**ORAL ARGUMENT NOT YET SCHEDULED**
**Nos. 20-1398, 20-1399, 20-1405**

---

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

---

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,
Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

---

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

---

# BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

---

NOAH PETERS
*Solicitor*

REBECCA J. OSBORNE
*Deputy Solicitor*

SARAH C. BLACKADAR
*Attorney*

Federal Labor Relations Authority
1400 K Street, N.W.
Washington, D.C. 20424
(202) 218-7908

# CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

## A. Parties

These consolidated Petitions for Review arise from a request by the U.S. Office of Personnel Management ("OPM") for a general statement of policy or guidance from the Federal Labor Relations Authority (the "Authority"). In response, the Authority issued its decision in *U.S. Office of Personnel Management*, 71 FLRA 977 (2020) (Member DuBester dissenting). The American Federation of Government Employees, National Treasury Employees Union ("NTEU"), and American Federation of State, County and Municipal Employees (collectively, the "Unions"), who were not parties below, have filed these Petitions for Review of that decision. In this Court proceeding, the Unions are the petitioners and the Authority is the respondent.

## B. Ruling Under Review

The Unions seek review of the Authority's decision in *U.S. Office of Personnel Management*, 71 FLRA 977 (2020) (Member DuBester dissenting).

### C. Related Cases

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

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**PAGE(S)**

**CASES**

**STATUTES**

**REGULATIONS**



**OTHER AUTHORITIES**

## GLOSSARY

| | |
|---|---|
| **Authority** | The Federal Labor Relations Authority |
| **Br.** | Petitioners' opening brief |
| **CBA** | Collective Bargaining Agreement |
| **JA** | The Joint Appendix |
| **NLRA** | The National Labor Relations Act |
| **NLRB** | The National Labor Relations Board |
| **NTEU** | National Treasury Employees Union |
| **OPM** | The U.S. Office of Personnel Management |
| **Panel** | The Federal Service Impasses Panel |
| **Policy Statement** | *U.S. Office of Personnel Management*, 71 FLRA 977 (2020) (Member DuBester dissenting) |
| **Reopener Clause** | A CBA provision specifying the conditions under which a party may seek to renegotiate topics "covered by" the CBA during the CBA's term |
| **Statute** | The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) |
| **Unions** | Petitioners, American Federation of Government Employees, National Treasury Employees Union, and American Federation of State, County and Municipal Employees |
| **Zipper Clause** | A provision that would foreclose or limit midterm bargaining during the term of a CBA |

## STATEMENT OF JURISDICTION

In the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2018) ("Statute"), Congress charged the Authority with "provid[ing] leadership in establishing policies and guidance" under the Statute. 5 U.S.C. § 7105(a)(1). Part 2427 of the Authority's regulations sets forth procedures by which parties may request general statements of policy or guidance. Those regulations allow the head of any federal agency, union, or lawful association (or designee) to "ask the Authority for" a policy statement. 5 C.F.R. § 2427.2(a).

In evaluating such requests, the Authority considers several factors. *See id.* § 2427.5(c). Before issuing a policy statement, the Authority will, "as it deems appropriate," give "interested parties" an opportunity to comment. *Id.* § 2427.4. The Authority thus had subject matter jurisdiction to issue U.S. Office of Personnel Management, 71 FLRA 977 (2020) (Member DuBester dissenting) (the "Policy Statement") under § 7105(a)(1) of the Statute and part 2427 of its regulations.

The Policy Statement is a "final order of the Authority" under 5 U.S.C. § 7123(a). *See Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 750

F.2d 143, 144-145 (D.C. Cir. 1984) ("*AFGE 1984*"). It "mark[s] the consummation of the [Authority]'s decisionmaking process" and is not "of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). And it is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal quotation marks omitted).

As in *AFGE 1984*, the Policy Statement contains the Authority's "final word on the subject" of whether zipper clauses are mandatory subjects of bargaining under the Statute, and "[n]othing further needs to be done by the" Authority to implement it. *AFGE 1984*, 750 F.2d at 144. After receiving comments from interested parties, the Authority held "that the Statute neither requires nor prohibits midterm bargaining, and that *all* proposals concerning midterm-bargaining obligations (including zipper clauses) are mandatory subjects for negotiation that may be bargained to impasse." (JA 78.)

