in rejecting the Unions' argument that the Act allows appropriated funds to be spent on lobbying communications targeted at a "membership organization" (Pet'r Br. 24) or "a narrow subset of people" (Pet'r Br. 21.) OLC explained, on the first page of the 2005 Opinion, that "[t]he essence of a 'grass roots' campaign is the use of telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress"—not that the communications are directed to "the people as a whole." (29 Op. O.L.C. at 179; *see also* Pet'r Br. 20.) Again, these are precisely the sorts of communications (telegrams, letters, and other private forms of communication asking recipients to contact Members of Congress) that the Authority was referring to in the portion of its Policy Statement to which the Unions object. (JA 182.) Like the 1989 Opinion (13 Op. O.L.C. at 304 n.6) and the Authority's Policy Statement (JA 182), the 2005 Opinion contrasted "indirect or grass roots lobbying" with "direct contact with or appeals to Members of Congress." (29 Op. O.L.C. at 179) (internal quotation marks omitted.)

In addition, the 2005 Opinion warned against attempts to use legislative history to cabin the Act's expansive language. 29 Op. O.L.C. at 183. It squarely rejected language from *Army* suggesting that the Act was only "intended to protect

[Congress's] members from indirect lobbying by agency officials." *Id.* (quoting *Army*, 52 FLRA at 930). In doing so, OLC emphasized that the Act's "language on its face applies to the use of appropriated funds for *any* communications designed to influence members of Congress or other officials with respect to any legislation, law, ratification, policy, or appropriation." *Id.* (emphasis added). The 2005 Opinion noted that the Act's prohibition is framed broadly, directing that "*[n]o part of* the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly" for prohibited purposes. *Id.* (emphasis added).

OLC thus rejected attempts to carve out *ad hoc* exceptions—such as the Unions' proposed exception for lobbying geared towards "people who are members within an organization" (Pet'r Br. 21)—from the Act's broad prohibition, finding "no reason to give" the Act "an interpretation that is narrower than its words would otherwise indicate." 29 Op. O.L.C. at 184; *accord Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020). The Authority similarly rejected such invitations to "go[] astray from the statutory text." (JA 182 (internal quotation marks omitted).) This Court should also reject the Unions' attempt to import phrases— "the general public" and "the public at large"—that appear nowhere in the text of the Act or the Statute, and then parse those terms as though they were statutory text. (*See* Pet'r Br. 20-21.)

As the Authority correctly noted (JA 183), the 2005 Opinion confirmed, by its approving citation of *Lowry AFB*), that appeals by a union to its members urging them

to contact government officials concerning "any legislation, law, ratification, policy or appropriation" fall within the scope of "indirect lobbying" barred by the Act. *See* 29 Op. O.L.C. at 187 n.9. *Lowry AFB* involved a federal union's effort to encourage its employee-members to send, under their own names, union-drafted letters to their congressional representatives opposing agency employment policies. *Lowry AFB*, 16 FLRA at 962. An agency manager attempted to warn an employee who was a union steward "that she and other employees should not send the letter to Congress." *Id.* At issue before the Authority was whether, in warning the employee not to send the letter, the agency had violated § 7102 of the Statute. *See id.* at 964. The Authority adopted the Administrative Law Judge's conclusion that it had not, because "although the proposed letter was drafted by the Union, it was intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union." *Id.*

The Unions try to wave away the 2005 Opinion's citation to *Lowry AFB* by claiming that it was included in a "lengthy footnote for an extremely narrow purpose not relevant here." (Pet'r Br. 35.) But the Unions admit in the very next sentence of their brief that *Lowry AFB* was indeed cited in the context of OLC's discussion of the matter at issue in this appeal—"whether the Anti-Lobbying Act's bar on grass roots lobbying extend[s] to union representatives." (*Id.*)

In the footnote where it cited *Lowry AFB*, OLC considered whether previous Authority cases had held that § 7102 of the Statute "gives an 'express authorization'

for 'grass roots' lobbying *that [the Act] would otherwise forbid*." 2005 Opinion, 29 Op. O.L.C. at 187 n.9 (emphasis added). OLC noted that three previous cases (*Clark AFB*, *Kadena AFB*, and *Smedley T. Butler*) had held, outside the context of the Act, that § 7102 "protected union requests for members of the public to write to their Senators and Representatives." *Id.* But, OLC noted that the version of the Act then in force would not have reached the specific lobbying activity at issue in those cases, and thus "these decisions do not even implicitly suggest that [S]ection 7102 gives an 'express authorization' for 'grass roots' lobbying that [the Act] would otherwise forbid." *Id.*

