ORAL ARGUMENT NOT YET SCHEDULED
Nos. 20-1038, 20-1041, 20-1063, 20-1237, 20-1250, 20-1263

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 AND FINAL RULE 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

I. Parties

These consolidated petitions for review arise from a request by the Office of Personnel Management ("OPM") 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) on employee-initiated revocations of union dues authorizations. In response, the Authority asked for public comment on the issues raised by OPM's request. *See Notice of Opportunity to Comment*, 84 Fed. Reg. 33,175 (July 12, 2019). After carefully reviewing those comments and the applicable law, the Authority granted OPM's request via its written decision in *Office of Personnel Management*, 0-PS-34, 71 FLRA 571 (2020) (Member Abbott concurring, Member DuBester dissenting) (the "Policy Statement"). In the Policy Statement, the Authority indicated that it would soon issue a proposed rule on dues revocation for notice and comment.

The National Treasury Employees Union ("NTEU"), American Federation of Government Employees ("AFGE") and American Federation of State, County and Municipal Employees ("AFSCME") (collectively, the "Unions"), who were not parties below, filed three petitions for review of the Policy Statement. This Court consolidated those petitions for review. The FLRA moved to dismiss those claims for lack of jurisdiction, the Unions opposed the motion.

On March 19, 2020, the Federal Register published the Authority's Notice and Opportunity to Comment for a proposed regulation concerning this issue.

Miscellaneous and General Requirements, 85 Fed. Reg. 15,742. On July 9, 2020, the Authority issued a Notice of Final Rule concerning dues revocation. *Miscellaneous and General Requirements*, 85 Fed. Reg. 41,169-73 (Member DuBester dissenting) (the "Final Rule"). Each of the Unions petitioned for review of the Final Rule. This Court first consolidated those three petitions, and then consolidated the Policy Statement petitions with the Final Rule petitions. In this proceeding, the Unions are the petitioners and the Authority is the respondent.

II. Rulings Under Review

The Unions seek review of the Authority's decision in *Office of Personnel Management*, 0-PS-34, 71 FLRA 571 (2020) (Member Abbott concurring, Member DuBester dissenting) and the final rule that the FLRA issued in the Federal Register, *Miscellaneous and General Requirements*, 85 Fed. Reg. 41,169-73 (July 9, 2020) (Member DuBester dissenting).

III. Related Cases

These cases were 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 that have not been consolidated into this action.

/s/ Noah Peters
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GLOSSARY OF ABBREVIATIONS

AFGE	American Federation of Government Employees
AFSCME	American Federation of State, County and Municipal Employees
Authority	Respondent, the Federal Labor Relations Authority
CBA	Collective Bargaining Agreement
Final Rule	*Miscellaneous and General Requirements*, 85 Fed. Reg. 41,169-73 (Member DuBester dissenting)
FLRA	Respondent, the Federal Labor Relations Authority
JA	The Joint Appendix
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NTEU	National Treasury Employees Union
OPM	The U.S. Office of Personnel Management
Pet'r Br.	Petitioners' opening brief
Policy Statement	*Office of Personnel Management*, 0-PS-34, 71 FLRA 571 (2020) (Member Abbott concurring, Member DuBester dissenting)
Request	OPM's Request for a General Statement of Policy or Guidance, dated March 19, 2019
SA	The Supplemental Appendix
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Unions	Petitioners, NTEU, AFGE, and AFSCME

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These consolidated cases arise from petitions for review ("Petitions") filed by the National Treasury Employees Union ("NTEU"), American Federation of Government Employees ("AFGE") and American Federation of State, County and Municipal Employees ("AFSCME") (collectively the "Unions"). The Petitions seek review of 1) *Office of Personnel Management*, 0-PS-34, 71 FLRA 571 (2020) (Member Abbott concurring, Member DuBester dissenting) (the "Policy Statement"), in which the Authority held that § 7115(a) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2018) (the "Statute"), in prohibiting union dues assignments from being "revoked for a period of 1 year," was silent on employee-initiated dues revocations *after* the first year of the assignment, and announced the Authority's intention to begin notice-and-comment rulemaking to fill the statutory gap and 2) the Authority's final rule concerning dues revocation. *Miscellaneous and General Requirements*, 85 Fed. Reg. 41,169-73 (July 9, 2020) (Member DuBester dissenting) (the "Final Rule").[1]

The Authority had subject matter jurisdiction to issue the Policy Statement pursuant to §§ 7105(a) and 7134 of the Statute and 5 C.F.R. § 2427.2(a). The

[1] The Policy Statement is included in the Joint Appendix ("JA") at 63-71; Final Rule (including the Authority's detailed justification for its rule and response to 17 categories of public comments) is included in the JA at 117-121.

Authority had subject matter jurisdiction to issue the Final Rule pursuant to 5 U.S.C. §§ 553, 7105(a), and 7134.

STATEMENT OF THE ISSUES PRESENTED

1. Was the Authority's determination in its Policy Statement that § 7115(a) of the Statute permits employees to revoke union dues assignments after a period of one year based on a permissible construction of the Statute?

2. Was the Final Rule, which permits employees to revoke union dues assignments after a period of one year, based on a permissible construction of the Statute?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

The Authority's Final Rule and related Policy Statement address the ability of federal employees to revoke union dues assignments under § 7115(a) of the Statute. The Unions' Petitions present the question of whether the Policy Statement and Final Rule are based on a permissible construction of § 7115(a).

I. The Statute's provisions concerning dues revocations

The Authority is an executive-branch federal agency created by the Statute, which is Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The Statute provides a general framework for regulating

labor-management relations for the federal government. *See generally* 5 U.S.C. §§ 7101-7135 (2018).

The Authority is a three-member independent and bipartisan body that is responsible for implementing the Statute through the exercise of broad adjudicatory, policy-making, and rule-making powers. *Id.* §§ 7104, 7134. The Authority's role is analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983) ("*BATF*"); *Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 342 (D.C. Cir. 2002).

In addition to empowering the Authority to oversee federal-sector labor relations, the Statute enumerates certain basic rights and responsibilities of federal employees, unions, and agencies. Among those rights is the right of employees to allow direct deductions from their paychecks for union dues. 5 U.S.C. § 7115(a). The Statute states that "[e]xcept as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year." *Id.*

II. The Authority's procedures for issuing policy statements and regulations

Section 7105(a)(1) of Statute "directs the [Authority] to 'establish[] policies and guidance relating to matters' arising under the [S]tatute." *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 750 F.2d 143, 143 (D.C. Cir. 1984) (quoting 5 U.S.C. § 7105(a)(1)). Part 2427 of the Authority's regulations set forth the procedures by

which parties may request issuance of 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 general statement of policy or guidance. 5 C.F.R. § 2427.2(a).

In assessing requests to issue policy statements, the Authority considers several factors, including "[w]hether the resolution of the question presented would have general applicability under" the Statute, *id.* § 2427.5(c), and whether issuing a policy statement would promote the purposes of the Statute, *id.* § 2427.5(f).

Section 7134 of the Statute states that "[t]he Authority . . . shall . . . prescribe rules and regulations to carry out the provisions of this chapter applicable to [it]." 5 U.S.C. § 7134. Section 7134 gives the Authority "broad authority . . . to promulgate regulations that carry out the [S]tatute's provisions." *Eisinger v. FLRA*, 218 F.3d 1097, 1100 (9th Cir. 2000). The procedures outlined in the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (2018), apply to the Authority's "issuance, revision, or repeal" of its regulations. 5 U.S.C. § 7134.

III. Deference is due to the Authority's interpretation of Section 7115(a)

The Authority receives "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). Thus, this Court "may not substitute its own construction of a statutory provision for

a reasonable interpretation made by [the Authority]." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

In this case, the Authority reviewed the meaning and application of § 7115(a) of the Statute not once, but twice. The Authority first reviewed that provision though its policy statement procedure after soliciting public comment. In particular, it examined the text of § 7115(a), which provides that after an employee authorizes union dues withholding via written assignment, "such assignment may not be revoked for a period of [one] year." Comparing that language with its previous interpretation in *U.S. Army, U.S. Army Materiel Dev. & Readiness Command, Warren, Michigan*, 7 FLRA 194 (1981) ("*Army*"), the Authority determined that *Army* erroneously interpreted § 7115(a) as permitting employees to revoke dues assignments only at one-year intervals after the first year of an assignment, when the text imposes no such restriction.