Thus, the Policy Statement is a "final order of the Authority" that is reviewable in this Court. *AFGE 1984*, 750 F.2d at 144 ("the term 'order' as employed in section 7123(a) of the [S]tatute should be

interpreted to permit direct review of a final agency interpretation, such as this one, promulgated after receipt of comments from interested parties.").

## STATEMENT OF THE ISSUES PRESENTED

1. Does the Statute explicitly or by unambiguous implication give unions an unqualified right to engage in midterm bargaining?

2. Does the Statute speak directly to the precise question of whether zipper clauses are mandatory subjects of bargaining?

3. Was it reasonable for the Authority to hold that the Statute neither requires nor prohibits midterm bargaining, but instead leaves questions regarding the scope of such bargaining for the parties to resolve as part of their term negotiations?

## RELEVANT STATUTORY PROVISIONS

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

## STATEMENT OF THE CASE

By letter dated July 24, 2019, OPM asked the Authority to issue a general statement of policy or guidance holding that zipper clauses are mandatory subjects of bargaining. (JA 1.) A "zipper clause" is a

provision in a collective bargaining agreement ("CBA") that forecloses or limits midterm bargaining during the CBA's term. (*Id.*) OPM noted that the Authority had never squarely decided whether zipper clauses are mandatory subjects of bargaining that may be bargained to impasse. (*Id.*)

OPM observed that "reopener clauses"—provisions that would require mid-term bargaining over matters expressly provided for in an existing CBA—are mandatory subjects that may be bargained to impasse. (JA 2 (citing *Nat'l Treasury Emps. Union*, 64 FLRA 156, 159 (2009) ("*NTEU 2009*").) Thus, the Federal Service Impasses Panel ("Panel") could impose reopener clauses—provisions expanding the scope of midterm bargaining to encompass even matters discussed and agreed-upon in term negotiations—on the parties during impasse proceedings. (*Id.*)[1] But the Panel could not similarly require the

[1] The Panel cannot impose a contract term on the parties if no previous Authority decision has found a "substantively identical" proposal to be a mandatory subject of bargaining. *Commander Carswell Air Force Base, Tex.*, 31 FLRA 620, 623-25 (1988). Thus, the Panel has declined to exercise jurisdiction over proposed zipper clauses. *See, e.g.*, *Dep't of Health & Hum. Servs.*, 18 FSIP 077 (Apr. 1, 2019). To even get before the Panel, moreover, a party proposing a zipper clause would run the risk of drawing an unfair labor practice charge, as "insisting to impasse

parties to adopt zipper clauses—clauses limiting the circumstances under which midterm bargaining may take place—because the Authority had never directly held that such clauses are mandatory subjects of bargaining. (*Id.*)

The Authority's precedent had thus resulted in a "fundamental inequity in application of the" Statute. (*Id.*) On one hand, unions could bargain to impasse regarding provisions greatly expanding midterm bargaining, and the Panel may force the parties to adopt such provisions. (*Id.*) But, on the other, agencies could not bargain to impasse regarding provisions that would partially or fully limit the scope of midterm bargaining. (JA 1.)

OPM urged that the lack of clear guidance on whether zipper clauses are mandatory subjects of bargaining had resulted in "uncertainty, ambiguity, and inefficiency," as well as "costly and time-consuming litigation." (JA 4.) In OPM's view, the efficiencies created by recognizing zipper clauses as mandatory bargaining subjects "could be enormous not just in terms of minimizing costly bargaining but also

---

on a permissive subject of bargaining violates the [Statute]." (JA 72 n.6 (quoting *Am. Fed'n of Gov't Emps., Local 3937, AFL-CIO*, 64 FLRA 17, 21 (2009).)

by incentivizing the parties to raise and address bargaining matters in the term bargaining process." (*Id.*)

The Authority asked for public comments on whether it should grant OPM's request and, if so, what the Authority's guidance should be. (JA 7-8.) NTEU, along with three other unions, four agencies, and two individuals, submitted timely public comments. (JA 15-65.) In its comment, NTEU argued that unions have a "unilateral right" to initiate midterm bargaining under the Statute, and thus any proposal that would limit a union's ability to engage in midterm bargaining is a permissive, not mandatory, bargaining subject. (JA 43-46.)