Further, OLC noted that those cases had failed to mention *Lowry AFB*, where the Authority "stated that [S]ection 7102 did not apply where a letter drafted by a union 'was intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union.'" *Id.* (quoting *Lowry AFB*, 16 FLRA at 964). OLC approvingly cited *Lowry AFB*'s conclusion that "'[S]ection 7102 protects representatives of labor organizations in their presentation of the views of the labor organization to Congress,' and therefore did not cover the presentation of individual views that the union was trying to generate," strongly suggesting that *Clark AFB*, *Kadena AFB*, and *Smedley T. Butler* should have reached the same conclusion. *Id.* (quoting *Lowry AFB*, 16 FLRA at 964).

The clear implication of the 2005 Opinion is that the lobbying activity in *Lowry AFB* was the sort of lobbying activity that "[the Act] would otherwise forbid." *Id.*

That is because the 2005 Opinion discussed *Lowry AFB* in the course of providing examples of "grass roots lobbying" of the type that the Act "would otherwise forbid" and for which "the federal labor laws offer no protection." *Id.* at 187 & n.9. Ultimately OLC endorsed, without qualification, *Lowry AFB*'s holding that the grass roots lobbying activities in that case were not protected by § 7102 of the Statute.

Indeed, the 2005 Opinion cited as another example of a case involving "grass roots lobbying that [the Act] would otherwise forbid," *Department of the Air Force Scott Air Force Base, Illinois*, 34 FLRA 1129, 1130 (1990), which involved an advertisement placed by a union in a base newspaper urging its bargaining-unit employees to "contact the Union or the Congressmen listed in the advertisement" about a base policy that it opposed. 2005 Opinion, 29 Op. O.L.C. at 187 n. 9. The Unions would characterize such an activity as "intra-union communications." (Pet'r Br. 23.) OLC, however, stated that such conduct was prohibited by the Act. 2005 Opinion, 29 Op. O.L.C. at 187 n.9

Thus, the Authority was right to conclude that "[i]f the OLC's 2005 opinion intended to create a bright-line rule that union members are not 'members of the public' for purposes of the Act, its citation to *Lowry AFB* would make no sense." (JA 183 (quoting 29 Op. O.L.C. at 186).) As the Authority explained, "[t]here is simply no logical reason why communications to or from individual union members under their own names that are not presented as "the views of the labor organization" . . . should be treated any different from any other communications from a member of the

public. (JA 183 (quoting 29 Op. O.L.C. at 186).) Indeed, the Act's "language on its face applies to the use of appropriated funds for *any* communications designed to influence members of Congress or other officials with respect to any legislation, law, ratification, policy, or appropriation." 2005 Opinion, 29 Op. O.L.C. at 183 (emphasis added).

Under the OLC's guidance, what matters is not whether the lobbying communications can be characterized as "communications within a membership organization," as the Unions would have it. (Pet'r Br. 24.) Instead, what matters is whether appropriated funds are being used for "direct communications" with government officials, or "grass roots" lobbying efforts. 2005 Opinion, 29 Op. O.L.C. at 179. Thus, the Policy Statement correctly treated "grass roots" lobbying efforts conducted by union representatives on official time the same as any other form of "grass roots" lobbying. (JA 182.)

C. The Authority Provided a Reasoned and Reasonable Explanation for Departing from *Dicta* in *DOT*

The Unions accuse the Authority of "fail[ing] to provide a reasoned explanation for departure from precedent" (Pet'r Br. 27) in *DOT*. (Pet'r Br. 29.) But, contrary to Unions' charge, the Authority accurately described its holding in *DOT* and provided a reasoned and reasonable basis for departing from *dicta* in that decision. (JA 182-83.)