After issuing the Policy Statement, the Authority published a proposed rule in the Federal Register for notice and comment. The Final Rule is the culmination of the Authority's cautious and well-reasoned deliberations concerning the meaning of § 7115(a), and is based upon a permissible construction of the Statute. This Court should thus deny the Petitions.

STATEMENT OF THE FACTS

I. The Authority issues the Policy Statement examining Section 7115(a)

On March 19, 2019, the Office of Personnel Management ("OPM") asked the Authority to issue guidance holding: 1) that the principles articulated in *Janus v.*

AFSCME, 138 S. Ct. 2448 (2018) apply to federal-sector labor-management relations, and 2) consistent with *Janus* and the text of § 7115(a), agencies should process employee union dues revocations as soon as administratively feasible so long as one year has passed since the initial assignment. (JA 1-3.)

In July 12, 2019, the Authority solicited public comments on OPM's request for a policy statement. (JA 4.) After considering those comments, the Authority issued the Policy Statement.

In the Policy Statement, the Authority assessed OPM's request in light of the text of § 7115(a). It found that "[t]he most reasonable way to interpret the phrase 'any such assignment may not be revoked for a period of [one] year' [in § 7115(a)] is that the phrase governs only the first year of an assignment." (JA 64.) It rejected the reasoning of *Army*, in which the Authority erroneously read § 7115(a) as imposing a requirement that employees may only revoke dues assignments at one-year intervals after the first year of an assignment, when the text imposes no such restriction. The Policy Statement determined that *Army* had improperly relied on the legislative history of § 7115(a) while ignoring its plain text. (JA 65 n.23 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994)) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").)

While the Policy Statement found that yearly dues-revocation periods are not required by § 7115(a), it did not state that they are prohibited by the Statute. (JA 64-65.) Instead, the Authority said that it would undertake notice-and-comment

rulemaking to craft a new regulation regarding dues revocation. (JA 65.) Through the rulemaking process, the Authority would balance interests such as "robustly protecting employees' rights and freedoms, and guarding unions' institutional interests in a clear and effective procedure for collecting dues." (JA 65.) The rule that the Authority ultimately propounded would "seek a reasonable balance between competing interests." (JA 65.)

Before the rulemaking process even began, however, the Unions filed petitions for review of the Policy Statement. The Authority moved to dismiss the petitions for review because the Policy Statement was not a final agency action, not ripe for review, and would be rendered moot by the Authority's forthcoming Final Rule.

II. The Authority issues its Final Rule allowing employees to initiate dues revocations at any time after the first year of the assignment

The Authority published its proposed regulations for notice and comment in the Federal Register on March 19, 2020. (JA 72-73.) The Authority issued its Final Rule on July 9, 2020. (JA 117-21.) The Final Rule added a new § 2429.19 to Title 5 of the Code of Federal Regulations that provides:

> Consistent with the exceptions in 5 U.S.C. 7115(b), after the expiration of the one-year period during which an assignment may not be revoked under 5 U.S.C. 7115(a), an employee may initiate the revocation of a previously authorized assignment at any time that the employee chooses. After the expiration of the one-year period of irrevocability under 5 U.S.C. 7115(a), upon receiving an employee's request to revoke a previously authorized dues assignment, an agency must process the revocation request as soon as administratively feasible.

(JA 120-21.)

When it published the Final Rule, the Authority comprehensively addressed the 17 categories of comments that it received in response to its Federal Register notices. (JA 117-20.) Indeed, the Authority addressed each of the issues the Unions raise in their brief in this case.

In particular, the Authority refuted claims that the legislative history of § 7115(a) requires the conclusion that federal employees may only revoke dues assignments at one-year intervals. The Authority found that when considering the issue of dues assignments and revocations, Congress was aware of a prior Executive Order that permitted employees to revoke dues assignments "at six-month intervals." (JA 118.) The version of § 7115(a) enacted into law, however, "does not mention intervals *at all*." (JA 118 (emphasis in original).) The Authority therefore reasonably concluded that, "*Army* improperly grafted an interval-based revocation restriction onto the wording of [S]ection 7115(a)" and rejected *Army*'s interpretation. (JA 118.)

The Unions filed a second set of petitions for review of the Final Rule, which this Court consolidated. NTEU then moved to consolidate the Policy Statement petitions with the Final Rule petitions. This Court subsequently issued an order

deferring consideration of the Authority's motion to dismiss to the merits panel and consolidating the Policy Statement and Final Rule petitions.[2]

SUMMARY OF ARGUMENT

In accordance with *Chevron*, this Court must defer to the Authority's reasonable construction of § 7115(a) of the Statute in its Policy Statement and Final Rule. 467 U.S. at 842–43. At each point in its decisionmaking process, the Authority sought comment from members of the federal labor-management community. The Authority carefully considered those comments in providing a well-reasoned Policy Statement and thoroughly-explained Final Rule that correctly interpreted the Statute and appropriately balanced the interests of federal employees, unions and agencies with respect to dues revocation. The Court should therefore deny the Petitions.

In its Policy Statement, the Authority performed one of its core statutory functions: interpreting the Statute. (JA 63.) In comparing the plain text of § 7115(a) with its previous reading of that provision in *Army*, the Authority concluded that the two could not be reconciled. (JA 63-65.) It therefore overruled *Army* and adopted an interpretation of § 7115(a) that gave effect to its plain language: that federal employees may revoke dues assignments at any time after the first year of the assignment. (JA 63-65.)

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[2] Because the Policy Statement petitions have been consolidated with the Final Rule petitions and the rulemaking process is now complete, the Authority no longer contends that the Policy Statement petitions should be dismissed for lack of finality and ripeness.

The Authority recognized that its new interpretation of § 7115(a) was a departure from *Army* and left a gap that could most appropriately be addressed via rulemaking. (JA 65.) The Authority proceeded carefully and deliberately, soliciting comment in order to craft a new rule that is consistent with the Statute's plain text and "further[s] important policies underlying the Statute, such as robustly protecting employees' rights and freedoms, and guarding unions' institutional interests in a clear and effective procedure for collecting dues." (JA 65.) In issuing its Final Rule, the Authority addressed all of the substantive concerns presented in public comments, clarified that federal employees may revoke dues assignments any time after the first anniversary of the assignments, and specified that agencies must process such revocations as soon as administratively feasible.

The Authority's well-reasoned interpretation of its Statute, which is owed *Chevron* deference, and prudent and lawful use of its broad rulemaking power warrant denial of the Petitions. The Unions' strained arguments do not establish that the Authority's decisions are based on an impermissible interpretation of the Statute, or that they are arbitrary or capricious.

Contrary to the Unions' arguments, § 7115(a)'s terms are unambiguous and support the Authority's—not the Unions'—interpretation. The Authority correctly found the "most reasonable way to interpret the phrase 'any such assignment may not be revoked for a period of [one] year' is that the phrase governs only the first year of an assignment." (JA 64, 118.) Acknowledging that its conclusion differed from that

of *Army*, the Authority overruled that decision. It explained that *Army* had come to a different result by improperly relying on the Statute's legislative history while ignoring the text of § 7115(a). As the text of § 7115(a) is not ambiguous, the Authority found that *Army*'s reliance on legislative history to interpret that provision reflected "poor statutory construction." (JA 65 (citing *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994)); JA 117.)

The Final Rule further explained that *Army* misiread the Statute's legislative history. When presented with a proposal that would have permitted employees to revoke dues at six-month intervals, Congress instead enacted a provision that permitted revocation after a year—while intentionally omitting any language concerning intervals. The Authority thus reasonably concluded that *Army's* flawed interpretation of the legislative history led it to "improperly graft[] an interval-based revocation restriction onto the wording of section 7115(a)"—an interval-based restriction that Congress expressly decided *not* to include in that provision. (JA 118.) Thus, the Unions' argument fails at *Chevron* step one because the text of § 7115(a) contains no interval-based restriction on dues revocation.