After carefully considering OPM's request and the public comments it received, the Authority issued a thorough and well-reasoned Policy Statement "hold[ing] that proposals that concern midterm-bargaining obligations—whether they resemble reopener or zipper clauses, or take some other form—are mandatory subjects of bargaining under the Statute." (JA 76.) "That treatment," the Authority observed, "is consistent with the Authority's previous recognition that matters relating to the parties' midterm-bargaining

relationship plainly relate to conditions of employment." (*Id.* (citing *NTEU 2009*, 64 FLRA at 157).)

"Further, the Statute presumes that all matters relating to conditions of employment are mandatory subjects of bargaining unless the text explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right." (*Id.*) And the Supreme Court had determined that the Statute does *not* explicitly or unambiguously confer a right to union-initiated midterm bargaining. (JA 73, 75 (citing *Nat'l Fed'n of Fed. Emps., Loc. 1309 v. Dep't of Interior*, 526 U.S. 86 (1999)) ("*NFFE*").)[2] Thus, "because neither party would be required to waive a statutory right, any proposal concerning midterm bargaining would

[2] The reason for the "union-initiated" qualifier is that the Statute, at 5 U.S.C. § 7106(b)(2)-(3), expressly requires midterm bargaining over the "impact and implementation" of management-initiated changes. *NFFE*, 526 U.S. at 96-98; *Ass'n of Civilian Technicians Ky. Long Rifle Chapter & Bluegrass Chapter*, 70 FLRA 968, 969 (2018) ("an appropriate arrangement under § 7106(b)(3) of the Statute" is "a mandatory subject of negotiation."). In the Policy Statement, the Authority made clear that it was "not discussing scenarios in which management exercises a right under § 7106(a) or (b)(1) to make changes to conditions of employment during the term of a CBA and a union seeks negotiations under § 7106(b)(2) or (b)(3) due to those changes—situations commonly known as 'impact-and-implementation bargaining.'" (JA 76 n. 39.)

come within the default rule that all matters relating to conditions of employment are mandatory subjects of bargaining." (JA 76-77.)

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

## STATEMENT OF THE FACTS

### I. The Statute Does Not Speak Directly to Union-Initiated Midterm Bargaining

The Statute's basic bargaining obligation is set forth in § 7114(a)(4), which provides that agencies and unions "shall meet and negotiate in good faith for the purposes of arriving at a [CBA]." 5 U.S.C. § 7114(a)(4). The duty "to negotiate in good faith" means that the parties must negotiate "with a sincere resolve to reach a [CBA]." *Id.* § 7114(b)(1).

The Statute's provisions do not "expressly address union-initiated midterm bargaining." *NFFE*, 526 U.S. at 92. The Statute's failure to expressly address midterm bargaining is notable in light of the fact that Congress spoke directly to such bargaining in the National Labor Relations Act ("NLRA"), the law upon which the Statute was modeled. *See* 29 U.S.C. § 158(d) (obligating "the employer and the representative of the employees to meet at reasonable times and confer in good faith

with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, *or any question arising thereunder*") (emphasis added).

Like the National Labor Relations Board ("NLRB"), the Authority does not require midterm bargaining where a matter is "covered by" or "contained in" a CBA. *Dep't of Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 53-55 (D.C. Cir. 1992) ("*Navy*"). But unlike in the private sector, the federal-sector "covered by" doctrine does not arise from an express statutory command. *Compare* 29 U.S.C. § 158(d) (NLRA provision stating that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.") Instead, the federal-sector "covered by" doctrine is based on the Statute's general policy favoring "stability and repose with respect to matters reduced to writing in the agreement." *U.S. Dep't of Health & Hum. Servs. Soc. Sec. Admin. Balt., Md.*, 47 FLRA 1004, 1017 (1993) (quoting *Navy*, 962 F.2d at 59).

## II. The Authority Initially Holds That There Is No Obligation to Bargain Midterm, But Is Reversed by the D.C. Circuit

The Authority first considered the issue of midterm bargaining in *Internal Revenue Service,* 17 FLRA 731 (1985) ("*IRS I*"). In *IRS I*, the Authority rejected the notion that there was an "obligation under the Statute to bargain over proposals initiated by a union during the term of an agreement which are unrelated to management-initiated changes in conditions of employment." *Id*. at 732. Looking to the text, purpose and history of the Statute, the Authority found that, "[w]hile Congress found collective bargaining in the public interest, in so doing, Congress further expressed an intent to limit the bargaining obligation over union-initiated proposals to situation[s] where parties are negotiating a basic [CBA]." *Id*. at 734-35.