First, the Authority properly noted that the discussion of the Act and OLC's 2005 Opinion in *DOT* was *dicta* because the remedy that the Authority upheld in *DOT* "direct[ed] an agency to 'permit union representatives to 'ask employees to support the union's views and positions on legislative issues during nonworking times," and "the Act is triggered only when appropriated funds are being used." (*Id.* (quoting *DOT*, 64 FLRA at 1186).) The crucial phrase from the remedy at issue in *DOT*, the Authority noted, "is 'during nonworking time.'" (JA 183 (quoting *DOT*, 64 FLRA at 1186).)

This Court has emphasized, in a similar context, "the critical distinction between employee use of official time and annual leave." *Tony Kempenich*, 269 F.3d 1119, 1122 (D.C. Cir. 2001) (citing *N.C. Guard*, 55 FLRA 811, 813 (1999)) (internal quotation marks omitted). As this Court noted, "[t]he collective bargaining laws impose restrictions on the use of official time that are not applicable to the use of paid annual leave." *Id.* at 1122. Moreover, official time, "unlike annual leave, is considered to be 'hours of work.'" *Id.* OLC's 2005 Opinion cited *Tony Kempenich* and observed the same distinction: "nothing in [the Act] affects what private persons may say while on their own time," i.e., while on annual leave. 2005 Opinion, 29 Op. O.L.C. at 184.

Unlike lobbying conducted while on annual leave, "[f]unds 'appropriated by . . . enactment[s] of Congress' within the meaning of [the Act] include funds used to pay the salaries of representatives of federal employees' unions insofar as they devote official time to their representational activities." *Id.* at 180 (quoting 18 U.S.C. § 1913).

As the Authority correctly noted, "[n]othing in the Act, or this policy statement, affects federal employees' ability to lobby Congress – whether it be directly or indirectly – during their unpaid time." (JA 183.) Instead, "the Act precludes the use of official time – *i.e.*, appropriated funds – for indirect lobbying." (*Id.*)

The Authority correctly found that *DOT*'s discussion of the Act was *dicta*, because nothing in the proposed remedy in *DOT* involved the expenditure of appropriated funds for lobbying activity. Instead, *DOT* solely "concerned union representatives' and union members' right to lobby Congress while in an *unpaid* and non-work status." (*Id* (emphasis in original).)

The Authority did not stop there, however. It engaged directly with *DOT's* reasoning, stating that "the finding in *DOT* that union members are not 'members of the public,' within the meaning of the 2005 [O]pinion, due to a 'special relationship' with a union, cannot withstand scrutiny." (*Id.* (quoting *DOT*, 64 FLRA at 1187).) *DOT* claimed that "the OLC['s 2005 Opinion] does not discuss as instances of 'grass roots' lobbying any situations where federal employees contact other federal employees." *DOT*, 64 FLRA at 1187. But, as the Authority observed, that is untrue: OLC cited *Lowry AFB*, which involved "federal employees contact[ing] other federal employees" and which the 2005 Opinion noted as an example "grass roots" lobbying. (JA 183 (citing the 2005 Opinion, 29 Op. O.L.C. at 187 n.9).) The Authority's failure in *DOT* to acknowledge *Lowry AFB* is telling because, in the 2005 Opinion, OLC faulted three previous Authority decisions for failing to discuss that case. (2005

Opinion, 29 Op. O.L.C. at 187 n.9.)[2] Thus, as the Authority in this case rightly pointed out, one of *DOT*'s central premises was incorrect. (JA 183.)

More broadly, *DOT* failed to provide any reasoned basis for its conclusory statement that "[w]hen a union is communicating with those whom it represents, it is dealing with persons with whom it has a special relationship – a relationship that distinguishes those persons from 'members of the public.'" *DOT*, 64 FLRA at 1187. As the OLC's 2005 Opinion noted, and the Authority's Policy Statement reiterates, there is no textual basis in the Act for reading into it an implicit exemption for "communications within a membership organization." (Pet'r Br. 24.) The Act's "language on its face applies to the use of appropriated funds for *any* communications designed to influence members of Congress or other officials with respect to any legislation, law, ratification, policy, or appropriation." 2005 Opinion, 29 Op. O.L.C. at 183 (emphasis added.) Moreover, 5 U.S.C. § 7102(1) specifies who the messenger for such "direct lobbying" communications must be: not any union member, but only one acting "in the capacity of a representative" who is "presenting the views of the labor organization." Thus, "[t]here is simply no logical reason why communications to or from individual union members under their own names that are not presented as

[2] The Union asserts that the Policy Statement should have assumed that the Authority was "aware of" *Lowry AFB* in *DOT* despite the fact that "*DOT* does not even mention *Lowry*." (Pet'r Br. 36.) But *DOT*'s failure to discuss *Lowry AFB*, along with its failure to grapple with the 2005 Opinion's reasoning, provides ample basis for finding (as the Policy Statement did) that *DOT*'s reasoning "cannot withstand scrutiny." (JA 183.)