Nor have the Unions demonstrated that the Policy Statement and Final Rule were based upon an impermissible interpretation of the Statute, or were arbitrary or capricious. *First*, as noted above, the Authority based the Policy Statement and Final Rule on a reasonable interpretation of both the unambiguous language of § 7115(a) and the Authority's interpretation of its legislative history.

Second, the Authority acknowledged the Unions' institutional interests in this matter, and addressed them both in the Policy Statement and (at great length) in issuing the Final Rule. (JA 63-67, 117-21.) The Authority ensured that the Final Rule would apply only to assignments made after its effective date. (JA 118.) It clarified that the Final Rule would not affect current collective bargaining agreements ("CBAs") containing clauses related to dues revocation. (JA 118.) The Final Rule further clarified that, going forward, parties would not be burdened with negotiating dues revocation provisions. (JA 120-21.)

The Authority also addressed the Unions' core concern that the decisions would affect the Unions' ability to plan financially. It explained that under the Final Rule, unions would still enjoy the "the certainty of the first year of irrevocability under section 7115(a)" and that the Final Rule did not require or provide an incentive for employees to revoke dues assignments after one year. (JA 119.) The Authority observed that unions were free to "enter into dues-payment arrangements outside the federal payroll system that would provide them a greater measure of funding predictability." (JA 119.)

Third, the Unions' claim that the Policy Statement and Final Rule unreasonably elevated the rights of individual employees over that of unions (Pet'r Br. 46-48) is wholly without merit. Contrary to the Unions' arguments, the Authority is responsible under the Statute for protecting the rights of individual employees, not just the institutional interests of unions. *See, e.g.*, 5 U.S.C. §§ 7102; 7115(a); 7116(a)(1),

(2), (4), (b)(1)-(4), (c). The Authority therefore considered the impact its Final Rule and Policy Statement had on both unions and individual employees, and balanced those interests. Comments the Authority received indicated that most unions (other than NTEU) calculated annual revocation deadlines based on the date the employee first made his or her dues assignment. (JA 118.) The Authority further learned that different CBAs contained different provisions concerning the window in which employees could revoke. (JA 117.) Several individual and organizational commenters observed that under this system, it was very difficult for average employees to know when they could revoke their dues assignments. While the Authority recognized and addressed unions' financial and institutional concerns, it was neither arbitrary nor capricious for the Authority to also address the financial concerns of individual employees.

Finally, notwithstanding the Unions' claims to the contrary (Pet'r Br. 48-51), the Authority considered and reasonably rejected NTEU's argument in its public comment that the Authority should look to case law under the National Labor Relations Act ("NLRA") allowing employees to obligate themselves to pay union dues even after they leave a union. (JA 120.) As the Authority recognized, the D.C. Circuit has squarely rejected the notion that NLRB precedent should carry any weight in the interpretation of § 7115(a). (JA 120 (citing *Am. Fed'n of Gov't Emps., Council 214, AFL-CIO v. FLRA*, 835 F.2d 1458, 1461 (D.C. Cir. 1987) ("*Council 214*").) Section 7115(a) has no analogue in the NLRA and creates a dues-withholding scheme that is

fundamentally different from that in the private sector. *Council 214*, 835 F.2d at 1461. That analysis alone was more than sufficient to justify the Authority in rejecting NTEU's proposed NLRA analogue.

But even under the NLRB case the Unions cite, a "clear and unmistakable" waiver of the statutory right to refrain from assisting a union is required before a continuing obligation to pay dues will be enforced against an employee. *Int'l Bhd. of Elec. Workers, Local No. 2088, AFL-CIO (Lockheed Space Ops. Co.)*, 302 NLRB 322, 328 (1991). In its comment, NTEU itself recognized that, if dues can be made irrevocable for rolling annual periods, employees may be confused as to when they can revoke those assignments. (JA 85.) The Authority's decision to address that unquestionably valid concern over employee confusion (one echoed by several other commenters) via its Final Rule creating a single, uniform standard across the federal government, instead of relying on ill-defined analogies to private-sector practice, was in no way arbitrary or capricious. (JA 119.)

Ultimately, the Policy Statement and Final Rule are the product of the Authority's measured and well-reasoned application of its statutory expertise. This Court should therefore deny the Petitions.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 842–43). Accordingly,

the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the Authority]." *Chevron*, 467 U.S. at 844. 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).

This Court reviews the Unions' challenges to the Authority's legal determinations under the two-step *Chevron* framework. At step one, where Congress "has directly spoken to the precise question at issue," this Court "give[s] effect to [its] unambiguously expressed intent[.]" *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 57 (D.C. Cir. 2005) (quoting *Chevron,* 467 U.S. at 842–43). If the statute is silent or ambiguous, this Court moves to step two and defers to the Authority's interpretation so long as it is "based on a permissible construction of the statute." *Id.*; *see also Nat'l Treasury Emps. Union v. FLRA,* 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*").

Courts uphold Authority decisions so long as they are not "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *NTEU 2014*, 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. FAA*, 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. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (internal quotation marks and citations omitted); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44–45 (1983); *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995).

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). Such an explanation must indicate "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; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

In assessing an agency regulation, "neither antiquity nor contemporaneity with the statute is a condition of validity." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740 (1996). As the Supreme Court has said:

> We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Id. at 740-41.

Legislative rules (like the Final Rule) that are made pursuant to a specific grant of statutory rulemaking authority "will be upheld unless they are arbitrary, capricious, or manifestly contrary to the statute." *Eisinger v. FLRA*, 218 F.3d 1097, 1100 (9th Cir. 2000) (internal formatting omitted). In addition, agency interpretations of statutory ambiguity that concern the scope of that agency's regulatory authority receive *Chevron* deference. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 293 (2013).

ARGUMENT

I. The Authority's construction of the Statute satisfies *Chevron* step one

The Unions erroneously claim that the Policy Statement and Final Rule conflict with the legislative history of § 7115(a) and the structure of the Statute. The Unions' legislative history arguments fail, both on their own terms and as an attempt to muddy the plain language of § 7115(a) providing that dues assignments "may not be revoked

for a period of one year." The Authority's Policy Statement and Final Rule are consistent with the text of § 7115(a) and the structure of the Statute. Section 7115(a) is silent on when employees may revoke dues assignments after the first year of the assignment. Drawing on its broad rulemaking power in § 7134, the Authority filled that gap. *See Eisinger*, 218 F.3d at 1100 (§ 7134 gives the Authority "broad authority . . . to promulgate regulations that carry out the [S]tatute's provisions"). In so doing, the Authority furthered the Statute's purposes of advancing employee rights while ensuring that dues-revocations are governed by a single, predictable rule. (JA 120.)

A. Section 7115(a) provides unambiguously that employees may revoke union dues assignments after "a period of one year."

In step one of the *Chevron* analysis, this Court presumes "that a legislature says in a statute what it means and means in a statute what it says there." *Va. Dep't of Med. Assistance Servs. v. U.S. Dep't of Health & Human Servs.*, 678 F.3d 918, 922–23 (D.C. Cir. 2012) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54, 1 (1992)). To overcome that presumption, the Unions "must 'show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.'" *Id.* (quoting *Performance Coal Co. v. Fed. Mine & Health Review Comm'n*, 642 F.3d 234, 238 (D.C. Cir.2011)). The Unions fail to overcome that presumption in this case.

The text of § 7115(a) is clear. Its first sentence says that employees can opt to their have union dues deducted directly from their paychecks through federal

government payroll services via a written assignment, and that such requests "shall [be] honor[ed]" by the agency and an appropriate deduction made from the employee's paycheck. The second sentence says that such services will be provided to unions without cost. The third sentence says, in relevant part, "***any such assignment*** may not be revoked for ***a*** period of [one] year." The plain text of § 7115(a) therefore speaks in unambiguous terms of a dues assignment that may not be revoked for a single year. That language is incompatible with any requirement of revocation at specified intervals. Instead, it creates a period of irrevocability "of [one] year." 5 U.S.C. § 7115(a).