"Were the Authority to now hold that there is a statutory obligation for agency management to bargain at any time during the life of a [CBA] over union-initiated proposals which are unrelated to changes initiated by agency management," the Authority observed, "the ability of the parties to rely upon such basic agreements as a stable foundation for their day-to-day relations would be diminished." *Id*. at 736.

The D.C. Circuit, however, reversed the Authority's decision and found that the Statute requires the parties to bargain midterm "over union proposals that pertain to negotiable issues not mentioned in the agreement." *Nat'l Treasury Emps. Union v. FLRA*, 810 F.2d 295, 296 (D.C. Cir. 1987) ("*NTEU 1987*"). *NTEU 1987* acknowledged that the Statute's text did not speak directly to midterm bargaining. *Id.* at 298. Looking beyond the Statute's text, *NTEU 1987* found support for its conclusion in NLRB precedent and a statutory purpose of strengthening federal unions and encouraging collective bargaining. *Id.* at 298-301.

## III. On Remand, the Authority Emphasizes That the Parties May Limit Midterm Bargaining Via Zipper Clauses

On remand from *NTEU 1987*, the Authority found that the Statute "requires an agency to bargain during the term of a [CBA] on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved." *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987) ("*IRS II*"). "Such a waiver of bargaining rights," the Authority held, "may be established by (1) express agreement, or (2) bargaining history." *Id.* As to the first category, the Authority emphasized that "a union may contractually agree to waive its right to initiate bargaining

in general by a 'zipper clause', that is, a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement." *Id.*

Following the issuance of *IRS II*, the IRS filed a Suggestion of Initial Hearing *En Banc*, which the D.C. Circuit denied. *See FLRA v. Internal Revenue Serv.*, 838 F.2d 567, 568 (D.C. Cir. 1988) (per curiam) ("*IRS III*"). Concurring in the denial, Judge Edwards, joined by Judge Silberman, strongly rejected the IRS's suggestion that "waivers of bargaining rights are only 'permissive' subjects for negotiation, over which management may not bargain to impasse." *Id.* at 570 (Edwards, J., concurring).

## IV. Disagreeing with *NTEU 1987*, the Fourth Circuit Finds That the Statute Prohibits Midterm Bargaining

In *Social Security Administration v. FLRA*, 956 F.2d 1280, 1284 (4th Cir. 1992) ("*SSA*"), the Fourth Circuit rejected *NTEU 1987* and came to the precise opposite conclusion: "union-initiated midterm bargaining is not required by the [S]tatute and would undermine the congressional policies underlying the [S]tatute." 956 F.2d at 1281. Such bargaining, the Fourth Circuit found, is at odds with the Statute's text, which "contemplate[s] that [the duty to bargain] arises as to only

one, basic agreement[.]" *Id.* at 1284 (citing 5 U.S.C. §§ 7114(a)(4), (b)(1) & (b)(5)). The Fourth Circuit further found that textual differences between the Statute and the NLRA—particularly the Statute's lack of an explicit "contained in" exception to midterm bargaining—showed that the Statute was not meant to require midterm bargaining. *Id.* at 1287 (citing 29 U.S.C. § 158(d)).

Additionally, the Fourth Circuit noted "practical distinctions" between private-sector and federal-sector bargaining that made a midterm bargaining requirement inappropriate in the latter context. *Id.* "In the private sector, once an impasse is reached, the union's alternative is often to strike—a drastic measure that is unlikely to be utilized midterm because all issues worthy of such action typically are resolved by the basic [CBA]." *Id.* In the federal sector, by contrast, the union may move upon impasse to binding arbitration before the Panel. *Id.* (citing 5 U.S.C. § 7119(b) & (c)). "Because [Panel] arbitration—unlike striking—is relatively costless for a union to invoke, many more midterm negotiations would be expected in the public sector than the private sector." *Id.*