'the views of the labor organization' . . . should be treated any different from any other communications from a member of the public." (JA 183 (quoting the 2005 Opinion, 29 O.L.C. at 186).)

The Unions may disagree with that reasoning, but it represents the correct interpretation of the plain text of the Act, the Statute, and related OLC guidance. The Authority's earlier discussion in *DOT* did not, and the Authority's Policy Statement correctly overruled it.

D. The Authority's Policy Statement Does Not Violate the Unions' First Amendment Rights

In its brief, the Unions make a half-hearted attempt to raise a First Amendment argument, claiming that the Policy Statement "inhibit[s] what amounts to protected speech" and imposes "a content-based restriction on speech." (Pet'r Br. 31, 32.) But similar arguments have been rejected by this Court. Both the OLC and the courts have held that the Act does *not* raise First Amendment concerns as applied to union lobbying on official time (that is, lobbying done while on paid, duty status), because nothing in the Act "affects what private persons may say while on their own time" (that is, while on annual leave, a non-duty status). 2005 Opinion, 29 Op. O.L.C. at 184; *see also Tony Kempenich*, 269 F.3d at 1122.

Unlike lobbying conducted while on annual leave, "[f]unds 'appropriated by . . . enactment[s] of Congress' within the meaning of [the Act] include funds used to pay the salaries of representatives of federal employees' unions insofar as they devote

official time to their representational activities." 2005 Opinion, 29 O.L.C. at 180 (quoting 18 U.S.C. § 1913). Thus, "[t]he First Amendment argument is a red herring" because the Act "does not in any way affect what Union members can do during their annual leave." *Tony Kempenich*, 269 F.3d at 1122 (quoting *Granite State Chapter, Ass'n of Civilian Technicians v. FLRA*, 173 F.3d 25, 28 n.3 (1st Cir.1999)).

As the D.C. Circuit noted in *Tony Kempenich*, "official time may only be granted to the extent that it is consistent with all 'applicable laws and regulations," and is subject to restrictions not applicable to annual leave. *Id.* at 1122. That the Act restricts the activities that may be performed on taxpayer-funded official time raises no First Amendment issues. The Union's allusions to the First Amendment should therefore be rejected.

II. The Authority Correctly Held That Training Union Members on How to Lobby Is Not Activity That is "Expressly Authorized" by the Statute

Next, the Unions take issue with the Authority's conclusion "that the type of training at issue in *SSA*—training union representatives *how* to lobby—does not constitute 'direct' lobbying and is not expressly authorized by § 7102(1) of the Statute." (JA 182 (citing *Soc. Sec. Admin., Balt., Md.*, 54 FLRA 600 (1998) ("*SSA*").) The Unions' argument on this point must be rejected as well.

In *SSA*, the Authority denied exceptions to an arbitrator's award finding that the agency was required to provide union representatives with official time for a conference whose "purpose was to prepare the union representatives to lobby

Congress on representational issues." *SSA*, 54 FLRA at 603. However, *SSA* contained no reasoned discussion for upholding this part of the award. It cited two previous cases (*Army*, *Department of Health & Human Services, SSA.*, 11 FLRA 7 (1983) ("*HHS*") and *Office of the Adjutant General N.H. National Guard Concord, N.H.*, 54 FLRA 301 (1998) ("*N.H. Nat'l Guard*")) that did not involve training of any sort and concluded, without further explanation, that the agency "has not provided any new arguments supporting a conclusion that the granting of official time to [u]nion officials to lobby Congress violates [the Act]." *Id.* at 606-7.