As the Authority correctly noted, "[t]he most reasonable way to interpret the phrase 'any such assignment may not be revoked for a period of [one] year' is that the phrase governs only the first year of an assignment." (JA 64.) That is, § 7115(a) "says that an 'assignment may not be revoked for a period of [one] year,' and such wording governs only one year because it refers to only '[one] year.'" *Id.* As the Authority explained,

> [I]t would be nonsensical to conclude that the one-year period under § 7115(a) is not the first year of an assignment. For example, we could not reasonably find that § 7115(a) prevents the revocation of an assignment during its second year, but not its first year. And because the provision says that it limits revocations for "a period of [one] year," it does not limit revocations for multiple periods of one year.

(JA 64.)

Under the dissenting Member's interpretation of § 7115(a), echoed by the Unions here, "one year means 'at any time during the first year, and not during subsequent years, except at annual intervals.'" *Id.* But such an interpretation, the Authority found, "ignores the actual wording of the provision in favor of a different restriction on revocations." *Id.*; *see also Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply[.]").

Thus, the Policy Statement correctly pointed out that the Authority's previous holding in *Army* (that § 7115(a) required dues revocation only at yearly intervals) rests on an untenable interpretation of § 7115(a), because the provision's text is silent on employee-initiated dues revocations that occur after "a period of [one] year." While *Army* purported to rely on legislative history to create the interval-based restriction, that reliance was flawed because (as *Army* itself acknowledged) the legislative history concerning § 7115(a) is ambiguous at best. *Army*, 7 FLRA at 198 n. 13 (observing that the parts of the legislative history "which did advert to the revocability language" of § 7115(a) do "not shed light on its intended meaning"). In fact, as demonstrated in Part II.B below, the legislative history supports finding that Congress did *not* intend § 7115(a) to create an interval-based restriction on employee-initiated dues revocations after the first year. Thus, the Authority was unquestionably correct in concluding that *Army* "in fact . . . made a policy judgment to impose annual revocation periods after

the first year of an assignment," as "§ 7115(a) neither compels, nor even supports, the existing policy on annual revocation windows." (JA 64-65.)

B. The legislative history of the Statute does not support any finding that dues may only be revoked at one-year intervals—in fact, it shows the exact opposite.

Resisting this conclusion, the Unions cite a single passage from a committee report for the proposition that § 7115(a), despite its silence, actually requires dues revocations to occur only at yearly intervals after the first year of the assignment. (Pet'r Br. 33.) The Unions' arguments fail for several reasons.

As an initial matter, the Unions have not met the high bar necessary to resort to legislative history to interpret § 7115(a). "[O]nly rarely have we relied on legislative history to constrict the otherwise broad application of a statute indicated by its text, and just recently we reiterated that '[w]hile such history can be used to clarify congressional intent even when a statute is superficially unambiguous, the bar is high.'" *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (citations omitted); *Va. Dep't of Med. Assistance Servs.*, 678 F.3d 918, 923 (D.C. Cir. 2012) ("This case does not present the very rare situation where the legislative history of a statute is more probative of congressional intent than the plain text.") (internal quotation omitted); *Mingo Logan Coal Co. v. U.S. P.A.*, 714 F.3d 608, 616 (D.C. Cir. 2013) (same); *Nat. Res. Def. Council v. Envtl. Prot. Agency*, 489 F.3d 1250, 1258 (D.C. Cir. 2007) (same). Here, the text of § 7115(a) is plain, and does not speak to revocation of dues assignments after an initial period "of [one] year."

But more fundamentally, the legislative history cited by the Unions supports the Authority's interpretation of § 7115(a), not the Unions'. If Congress intended union dues assignments to be revocable at one-year intervals, it knew how to incorporate that requirement into the law. With § 7115(a), it deliberately chose *not* to do so. The version of the Statute passed by the Senate included language similar to that of Executive Order 11,491, which had governed the issue prior to the Statute. The Senate's proposed language "provided that assignments of dues allotments 'shall be revocable at stated intervals of not more than 6 months.'" *Army*, 7 FLRA at 197 (emphasis added) (quoting *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Congress, 1st Sess., Committee Print No. 96-7 (November 19, 1979), at 539 & 599-600 ("Legis. Hist.") (available at: https://go.usa.gov/xPfNk)).

Crucially, however, the language referring to dues assignments being revocable at "intervals of not more than 6 months" was dropped by the conference committee and does not appear in the final version of § 7115(a). *Id.* at 198 (citing Legis. Hist. at 823). That is, Congress removed the reference to "intervals" in favor of language providing that dues "assignments may not be revoked for a period of [one] year." 5 U.S.C. § 7115(a). Thus, the version of § 7115(a) passed by Congress and signed into law contains no reference to revocation at intervals. The legislative history shows Congress's choice was deliberate, because it had considered language that would permit dues revocation only at specified intervals and purposefully chose very

different language providing for a one-year period of irrevocability. The Statute's legislative history thus reflects what the text makes plain: Congress did not intend for dues assignments to be revocable only at one-year intervals, but rather at any time after the first year of the assignment.

Indeed, *Army* itself recognized that the parts of the legislative history "which did advert to the revocability language" of § 7115(a) **do "not shed light on its intended meaning**." *Army*, 7 FLRA at 198 n.13 (emphasis added) (citing Legis. Hist. at 879-80 (Statement of Rep. Erlenborn) and 907 (Statement of Rep. Collins)). Thus, the Authority correctly noted in its Policy Statement, *Army* "made a policy judgment to impose annual revocation periods after the first year of an assignment" that was disconnected from § 7115(a)'s legislative history. (JA 64-65.) As the Authority explained in promulgating the Final Rule,

> the legislative history of section 7115(a) is not nearly as supportive of *Army*'s interpretation as that decision suggested. *Army* began with the observation that dues deductions were revocable at six-month intervals under Executive Order 11,491. Then, examining congressional committee reports, *Army* concluded that the Statute was intended to provide greater union security than Executive Order 11,491, but not as much security as an "agency shop." Finally, *Army* concluded that section 7115(a) "must" be interpreted to allow revocations only at one-year intervals. 7 FLRA at 199. **The logical flaw in that reasoning is clear. Whereas Executive Order 11,491 stated explicitly that dues-deduction assignments must allow employees to "revoke [an] authorization at stated six-month intervals," *Army*, id. at 196, section 7115(a) of the Statute does not mention intervals at all. Rather, it mentions irrevocability for "a period of [one] year." 5 U.S.C. 7115(a).**

(JA 118 (emphasis added).)

The Unions' claim that the legislative history supports their reading of § 7115(a) relies almost entirely on a single sentence from the House Committee Report. (Pet'r Br. 33.) That sentence says that § 7115 "reflects a compromise between two sharply contrasting positions which the committee considered: no guarantee of withholding for any unit employee and mandatory payment by all unit employees ('agency shop')." (Pet'r Br. 33 (quoting *Army*, 7 FLRA at 197 (quoting, in turn, Legis. Hist. at 694)).) That lone sentence, however, neither states nor implies that dues authorizations may only be revoked at one-year intervals. Indeed, it says nothing about dues revocation at all, but merely describes the overall dues-withholding scheme created by § 7115.

Under that scheme, an employee's written assignment authorizing dues deductions *must* be honored by the agency pursuant to the first sentence of § 7115(a)—and that is not affected by the Authority's Policy Statement or Final Rule. In addition, under the Authority's Policy Statement and Final Rule, even the employee cannot choose to revoke that assignment for an initial one-year period—creating a "guarantee of withholding" so strong that not even the employee can alter it for an initial one-year period. (Pet'r Br. 33.) Thus, the Authority's interpretation of § 7115(a) in the Policy Statement and the Final Rule "reflect[] a compromise between . . . no guarantee of withholding for any unit employee and mandatory payment by all unit employees ('agency shop')." (Pet'r Br. 33 (quoting *Army*, 7 FLRA at 197

(quoting, in turn, Legis. Hist. at 694)).) Far from being a system where there is "no guarantee of withholding for any employee," (Pet'r Br. 33) the Authority's interpretation of § 7115(a) in the Policy Statement and Final Rule would guarantee withholding 1) during the first year of the assignment and 2) continuing for so long as the unit member authorizes it. The only difference from *Army* is that the Policy Statement and Final Rule would not limit employees' opportunity to revoke assignments to confusingly-defined one-year anniversary intervals.