Federal-sector unions could thus use binding Panel arbitration to "achieve a tactical advantage that is absent in the private sector . . . . by negotiating—and then arbitrating—issues seriatim rather than as a unified package." *Id.* Such "seriatim midterm bargaining—and then seriatim [Panel] arbitration—over individual issues raised midterm" would contravene the Statute's fundamental purposes of ensuring contractual stability and an "effective and efficient Government." *Id.* at 1288 (quoting 5 U.S.C. § 7101(b)). Zipper clauses would not be "an adequate solution to the problem" because the Authority had never expressly held such clauses to be mandatory subjects of bargaining that may be negotiated to impasse. *Id.*

The Fourth Circuit subsequently extended *SSA* to hold that "clause[s] that require[] an agency to bargain midterm with respect to union-initiated proposals"—that is, reopener clauses—are non-negotiable. *U.S. Dep't of Energy v. FLRA*, 106 F.3d 1158, 1163 (4th Cir. 1997) ("*Energy*"). In the Fourth Circuit's view, "not only is union-initiated midterm bargaining not mandated by the [Statute]," but it is also "contrary to the [Statute]." *Id.*

## V. The Supreme Court Unanimously Rejects *NTEU 1987*

After the Fourth Circuit, applying *Energy*, found that an agency's refusal to bargain over a reopener clause was not an unfair labor practice, *see U.S. Department of Interior v. FLRA*, 132 F.3d 157 (4th Cir. 1997), the Supreme Court granted certiorari to resolve the split between the D.C. Circuit and Fourth Circuit, *NFFE*, 526 U.S. at 88-91. Before the High Court, the union argued that the Statute unambiguously required midterm bargaining. (*See* Brief for Petitioner National Federation of Federal Employees, Local 1309, *Nat'l Fed'n of Fed. Emps., Loc. 1309 v. Dep't of the Interior*, U.S. Nos. 97-1184, 97-1243, 1998 WL 34081049, at 13-29.)

The Supreme Court unanimously rejected this argument. It found "ambiguity created by the Statute's use of general language that might, or might not, encompass various forms of midterm bargaining." *NFFE*, 526 U.S. at 98. "That kind of statutory ambiguity is inconsistent both with the Fourth Circuit's absolute reading of the Statute [in *SSA*] and also with the D.C. Circuit's similarly absolute, but opposite, reading [in *NTEU 1987*]." *Id.* Instead, "Congress delegated to the Authority the power to determine—within appropriate legal bounds—whether, when,

where, and what sort of midterm bargaining is required." *Id.* at 98-99 (citations omitted).

As to "[t]he specific question before us"—"whether an agency must bargain endterm about including in the basic labor contract a clause that would require certain forms of midterm bargaining"—the Supreme Court found that the Statute gave the Authority "leeway" in answering that question as well. *Id.* at 99-100. Thus, "the Statute does not resolve the question of midterm bargaining, nor the related question of bargaining about midterm bargaining." *Id.* at 100.

The four dissenting justices believed that the Statute unambiguously forbade midterm bargaining. *Id.* at 101 (O'Connor, J., dissenting). They noted that the Statute "specifies a few instances where midterm bargaining is required, *see* 5 U.S.C. § 7106(b), but it contains no provision that expressly or implicitly imposes a *general* duty on agencies to bargain during the term of a [CBA]." *Id.* In their view, the Statute, by its terms, "requires an agency to 'meet and negotiate in good faith' with unions only 'for the purposes of' achieving an end: a comprehensive [CBA]." *Id.* (quoting 5 U.S.C. § 7114(a)(4)).

## VI. The Authority, on Remand, Determines That Midterm Bargaining Is Required, Without Deciding Whether Such

**Bargaining is a Unilateral Right or Whether Zipper Clauses Are Mandatory Bargaining Subjects**

On remand from the Supreme Court, the Authority "conclude[d] that an agency is required to bargain over a proposal obligating the agency to engage in midterm bargaining over matters not contained in or covered by the term agreement" because such a proposal "restates a statutory obligation." *U.S. Dep't of the Interior Wash., D.C.*, 56 FLRA 45, 45 (2000) ("*Interior*").