Neither *SSA* nor the cases it cited provided any reasoned explanation for treating lobbying-related training the same as "present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities," the activities specifically authorized by § 7102(1) of the Statute. Nor did any of these cases discuss or apply the distinction between "direct" and "indirect" lobbying that was the linchpin of OLC's 2005 Opinion.[3]

[3] Indeed, *N.H. Nat'l Guard*, like *SSA*, concluded without explanation that the agency "ha[d] not provided any new arguments supporting a conclusion that the granting of official time to [u]nion officials to lobby Congress violates [the Act]" and cited *Army*. 54 FLRA at 307. Moreover, *N.H. Nat'l Guard* involved only direct lobbying. *Id.* at 302. As to *HHS*, *Army* itself noted that in that case, the Authority "concluded, without providing its reasoning, that an arbitration award granting official time to lobby Congress was not deficient as contrary to [the Act]." *Army*, 52 FLRA at 934 n.5. And OLC itself rejected *Army*'s conclusion that the Act has no application to "grass roots" lobbying conducted by union representatives on taxpayer-funded official time. 2005 Opinion, 29 Op. O.L.C. at 186-87.

The Authority in this case was unquestionably correct in finding "that the type of training at issue in *SSA* – training union representatives *how* to lobby –does not constitute 'direct' lobbying and is not expressly authorized by § 7102(1) of the Statute." (JA 182.) Indeed, the Unions effectively concede both points in stating that that "[t]raining . . . does not constitute lobbying at all." (Pet'r Br. 32.) Thus, the Unions admit that training does not constitute "direct lobbying" (or lobbying of any kind), and that it is not lobbying of the sort "expressly authorized" in § 7102 of the Statute: "present[ing] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." 5 U.S.C. § 7102(1). The Authority's Policy Statement held simply that "training union representatives *how* to lobby . . . does not constitute 'direct' lobbying and is not expressly authorized by § 7102(1) of the Statute," and overruled the seemingly contrary conclusion in *SSA*, which inexplicably treated lobbying-related training as equivalent to "direct lobbying." (JA 182.) The Policy Statement thus merely confirms what the Union concedes—that "[t]raining . . . does not constitute lobbying at all" (Pet'r Br. 24), much less the "present[ation of] the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities." *See* 5 U.S.C. 7102(1).

III. The Foundation is a "Lawful Association Not Qualified as a Labor Organization" and the Authority Did Not Err in Considering Its Policy Statement Request

The Authority's regulations allow "[t]he head of any lawful association not qualified as a labor organization" to request that the Authority issue a policy statement, "provided the request is not in conflict with the provisions of chapter 71 of title 5 of the United States Code or other law." 5 C.F.R. § 2427.2(a). The Foundation is a "lawful association not qualified as a labor organization" and thus had standing under this regulation to request a policy statement. The Unions' argument to the contrary must be rejected.

A. The Foundation is a "Lawful Association Not Qualified as a Labor Organization" Under the Plain Meaning of Those Terms

In arguing that the Foundation is not a "lawful association not qualified as a labor organization," the Unions seek to give a peculiarly narrow definition to the term "lawful association." They argue that the term "lawful association" refers only to organizations that file as an "association" on their tax returns and that have "individual members" that are "involved in" its governance. (Pet'r Br. 41-3.) Under this reasoning, the Authority could only grant a policy statement request from the head of a "lawful association" after examining the group's tax return and articles of incorporation to confirm that it has filed as an "association" and that it has "members" who are "involved in" its governance. (*See id.*) The Court should reject

this attempt to distort the regulation's plain meaning and give the term "lawful association" an unusual definition that finds no support in its text.

When interpreting an agency's regulation, courts look to the regulation's plain meaning. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419 (2019). "Plain meaning" refers to the ordinary or natural definition of the relevant text. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994).

Here, the Foundation is a "lawful association not qualified as a labor organization" under the plain meaning of those terms. The ordinary definition of "association" is "an organization of persons having a common interest." *Association, Merriam-Webster*, https://www.merriam-webster.com/dictionary/association; *see also Cambridge Dictionary*, https://dictionary.cambridge.org/dictionary/english/association (defining "Association" as "a group of people who work together in a single organization for a particular purpose."). The Foundation undoubtedly is an organization of persons united for a common purpose of "eliminating coercive union power and compulsory unionism." National Right to Work Legal Defense Foundation, *About*, https://www.nrtw.org/about; *see also* JA 124, 153 (describing the Foundation's mission); JA 129-30 (listing the Foundation's officers and directors). And the Foundation is "lawful" in both senses of that term: it is "in harmony with the law" and "constituted, authorized, or established by law." *See Lawful, Merriam-Webster*, https://www.merriam-webster.com/dictionary/lawful.