Even more tenuously, the Unions cite a Civil Service Commission ("CSC") interim guidance document from 1978. (Pet'r Br. 34.) That CSC guidance document provides that, on or before January 11, 1979 (the effective date of the Statute), "agencies should inform employees affected of the elimination of the semi-annual revocation periods" and "explain that after the next available six-month revocation date established by the applicable [CBA], any future revocation can only be at one-year intervals from that date." *Army*, 7 FLRA at 202 n. 16 (quoting CSC Bulletin 711-48, Special Bulletin No. 10, at 4 (Dec. 28, 1978)). The Unions call this a "contemporaneous construction of the statute by those presumed to have been aware of congressional intent" that should carry "particular force." (Pet'r Br. 34 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 54 (2011)).)

But CSC's interim guidance document carries no force and warrants no deference. The now-defunct CSC (whose functions were mostly transferred to OPM) was never responsible for administering the Statute; that function belongs exclusively

to the Authority. *BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs., Mont. Air Chapter No. 29*, 22 F.3d at 1153. Courts do not defer to interpretations of the Statute offered by agencies other than the Authority. *Am. Fed'n of Gov't Emps,, AFL-CIO, Local 3669 v. Shinseki*, 709 F.3d 29, 33 (D.C. Cir. 2013) (refusing to defer to the Department of Veterans Affairs' interpretation of the Statute); *Office of Pers. Mgmt. v. FLRA*, 864 F.2d 165, 167 (D.C. Cir. 1988) ("Because section 7117(a)(1) is part of the Authority's enabling legislation, and not OPM's, we owe deference primarily to the [Authority]'s construction of that section.").

Indeed, *Mayo Foundation* and *National Muffler*, the two cases cited by the Unions (Pet. Br. at 34), both emphasize that very point—courts do *not* defer to interpretations of statutes offered by agencies that are not charged with administering them. *Mayo Found.*, 562 U.S. at 58 (In determining whether *Chevron* deference should apply, "the ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of 'gap-filling' authority."); *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 476-77 (1979) (Deference is only warranted where an interpretive rule is promulgated by the agency "responsible for putting the rule[] into effect.").

Even more fundamentally, CSC's 1978 bulletin provided no explanation for its conclusion that "after the next available six-month revocation date established by the applicable [CBA], any future revocation can only be at one-year intervals from that date." *Army*, 7 FLRA at 202 n.16 (quoting CSC Bulletin 711-48, Special Bulletin No.

10, at 4). CSC's 1978 bulletin thus carries no weight, both because the CSC never administered the Statute and because CSC offered no reasoning or justification for its conclusion regarding what the Statute requires.[3]

The Unions claim that "Congress has legislatively ratified the statutory construction adopted in *Army*" because it has subsequently amended other parts of the Statute but not § 7115(a). The Unions cite the "ratification doctrine" set forth in *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), which holds that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." The ratification doctrine has two components: the statutory text must be re-enacted without change, and there must be a judicial consensus regarding the re-enacted language that is "so broad and unquestioned that we must presume Congress knew of and endorsed it." *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005).

Here, neither condition obtains. Congress has not re-enacted § 7115(a), nor does § 7115(a) contain text that was reenacted from another statute (indeed, as noted

[3] The Unions cite *Catawba County v. Environmental Protection Agency*, 571 F.3d 20, 35 (D.C. Cir. 2009) (per curiam) (Pet'r Br. 31) for the proposition that "a statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque." But here, both the text of § 7115(a) and its legislative history support the Authority's—not the Unions'—interpretation of § 7115(a). Thus, the next sentence of *Catawba County* applies equally here: "Notwithstanding petitioners' torrent of arguments to the contrary, this is not such a case—indeed, it isn't even close."

above, Congress specifically chose *not* to include the "intervals" language of Executive Order 11,491 in § 7115(a)). Instead of pointing to re-enacted statutory text, the Unions cite amendments to *other* parts of the Statute that have nothing to do with dues revocation: amendments designating the Authority's Chairman as Chief Executive Agency Officer to improve its internal administration,[4] adding the Smithsonian Institution to the list of agencies covered by the Statute,[5] and addressing limits on back-pay awards.[6] (Pet'r Br. 35.) There is no evidence that "Congress knew of and endorsed" *Army* when it passed those unrelated amendments.

This case is thus very far afield from *Lorillard*, where Congress incorporated specific language regarding civil suits from the Fair Labor Standards Act ("FLSA") verbatim into the Age Discrimination in Employment Act ("ADEA"). 434 U.S. at 579-80. The Supreme Court observed that in passing ADEA, "Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Id.* at 581. Thus, it was logical to conclude that by intentionally incorporating specific language verbatim from the FLSA into the ADEA, Congress

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[4] Civil Service Miscellaneous Amendments Act of 1983, Pub. L. No. 98-224, §§ 3-4, 98 Stat. 47, 47-48 (amending Sections 7104 and 7122).

[5] Workforce Investment Act of 1998, Pub. L. No. 105-220, § 341(e), 112 Stat. 936, 1092 (amending Section 7103).

[6] Strom Thurmond National Defense Authorization Act for FY 1999, Pub. L. No. 105-261, Div A, Title XI, § 1104(b), 112 Stat. 1920, 2142 (1998) (amending section 7121).

meant to incorporate previous judicial interpretations of that specific language. Here, there is no reason to presume that unrelated amendments to the Statute having nothing to do with dues revocations were intended to ratify or endorse *Army*. *See Braeburn Inc. v. U.S. Food & Drug Admin.*, 389 F. Supp. 3d 1, 27 (D.D.C. 2019); *United States v. Blavatnik*, 168 F. Supp. 3d 36, 49–50 (D.D.C. 2016).

As neither the text nor the legislative history of § 7115(a) supports the Unions' interpretation, the Court should defer to the Authority's Policy Statement and Final Rule. *See Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116, 129 (1985).

C. The Authority's decision to fill the silence Congress left with respect to when employees may revoke union dues after the first year of the assignment was consistent with the Statute's structure and purpose.

Having discarded the untenable interpretation of § 7115(a)'s text and legislative history set forth in *Army* and correctly determined that the Statute is silent on employee-initiated dues revocations that occur after the first year of the assignment, the Authority properly decided to fill the gap in the statutory scheme through rulemaking. (JA 65.) The Authority had the clear power under the Statute to do so. *See* 5 U.S.C. §§ 7105(a)(1) ("The Authority shall provide leadership in establishing policies and guidance relating to matters under" the Statute "and, except as otherwise provided, shall be responsible for carrying out [its] purpose[.]"); 7105(a)(2)(I) ("The Authority shall . . . take such other actions as are necessary and appropriate to effectively administer the provisions of" the Statute.); 7134 ("The Authority . . . . shall

. . . prescribe rules and regulations to carry out the provisions of this chapter applicable to [it].").