*Interior* based its holding that midterm bargaining was required on two policy considerations: (1) such bargaining "furthers Congress's goal of promoting and strengthening collective bargaining in the federal workplace" and (2) "will not result in significant costs or disruptions that would outweigh the benefits of such bargaining." *Id.* at 52. *Interior* did not consider whether midterm bargaining was a "unilateral right[] specifically vested in one party" within the meaning of *American Federation of Government Employees, Locals 225, 1504, & 3723, AFL-CIO v. FLRA*, 712 F.2d 640, 646 (D.C. Cir. 1983) ("*AFGE 1983*"). And *Interior* expressly declined to consider whether zipper clauses were mandatory bargaining subjects. *Id.* at 54.

Member Cabaniss dissented in part. She agreed that the union's proposal requiring the agency to bargain midterm "on any negotiable matters not covered by the provisions of" the parties' CBA was a mandatory subject of bargaining. *Id.* at 55 (opinion of Member Cabaniss, concurring in part and dissenting in part). However, she disagreed with the majority's decision not to address "the interrelated question" of whether zipper clauses are mandatory bargaining subjects, which she considered "possibly the most crucial aspect of midterm bargaining[.]" *Id.*

## VII. The D.C. Circuit in *NTEU 2005* Strongly Suggests That All Proposals Relating to the Scope of Midterm Bargaining Are Mandatory Bargaining Subjects

Three years later, in *National Treasury Employees Union*, 59 FLRA 217, 220 (2003) ("*NTEU 2003*"), the Authority held that proposals limiting an agency's ability to invoke the "covered by" defense were permissive subjects only. The Authority reasoned that the "covered by" doctrine was a "statutory right" because it derives from "the Statute's purposes of stability and repose[,]" and any proposal that requires a party to waive a statutory right is a permissive subject of bargaining. *NTEU 2003*, 59 FLRA at 220.

NTEU petitioned for review, urging that the agency was required to bargain over its proposals. It contended that its proposals "sought nothing more than a limited reopener, or 'reverse zipper clause.'" Brief for Petitioner, *Nat'l Treasury Emps. Union v. FLRA*, D.C. Cir. No. 03-1351, 2004 WL 960785, at 8 (May 3, 2004). In its view, "[t]here can be no question that the duty to bargain extends to a party's attempt to define precisely the mutual bargaining obligations during the term of a [CBA]." *Id.* at 7-8.

The D.C. Circuit granted the petition, finding the Authority's decision deficient on two grounds. *First*, the Authority had failed to consider whether, "even if the 'covered by' test defines the scope of a statutory right, it is not a 'unilateral' statutory right, and thus not subject to permissive bargaining only." *Nat'l Treasury Emps. Union v. FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005) ("*NTEU 2005*"). The Court noted that "[m]any provisions of the [Statute] confer benefits and impose obligations in varying degrees on labor and management[,]" but "[n]ot all of these provisions constitute 'statutory rights" that must be waived before they are negotiable." *Id.* at 339-40. Instead, the Statute "establishes that all 'conditions of employment' are presumed to be

mandatory subjects of bargaining" unless the Statute "explicitly or by unambiguous implication vests in a party an unqualified 'right.'" *Id.* at 340 (quoting *AFGE 1983*, 712 F.2d at 649, 647 n.27). The Court held that the Authority had failed to sufficiently address *AFGE 1983* and other "unilateral rights" cases in its treatment of the "covered by" doctrine. *Id.* at 340-41.

*Second*, the Court found that the Authority had "fail[ed] to explain (or even to discuss) the relationship between the Union proposals at issue and both [Authority] and private sector precedent regarding zipper and reopener clauses." *Id.* at 341. The Court noted that both NLRB and Authority decisions had held reopener clauses to be mandatory subjects of bargaining. *Id.* at 341-42. In addition, the Authority had "omit[ted] any discussion of the relationship between a zipper clause and the Union's proposals." *Id.* at 343. The Court cited NLRB precedent holding zipper clauses to be mandatory bargaining subjects. *Id.* (citing *NLRB v. Tomco Commc'ns, Inc.*, 567 F.2d 871, 879 (9th Cir.1978)). Noting that the Authority had ducked the question of the negotiability of zipper clauses in *Interior*, the Court strongly

suggested that the Authority address on remand whether zipper clauses are mandatory bargaining subjects. *Id.*

However, on remand, the Authority yet again declined to address the negotiability of zipper clauses. *NTEU 2009*, 64 FLRA at 159 n.10. Instead, it found that there was no explicit or unambiguous right to raise a "covered by" defense in the Statute, and thus the "covered by" defense was not a unilateral right. *Id.* at 157. In addition, the Authority determined the proposals at issue were "similar to reopener proposals, which both the Authority and the [NLRB] have found to be mandatory subjects of bargaining." *Id.* at 158. Thus, it held that the proposals were mandatory subjects of bargaining.