Indeed, this Court has itself referred to the Foundation as "a bona fide, independent legal aid association." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Nat'l Right to Work Legal Def. & Ed. Found., Inc.*, 590 F.2d 1139, 1142 (D.C. Cir. 1978) ("*UAW*"); *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Inc. v. Nat'l Right To Work Legal Def. & Educ. Found., Inc.*, 781 F.2d 928, 932 (D.C. Cir. 1986) (stating that the Foundation is "a bona fide, independent legal aid organization."). Those references underscore that the term "association" typically does not refer only to groups that file as an "association" on their tax returns, or that have "individual members" that are "involved in" their governance (*see* Pet'r Br. 41-43), but more naturally refers to "an organization of persons having a common interest."

In permitting "the head of *any* lawful association not qualified as a labor organization" to request a policy statement, the Authority's regulation makes clear that the term "lawful association" was not meant to have the hyper-technical definition urged by the Unions. *See* 5 C.F.R. § 2427.2(a) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976).) Giving the term "lawful association" the narrow and unnatural meaning urged by the Unions would run counter to the regulation's plain text.

Nor, contrary to the Unions' suggestion, does the use of the term "lawful association" in Executive Orders 10988 (1962) and 11491 (1969) suggest that the Foundation is not a "lawful association" under 5 C.F.R. § 2427.2(a). (Pet'r Br. 41.) Those now-superseded Executive Orders provided that once a labor organization was recognized as the exclusive representative for agency employees, an agency could continue "consulting or dealing with a religious, social, fraternal, or other lawful association, not qualified as a labor organization, with respect to matters or policies which involve individual members of the association or are of particular applicability to it or its members." Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962); Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969).

By contrast, 5 C.F.R. § 2427.2 does not limit a "lawful association" to only requesting policy statements about "matters or policies which involve individual members of the association or are of particular applicability to it or its members." Indeed, 5 C.F.R. § 2427.2(a) nowhere states that a "lawful association" must have "individual members." The Unions' attempt to read the language from the old Executive Orders concerning "individual members" into the Authority's regulation, when the Authority made the choice to *not* include this language, violates basic rules of statutory construction. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020).

Indeed, the term "association" also appears in the Taft-Hartley Act (enacted in 1947) and Landrum-Griffin Act (enacted in 1959), both of which refer to "employer

associations." *See* 29 U.S.C. § 186(a); 29 U.S.C. § 411(a)(4); *cf. UAW*, 590 F.2d at 1147 (noting the district court's finding that the Foundation was an "employer association" under the Landrum-Griffith Act). The Authority in its regulation could have limited "lawful associations" to "employer associations" or "religious, social, [or] fraternal . . . association[s]" that have "individual members," but decided to forgo such limitations and allow "the head of *any* lawful association not qualified as a labor organization" to request a policy statement. 5 C.F.R. § 2427.2(a) (emphasis added). There are no limitations on what counts as a "lawful association not qualified as a labor organization" in the Authority's regulation. Instead, the regulation emphasizes that "*any*" such group is permitted to request a policy statement. *Id.* (emphasis added).

B. Even If 5 C.F.R. § 2427.2(a) Were Ambiguous, the Authority's Interpretation of It Receives Deference

Even if the Authority's regulation were ambiguous (and it is not) the Authority receives deference in interpreting it. *Kisor,* 139 S.Ct. at 2415. The Authority held, in its Policy Statement, that "the Authority's Regulations specifically permit the head of '*any* lawful association not qualified as a labor organization' to ask the Authority for a general statement of policy or guidance, with an exception not relevant here," countering the dissenting Member's argument that the Authority should not have considered the Foundation's request. (JA 183 (emphasis in original) (quoting 5 C.F.R. § 2427.2(a)).) In so doing, the Authority expressed its formal position that 5 C.F.R.

§ 2427.2(a) is to be interpreted broadly in accordance with the plain meaning of its text, and not given a narrow, technical meaning such as that urged by the Unions.