The Unions argue that the Authority's Policy Statement and Final Rule conflict with the Statute's structure. (Pet'r Br. 36-40.) In particular, they contend that the Statute creates a broad obligation to bargain over all "conditions of employment," with certain expressly-defined exceptions. (Pet'r Br. 36-37.) But one of the Statute's express exceptions is that the duty to bargain does not extend to matters that are "inconsistent with any . . . Government-wide rule or regulation." *See* 5 U.S.C. § 7117(a)(1). And the Statute gives the Authority broad power to "provide leadership in establishing policies and guidance relating to matters under" the Statute, *id.* § 7105(a)(1), to take actions that "are necessary and appropriate to effectively administer the provisions of" the Statute, *id.* § 7105(a)(2)(I), and to "prescribe rules and regulations to carry out" the Statute's provisions, *id.* § 7134. Section 7134, in particular, gives the Authority "broad authority . . . to promulgate regulations that carry out the [S]tatute's provisions." *Eisinger*, 218 F.3d at 1100; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005) (holding that similar language in the Communications Act of 1934 gave the FCC "the authority to promulgate binding legal rules"); *Buckley v. Valeo*, 424 U.S. 1, 110 (1976) (per curiam) (similar language in the 1974 amendments to the Federal Election Campaign Act of 1971 gave the Federal Election Commission "extensive rulemaking . . . powers"); *In re Permanent Surface Min. Regulation Litig.*, 653 F.2d 514, 521 (D.C. Cir. 1981) (describing

similar language in the Surface Mining Control and Reclamation Act of 1977 as "a general rulemaking grant typical of statutes that, like the Act, delegate extensive responsibilities to administrative agencies").

As the Authority noted in issuing the Final Rule, "Congress instructed in section 7117(a)(1) of the Statute that the duty to bargain would not extend to a matter that was inconsistent with any governmentwide regulation." (JA 118.) Further, "there is no basis in the Statute for finding that Congress intended for § 7117(a)(1) to apply to governmentwide regulations issued by all of the other federal agencies that are statutorily authorized to promulgate legislative rules, but not to governmentwide regulations issued by the Authority." (JA 118.)

In short, the Authority's issuance of the Final Rule did not conflict in any way with the Statute's scheme. Instead, it fulfilled Congress's expectation that the Authority would exercise broad powers to "provide leadership in establishing policies and guidance relating to" the Statute, to take actions "necessary and appropriate to effectively administer" the Statute, and to "prescribe rules and regulations to carry out the provisions of" the Statute. 5 U.S.C. §§ 7105(a)(1) & (2)(I), 7134. While the Unions may disagree with the Authority's decision to exercise its rulemaking powers in the way that it did, that decision was entirely consistent with the Statute.

The Authority's decision to issue the Final Rule was plainly reasonable and advanced important statutory purposes. The Final Rule specifies that employees may revoke dues assignments at any time after the first year. (JA 120-21.) In so doing, the

Final Rule provides certainty to all parties and a clear, government-wide rule for all agencies, instead of leaving the federal workforce at the mercy of a confusing patchwork of differing dues-revocation rules. (JA 120-21.) Indeed, the necessity for the Final Rule is demonstrated by arguments made by the Unions in their opposition to the Authority's motion to dismiss the Policy Statement petitions, in which they decried confusion over when employees could revoke dues assignments and the additional burden that negotiations on that issue would impose upon them. (*See* Petitioners' Response in Opposition to Respondent's Motion to Dismiss, at 23-24, No. 20-1038, (D.C. Cir. May 28, 2020), Document #1844719.)

In addition to providing certainty and stability, the Final Rule advances another important purpose of the Statute: "assur[ing] employees the fullest freedom in the exercise of their rights under the Statute, including their rights under [S]ections" 7102, 7115, and 7116 of the Statute. (JA 119.) In particular, while "[n]egotiated delays in processing revocation forms may provide benefits to unions or agencies . . . they do not benefit individual employees." (JA 119.) Indeed, s the Authority noted, such negotiated delays could seriously impair the free exercise of employee rights protected by the Statute. (JA 119 (citing *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport, R.I.*, 16 FLRA 1124, 1126–27 (1984) (finding that agency committed an unfair labor practice by impeding the processing of revocation forms) and *AFGE, Local 2192, AFL–CIO*, 68 FLRA 481, 482–84 (2015) (finding that union committed an unfair labor practice by impeding the processing of revocation forms)).); 5 U.S.C. § 7102

(providing that each employee shall have the right to refrain from joining or assisting a labor organization).

The Authority's Final Rule thus "further[s] important policies underlying the Statute, such as robustly protecting employees' rights and freedoms, and guarding unions' institutional interests in a clear and effective procedure for collecting dues" and represents "a reasonable balance between competing interests." (JA 65.) While the Final Rule does not represent "the only possible balance that could be struck among competing interests," it is the balance that the Authority, in the exercise of its congressionally-delegated power to craft legislative rules, 5 U.S.C. § 7134, found to best fulfill the Statute's purposes. (JA 120.)

Although the Unions cite the Statute's recognition in § 7101 that collective bargaining is in the public interest (Pet'r Br. 38), it is well-settled that 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). Congress clearly intended that the Authority would be responsible for balancing those competing interests—as it did in this case. *BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs., Mont. Air Chapter No. 29*, 22 F.3d at 1153.

The Unions' citation to *King v. Burwell*, 576 U.S. 473 (2015) is inapposite. (Pet'r Br. 39.) *King* noted that *Chevron* deference "is premised on the theory that a statute's

ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 576 U.S. at 485 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). But, the Court noted, "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* *King* was such a case, because it involved a rule interpreting the Affordable Care Act ("ACA") issued by the Internal Revenue Service ("IRS"), and Congress did not expressly delegate interpretive authority over the ACA to the IRS. *Id.* at 486. Moreover, *King* observed, it was unlikely that Congress meant to delegate such authority to the IRS implicitly, because the IRS "has no expertise in crafting health insurance policy." *Id.*

The contrast between *King* and this case could hardly be more stark. The Authority issued the Final Rule pursuant to *express* rulemaking authority in § 7134 of the Statute, not implicit rulemaking authority. So too, it issued its Policy Statement pursuant to its express authority in § 7105(a)(1) to "provide leadership in establishing policies and guidance relating to" the Statute. There can be no question that Congress meant to delegate these powers to the Authority; it did so explicitly in the Statute. And, unlike *King*, here the Authority interpreted a statute on which it has unquestioned expertise. *BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs., Mont. Air Chapter No. 29*, 22 F.3d at 1153. Thus, this is not an "extraordinary case" where there may be reason to doubt that Congress meant to authorize the Authority to interpret § 7115(a) or promulgate rules regarding dues revocation.

The Unions' citation to *Office of Personnel Management v. FLRA*, 864 F.2d 165, 168 (D.C. Cir. 1988) is similarly inapposite. At issue in that case was whether an agency subject to the Statute and the Authority's jurisdiction could promulgate a rule that would effectively nullify § 7106(b)(3) of the Statute, which requires agencies to negotiate over appropriate arrangements concerning an agency's exercise of its management rights. In this case, by contrast the Final Rule does not nullify any part of the Statute, but instead fills a narrow statutory gap on a matter on which § 7115(a) is silent: employee-initiated dues revocations that occur after the first year of an assignment. The Unions' claim that the Final Rule represents such a fundamental change to the statutory scheme as to effectively nullify § 7115(a) and the Statute's general duty to bargain must therefore be rejected.

II. The Policy Statement and Final Rule are based upon a permissible construction of the Statute that is neither arbitrary or capricious

The Authority did not lightly issue either the Policy Statement or Final Rule. Before even deciding to issue the Policy Statement, the Authority requested comments from interested parties. After issuing its Policy Statement, the Authority again requested comments concerning the proposed dues-revocation regulation that it was considering. Only after conducting a full review and analysis of all of the comments it had received did the Authority issue the Final Rule. The final regulation, promulgated at 5 C.F.R. § 2429.19, was accompanied by the Authority's extensive and detailed responses to 17 categories of comments. (*See* JA 117-20.) While the Unions

may not agree with the Policy Statement and Final Rule, they cannot demonstrate that either was arbitrary or capricious.

A. The Authority adequately explained its interpretation of Section 7115(a) and addressed the Unions' "reliance interests."

Contrary to the Unions' claim (Pet'r Br. 42-46), the Authority fully explained the reasons why it interpreted § 7115(a) as it did and why it was departing from *Army*. And both the Policy Statement and the Final Rule addressed any reliance interests the Union may have had in maintaining the rule of *Army*. That is all the Authority was required to do under *Chevron* step two and this Court's precedent.

This Court has recognized the right of agencies to change their interpretations of their implementing statutes. The Authority's decision to overrule *Army* does not diminish the deference owed to the Authority's interpretation. *See FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009); *Local 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 501 (D.C. Cir. 1985) ("*Local 32*"). The Court will still afford the Authority's interpretation deference so long as it supplies "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Nat'l Fed'n of Fed. Emps. v. FLRA*, 369 F.3d 548, 553 (D.C. Cir. 2004) (citations omitted); *see also Local 32*, 774 F.2d at 502. Ultimately, "the Authority must provide a rational explanation for its decision but in reviewing [Authority orders] . . . the court recognizes that such determinations are best left to the expert judgment of the Authority." *Nat'l Treasury Emps. Union v. FLRA*, 745 F.3d 1219, 1224 (D.C.

Cir. 2014) (internal quotations omitted); *see also Ass'n of Civilian Techs. v. FLRA*, 353 F.3d 46, 50 (D.C. Cir. 2004) ("We therefore . . . defer to the Authority's *reasonable* interpretations of the Statute and its resulting negotiability determinations.").

The Authority did just this in both the Policy Statement and Final Rule. The Authority first explained that in reviewing § 7115(a), the "most reasonable way to interpret the phrase 'any such assignment may not be revoked for a period of [one] year' is that the phrase governs only the first year of an assignment." (JA 64 (quoting 5 U.S.C. 7115(a)); JA 117.) The Authority then explained that *Army*'s interpretation of § 7115(a) was untenable because it was based "almost exclusively on legislative history," when the text of § 7115(a) is silent on employee-initiated dues revocations that occur after "a period of [one] year." (JA 117.) In particular, *Army* improperly sought to use legislative history to add a requirement that employee-initiated dues revocations may only occur at yearly intervals, when such a requirement appears nowhere in the statutory text. The Authority correctly reasoned that "Congress's 'authoritative statement is the statutory text, not the legislative history. . . . Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on [Congress's] understanding of otherwise ambiguous terms.'" (JA 65 n.23 (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)); JA117.)

Moreover, *Army*'s purported reliance on legislative history was flawed because (as *Army* itself acknowledged) the legislative history concerning § 7115(a) is (at best) ambiguous. *Army*, 7 FLRA at 198 n.13 (emphasis added) (observing that the parts of

the legislative history "which did advert to the revocability language" of § 7115(a) do "not shed light on its intended meaning"). In the Final Rule, the Authority explained that even if the legislative history of § 7115(a) was relevant, that history supported its conclusions. (JA 117-18.) It noted that both a previous Executive Order and the Senate version of § 7115(a) provided that employees could revoke dues at six month intervals. (JA 118.) The final version of § 7115(a) provided that dues could not be revoked "for a period of [one] year" and does not mention intervals at all. (JA 118.) Thus, the Authority reasonably determined that "*Army* improperly grafted an interval-based evocation restriction onto the wording of section 7115(a)" (JA 118) and its statutory interpretation disguised what was in fact "a policy judgment to impose annual revocation periods after the first year of an assignment." (JA 64-65.)

In making those determinations, the Authority considered and addressed the Unions' claimed "reliance interests," their argument to the contrary notwithstanding. (Pet'r Br. 42-44.) *First*, the Authority made clear in the Final Rule that it affects only assignments authorized on or after the effective date of the Final Rule. (JA 118.) *Second*, the Authority explained that the Final Rule would not affect "dues-assignment and assignment-revocation procedures that are included in collective-bargaining agreements that are currently in force." (JA 118.) The Authority reassured the Unions that the Final Rule would be treated as any other government-wide rule, i.e. the Final Rule would not become effective in agencies with such CBAs until after the current CBAs expire. (JA 118.) *Third*, the Authority addressed concerns, raised by the

Unions in opposition to the Authority's Motion to Dismiss, that the Unions would suffer harm by having to negotiate with agencies over dues revocation. (Petitioners' Response in Opposition to Respondent's Motion to Dismiss, at 23-24, No. 20-1038, (D.C. Cir. May 28, 2020), Document #1844719.) It did so by clarifying that the revocation could occur at any time after the first year of an assignment.

Finally, the Authority responded to the Unions' concern that the Final Rule would inhibit their financial planning. (JA 119.) It explained that under the Final Rule, the Unions would still enjoy the "the certainty of the first year of irrevocability under section 7115(a)." (JA 119.) Moreover, it observed that the Final Rule did not require employees to revoke dues assignments after one year, or provide employees with an incentive to do so. (JA 119.) Rather, the Authority explained, it was merely giving employees an option. (JA 119.) The Authority observed that even with the Final Rule, Unions were free to "enter into dues-payment arrangements outside the federal payroll system that would provide them a greater measure of funding predictability." (JA 119.)

Thus, this is not a case where the Authority changed a policy requiring "'systemic, significant changes' to . . . parties' operations and 'when it came to explaining the good reasons for the new policy,' the agency 'said almost nothing.'" (Pet'r Br. 44 (quoting *Encino Motor Cars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016)).) Instead, it is one where the Authority carefully considered a request that it received from an agency concerning a single issue, twice asked for comments as it

considered its decision in increments, and addressed the comments it received at great length. This Court should therefore defer to the Authority's Policy Statement and Final Rule.

B. The Policy Statement and Final Rule appropriately balance the interests of unions, agencies, and individual employees

At all stages of its decisionmaking process, the Authority considered and sought a "reasonable balance between [the] competing interests" of federal unions, employees, and agencies. (JA 65.) Through that process, it designed a policy that was explicitly aimed at furthering "important policies underlying the Statute, such as robustly protecting employees' rights and freedoms, and guarding unions' institutional interests in a clear and effective procedure for collecting dues." (JA 65.) The Authority recognized, however, "that the interests of bargaining-unit employees and unions are not one and the same when employees want to discontinue financial support to unions by stopping dues payments." (JA 65.) Acknowledging that distinction does not reflect a "distorted view of employee rights." (Pet'r Br. 46.) Instead, it merely reflects the Authority's reasoned interpretation of the Statute, including the Statute's protection of the right to refrain from supporting a union in § 7102, and the very real frustration and confusion expressed by federal employees regarding dues-revocation procedures. (JA 119.)

The Statute outlines specific rights for management (*see* § 7106) and unions (*see* §§ 7111-7115). But the Statute also outlines the rights of individuals, both vis-à-vis

management and vis-à-vis their unions. Those rights include the right to be protected from unfair labor practices, including the right to refrain from joining or assisting a union. 5 U.S.C. §§ 7102, 7116 (a)(1), (b)(1).

The Statute also provides employees with the explicit right to choose whether to financially support their exclusive bargaining representative through dues assignments, or to revoke those assignments. 5 U.S.C. § 7115(a). While addressing at length their own interest in receiving dues (Pet'r Br. 42-46), the Unions overlook the fact that the Statute provides only for *voluntary* dues assignments. What the Unions fail to acknowledge, and what the Authority gleaned from public comments, is just how difficult it was for employees to exercise their right to revoke dues authorizations under the system that developed in the aftermath of *Army*.

While it may seem obvious, it is worth remembering that federal employees are human beings who have financial obligations outside of their union membership. Commenters who supported the Authority's interpretations of the law explained that they valued their union membership, and believed that the interpretation was "pro worker" because it gave employees the choice to join or leave the union at will. (JA 57, 62, 116.) Employees noted that there were times when union members needed to withdraw from membership (even temporarily) because of personal financial circumstances. (JA 48, 54, 110, 114, 116.) Many commenters wrote of the difficulties they encountered when they attempted to revoke their dues assignments, because there were short revocation windows, and because they often did not know the

anniversary of their assignments. (JA 47, 48, 49, 50, 51, 54, 56, 59, 60, 61, 106-08, 110, 114-15, 116.) Some wrote that their union was unwilling to provide this information and/or assist in processing requests. (JA 47, 52, 60, 61, 106-08, 116.)

The confusion and challenges faced by federal employees seeking to revoke their dues authorizations are understandable, given the system that developed following *Army*. As the Authority observed,

> With the exception of the system negotiated by the National Treasury Employees Union, in all of the examples discussed in the comments, assignment-revocation windows depend entirely on the date that an individual employee first authorized the assignment, or when the authorized assignment first became effective. Thus, every employee's revocation window is uniquely dependent on the anniversary date of that employee's assignment authorization (or effective date).