The Authority's interpretation of the regulation is contained in a formal Policy Statement that sets forth an "authoritative policy in the relevant context" (not an "informal memorandum") that emanates from the Authority's Members (not a "mid-level official.") *See Kisor*, 139 S.Ct. at 2416-17. The regulation in question is one that the Authority itself drafted and which the Authority itself administers. *Id.* at 2417. In interpreting that regulation (and in particular, the phrase "any lawful association not qualified as a labor organization"), the Authority applied its substantive expertise in federal-sector labor-relations. There can thus be no question that the Authority is "best positioned to develop" expertise in its own regulation dealing with its own policy statement procedure. *Id.*[4] The Unions point to no previous Authority interpretation of the term "any lawful association not qualified as a labor organization" that conflicts with that in the Policy Statement. *See id.* at 2417-18.

[4] The Union's argument that "the FLRA's interpretation [of the term 'lawful association not qualified as a labor organization'] does not involve the FLRA's area of expertise" (Pet'r Br. 46 (alteration added)) does not make sense in light of its earlier assertion that the term "has a specific meaning in federal-sector labor law" (*id.* at 40). If, indeed, the term has a "specific meaning in federal-sector labor law," then the Authority, which Congress charged with adjudicating federal-sector labor matters, is best qualified to determine what the term means. The Union also illogically pivots from asserting that "the term 'lawful association not qualified as a labor organization' has a specific meaning in federal-sector labor law" (*id.* at 40) to asserting, a mere seven pages later, that "[t]he term 'lawful association' is a business law term." (*id.* at 47).

Finally, the Authority's interpretation of the term "any lawful association not qualified as a labor organization" in its Policy Statement is not merely a "convenient litigating position" or "*post hoc* rationalization," but one that appears in the Policy Statement itself. *Id.* (internal formatting omitted). Thus, the Authority's interpretation of its regulation to broadly permit the head of "'*any* lawful association not qualified as a labor organization' to ask the Authority for a general statement of policy or guidance" (JA 183), and not simply groups that file as an "association" on their tax return or that have individual members, must receive deference to the extent that 5 C.F.R. § 2427.2(a) is ambiguous.

C. Allowing the Foundation to Request a Policy Statement is Consistent With the Statute's Purpose

This Court should reject the Unions' argument that the Authority's "decision to accept and act upon [the Foundation's] request cuts against the core purpose of the Statute" because the Foundation is supposedly "anti-union" and the Statute seeks to promote collective bargaining. (Pet'r Br. 43-44.) That argument rests on an overly simplistic view of the Statute's purpose.

The Statute "serve[s] a variety of purposes," including "strengthen[ing] the authority of federal management to hire and discipline employees" while protecting "the right of employees to organize (and) bargain collectively." *Dep't of Def. v. FLRA*, 659 F.2d 1140, 1145 (D.C. Cir. 1981) (citation omitted). It was designed "to meet some of the legitimate concerns of the Federal employee unions as an integral part of

what is basically a bill to give management the power to manage and the flexibility that it needs," *id.* (quoting 124 Cong. Rec. H9633 (daily ed. Sept. 13, 1978) (statement of Rep. Udall) and represents "a fair package of balanced authority for management, balanced with a fair protection for at least the existing rights the employees have," *id.* (quoting 124 Cong. Rec. H9647 (daily ed. Sept. 13, 1978) (statement of Rep. Ford).)

Through the Statute, Congress sought to "strike a balance between the need to strengthen employees' bargaining rights, and the need not to unduly interfere with government operations." *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 778 F.2d 850, 852 (D.C. Cir. 1985). Congress designed the Statute to "meet the special requirements and needs of the Government," *id.* (quoting 5 U.S.C. § 7101(b)), and directed that it "be interpreted in a manner consistent with the requirement of an effective and efficient Government," 5 U.S.C. § 7101(b).

The Foundation's goals are to protect workers' rights and combat union abuse. *See* National Right to Work Legal Defense Foundation, *About*, https://www.nrtw.org/about. That mission fits comfortably with the purposes of the Statute, as the Statute seeks to protect individual workers' rights while strengthening management's authority.

Moreover, there is nothing in the Authority's regulation that would support denying a "lawful association" the ability to request a policy statement based on its viewpoint. Indeed, in permitting "[t]he head of an agency" to request a policy

statement, the Authority's regulation makes clear that the policy statement procedure is not reserved for groups that are "pro-union." *See* 5 C.F.R. § 2427.2(a).

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court deny the Petitions for Review.

Respectfully submitted,

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January 14, 2021

FED. R. APP. P. RULE 32(a) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 12,778 words excluding exempt material.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

ADDENDUM

Relevant Statues and Regulations

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5 U.S.C. § 706(2)

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 7101(b)

Findings and purpose

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

5 U.S.C. § 7102(1)

Employees rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

> **(1)** to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

5 U.S.C. § 7105(a)

Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

> **(2)** The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--
>
> > **(A)** determine the appropriateness of units for labor organization representation under section 7112 of this title;
> >
> > **(B)** supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111of this title relating to the according of exclusive recognition to labor organizations;
> >
> > **(C)** prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;
> >
> > **(D)** prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

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

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 7123

Judicial review; enforcement

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

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

…

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

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

5 U.S.C. § 7131(d)

Official Time

(d) Except as provided in the preceding subsections of this section--

> **(1)** any employee representing an exclusive representative, or
>
> **(2)** in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

18 U.S.C. § 1918

Lobbying with appropriated moneys

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

28 U.S.C. § 512

Attorney General to advise heads of executive department

The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department.

29 U.S.C. § 186(a)

Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in

the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

29 U.S.C. § 411(a)(4)

Bill of rights; constitutional and bylaws of labor organizations

(a)(4) Protection of the right to sue

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

5 C.F.R. § 551.424(b)

Time spent adjusting grievances or performing representational functions.

(b) "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such functions during regular working hours (including regularly scheduled overtime hours), or during a period of irregular, unscheduled overtime work, provided an event arises incident to representational functions that must be dealt with during the irregular, unscheduled overtime period.

5 C.F.R. § 2427.2

Requests for general statements of policy or guidance.

(a) The head of an agency (or designee), the national president of a labor organization (or designee), or the president of a labor organization not affiliated with a national organization (or designee) may separately or jointly ask the Authority for a general statement of policy or guidance. The head of any lawful association not qualified as a labor organization may also ask the Authority for such a statement provided the request is not in conflict with the provisions of chapter 71 of title 5 of the United States Code or other law.

(b) The Authority ordinarily will not consider a request related to any matter pending before the Authority, General Counsel, Panel or Assistant Secretary.

28 C.F.R. § 0.25

General functions

The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Assistant Attorney General, Office of Legal Counsel:

(a) Preparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet.

(b) Preparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to

the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General.

(c) Rendering opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department.

(d) Approving proposed orders of the Attorney General, and orders which require the approval of the Attorney General, as to form and legality and as to consistency and conformity with existing orders and memoranda.

(e) Coordinating the work of the Department of Justice with respect to the participation of the United States in the United Nations and related international organizations and advising with respect to the legal aspects of treaties and other international agreements.

(f) When requested, advising the Attorney General in connection with his review of decisions of the Board of Immigration Appeals and other organizational units of the Department.

(g) Designating within the Office of Legal Counsel:

> **(1)** A liaison officer, and an alternate, as a representative of the Department in all matters concerning the filing of departmental documents with the Office of the Federal Register, and
>
> **(2)** A certifying officer, and an alternate, to certify copies of documents required to be filed with the Office of the Federal Register (1 CFR 16.1).

(h) Approving certain blind trusts, as required by section 202(f) (4) (B) of the Ethics in Government Act of 1978, 92 Stat. 1843.

(i) Consulting with the Director of the Office of Government Ethics regarding the development of policies, rules, regulations, procedures and forms relating to ethics and conflicts of interest, as required by section 402 of the Ethics in Government Act of 1978, 92 Stat. 1862.

(j) Taking actions to ensure implementation of Executive Order 12612 (entitled "Federalism"), including determining which Department policies have sufficient federalism implications to warrant preparation of a Federalism Assessment, reviewing Assessments for adequacy, and executing certifications for the Assessments.

(k) Performing such special duties as may be assigned by the Attorney General, the Deputy Attorney General, or the Associate Attorney General from time to time.