(JA 118.)

This means that to revoke their dues assignments, employees must know not only the date on which they first made a dues assignment, but also how long they have, before or after that anniversary, to revoke that assignment. (*Id.*; *see also* Supplemental Appendix ("SA") 6.) If the employee does not know, they must then rely upon the ability of either their human resources division, payroll provider, or exclusive representative to provide them with that information. And, as some commenters pointed out, unions have a financial interest in not having a member's assignment revoked. (JA 61, 110.)

The Authority recognized these concerns, but also recognized the Unions' institutional interests and rights under § 7115(a). It therefore adopted an approach

that was consistent with the plain language of the Statue—permitting employees to revoke dues any time, but only after the first year of the assignment. Contrary to the Unions' claims, the Final Rule protected their institutional rights. The Final Rule reaffirms the Unions' rights to a guaranteed first year of dues assignments. (JA 120-21.) It does not provide an incentive for employees to revoke their assignments after the first year or require employees to reauthorize their assignments after the first year. (JA 119.) Nor does it prohibit Unions from "developing dues-payment arrangements outside the federal payroll system that would provide them a greater measure of funding predictability." (JA 119.) The Final Rule simply gives federal employees greater control over the deductions from their paychecks after the first year of their dues assignments.

Other arguments put forward by the Unions are similarly without merit. While the Final Rule may prevent Unions from negotiating about dues revocations in the future (Pet'r Br. 46-47), the Final Rule does not affect the validity of current CBAs. (JA 118.) Nor does the Final Rule require the Unions to negotiate about the issue, which the Unions claimed was an irreparable harm in their opposition to the Authority's Motion to Dismiss the Policy Statement petitions. (*See* Petitioners' Response in Opposition to Respondent's Motion to Dismiss, at 23-24, No. 20-1038, (D.C. Cir. May 28, 2020), Document #1844719.)

The Unions' claim that the Final Rule limits the right of employees to "join

and assist their union" (Pet'r Br. 47) is simply wrong. The Policy Statement and Final Rule in no way impair the ability of employees to join or assist a union. They address *only* the narrow issue of when, after the first year of a dues assignment, employees may revoke those assignments. Nor does the Final Rule inhibit employees' ability to contract with their Unions. Employees are free to allocate dues from their first date of eligibility for membership through their separation from service. The Final Rule simply clarifies that those employees may, if they choose, revoke an assignment at any time after the first year of the assignment.

To the extent that the Unions are attempting to claim that the Final Rule limits employee contract rights because employees cannot give their unions consideration in the form of year-over-year assignments renewal (Pet'r Br. 47), that claim is off-base. Again, the Final Rule does nothing to impede the ability of employees to pay union dues throughout the course of their federal service if they wish to do so. Moreover, the Final Rule (and Statute) provide unions with a very concrete form of consideration: the guarantee that employees cannot revoke dues assignments for one year.

The Authority's decision to consider the rights of both individual employees and unions vis-à-vis dues collection was neither arbitrary nor capricious, and this Court should defer to that decision.

C. The Authority addressed, and reasonably rejected, NTEU's "alternative" proposal

The Unions claim that the Authority failed to consider NTEU's argument, presented in its public comment, that the Authority should look to case law under the NLRA allowing employees to obligate themselves to pay union dues even after they leave a union. (Pet'r Br. 48-49; *see also* JA 83-86 (NTEU comment urging the Authority to look to NLRB case law).) But the Authority specifically considered, and reasonably rejected, NTEU's contentions when it issued the Final Rule. (JA 120.)

As the Authority pointed out in the Final Rule, this Circuit has squarely rejected the notion that NLRB precedent has relevance in interpreting § 7115(a). (JA 120 (citing *Am. Fed'n of Gov't Emps., Council 214, AFL-CIO v. FLRA*, 835 F.2d 1458, 1461 (D.C. Cir. 1987) ("*Council 214*").) In *Council 214*, this Court found that it has "cautioned against an inappropriate reliance on private labor precedents in litigation concerning the [Statute]." *Council 214*, 835 F.2d at 1461. That is because "labor-management relations in the public and private sectors are determined by different statutory provisions and by different policy considerations." *Id.* (internal quotation marks omitted). "Thus, private labor cases are relevant *only* when they involve statutory provisions and policy considerations comparable to those governing labor relations under the [Statute]." *Id.* (emphasis in original).

Council 214 determined that § 7115(a) "has no counterpart in the [NLRA]." *Id.* It noted that, unlike the federal sector, "[i]n private cases, dues withholding is a matter reserved for collective bargaining." *Id.* And, in the private sector, the withholding employer "acts primarily for the benefit of the union" and "as the union's agent" in

administering dues withholding. *Id.* In sharp contrast, in the federal sector, "withholding is authorized by statute and is made at the explicit request of the employee." *Id.* "The union has no role in negotiating the checkoffs, and the withholding employer acts solely as the employee's agent." *Id.*

Thus, as *Council 214* explained at length, the dues-withholding scheme created by § 7115(a) has no analogue in the NLRA and is fundamentally different from dues-withholding scheme in the private sector. The Authority's citation to this Court's forceful rejection of analogies between dues-withholding under § 7115(a) and under the NLRA was more than sufficient to justify rejecting NTEU's proposal to import rules and concepts from NLRA case law into federal-sector dues-withholding. (JA 120.)

But, even on its own terms, the NLRB case on which the Unions rely does not show that the Final Rule was arbitrary or capricious. In *International Brotherhood of Electrical Workers, Local No. 2088, AFL-CIO (Lockheed Space Ops. Co.)*, 302 NLRB 322, 328 (1991), the NLRB held that there must be a "clear and unmistakable" waiver of the right to revoke a dues assignment before a continuing obligation to pay dues against an unwilling employee could be enforced. As NTEU acknowledged in its comment, if dues can be made irrevocable for rolling annual periods, employees may be confused as to when they can revoke those assignments. (JA 85.)

The Authority's decision to address that employee confusion (which was echoed by several other commenters) in its Final Rule was in no way arbitrary or

capricious. (JA 119; *see also* JA 47, 48, 51, 54, 60, 61, 106-08, 114-15, 116; SA 5.) The Authority found, based on the comments it received, that "negotiated procedures for determining anniversary dates and window periods were not easily decipherable to a layperson." (*Id.* (citing SA 5).) That is the system that NTEU urged in its comment (JA 80-87), and the Authority articulated at length its reasons for rejecting such a scheme. (JA 119.)

Given the deference that this Court owes to the Authority when it interprets the Statute and makes rules to carry out its purposes, and the care with which the Authority developed the Policy Statement and Final Rule, the Court should deny the Petitions.

CONCLUSION

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

Respectfully submitted,

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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 11,909 words excluding exempt material.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 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
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ADDENDUM

Relevant Statutes and Regulations

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5 U.S.C. § 706

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--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(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. § 7102

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

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7104

Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of--

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may--

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

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.

(a)(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 7111 of 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. § 7106

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7111

Exclusive Recognition of Labor Organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority--

(1) by any person alleging--

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which--

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization--

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

5 U.S.C. § 7112

Determination of Appropriate Units for Labor Organization Representation

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

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

5 U.S.C. § 7113

National Consultation Rights

(a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall--

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization--

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

5 U.S.C. § 7114

Representation Rights and Duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

5 U.S.C. § 7115(a)

Allotments to Representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

5 U.S.C. § 7116(a)(1), (2), (4), (b)(1)-(4), (c)

Unfair Labor Practices

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

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

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

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

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

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

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status, or handicapping condition;

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

5 U.S.C. § 7117(a), (c)

Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which

are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by--

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall--

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

5 U.S.C. § 7123(a), (c)

Judicial review; enforcement.

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

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

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. § 7134

Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

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.

5 C.F.R. § 2427.5 (c), (f)

In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:

(c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor–Management Relations Statute;

(f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor–Management Relations Statute.