## VIII. The Authority's Policy Statement Finally Clarifies—After Decades of Confusion—That *All* Proposals Concerning Midterm-Bargaining Obligations Are Mandatory Subjects of Bargaining

By letter dated July 24, 2019, OPM asked the Authority to issue a policy statement holding that zipper clauses are mandatory subjects of bargaining. (JA 1.) OPM noted that the Authority had never squarely decided whether zipper clauses are mandatory subjects that may be bargained to impasse. (*Id.*) The Authority's precedent had thus resulted in a "fundamental inequity in application of the" Statute where

reopener clauses are required bargaining subjects but zipper clauses are not. (JA 2.)

In response, the Authority solicited public comments. (JA 7-8.) After carefully considering OPM's request and the public comments it received, the Authority issued a Policy Statement "hold[ing] that proposals that concern midterm-bargaining obligations—whether they resemble reopener or zipper clauses, or take some other form—are mandatory subjects of bargaining under the Statute." (JA 76.) "That treatment," the Authority observed, "is consistent with the Authority's previous recognition that matters relating to the parties' midterm-bargaining relationship plainly relate to conditions of employment." (*Id*. (citing *NTEU 2009*, 64 FLRA at 157).)

"Further, the Statute presumes that all matters relating to conditions of employment are mandatory subjects of bargaining unless the text explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right." (*Id*.) The Authority noted that the Supreme Court in *NFFE* had determined that the Statute does *not* explicitly or unambiguously confer a right to union-initiated midterm bargaining. (JA 73, 75.) Thus, "because neither party would be

required to waive a statutory right, any proposal concerning midterm bargaining would come within the default rule that all matters relating to conditions of employment are mandatory subjects of bargaining." (JA 76-77.)

The Authority found further support—beyond the default rule—for treating zipper clauses as mandatory subjects. It noted that "adding a zipper clause to a CBA may provide management with an assurance that its other contractual commitments will not be interpreted as imposing an ongoing midterm-bargaining obligation," thus facilitating efficient and effective bargaining. (JA 77.) "In other words, management negotiators can have greater confidence that, if they agree to union-favored proposals that recognize additional midterm bargaining obligations for the agency, then those obligations can be counterbalanced with an appropriately tailored zipper clause." (*Id.*) Thus, a zipper clause may be an "appropriate technique . . . to assist in . . . negotiation[s]" under 5 U.S.C. § 7114(a)(4). (*Id.*)

The Authority observed that, in *Interior*, it had determined that the Statute requires midterm bargaining, while at the same time declining to decide whether zipper clauses are mandatory bargaining

subjects. (JA 74-75.) But a key part of *Interior*'s analysis was flawed. (JA 75.) While *Interior* had asserted that the Statute does not distinguish between midterm and term bargaining obligations, the Authority found that the mutual obligation to engage in term bargaining is clearly established in the Statute, while the mutual obligation to bargain midterm is not. (*Id.*) Indeed, this ambiguity regarding midterm bargaining obligations was central to the Supreme Court's *NFFE* decision. (*Id.*)

Thus, the Authority found that it would be inappropriate to treat midterm bargaining as a unilateral statutory right, when the Statute says nothing about it. "Instead, the Statute leaves midterm-bargaining obligations to the parties to resolve as part of their term negotiations." (JA 75-76.)

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

## SUMMARY OF ARGUMENT

The Unions argue that the Authority's Policy Statement fails at *Chevron* step one because the Statute unambiguously requires midterm bargaining. (Br. at 23-34.) They cite the Statute's failure to distinguish

between term and midterm bargaining (Br. at 25-26), its pro-bargaining purpose (*id.* at 26-32), and private-sector precedent (*id.* at 32-34).

These are the same arguments relied upon in *NTEU 1987*, 810 F.2d at 298-301. And, as the Policy Statement correctly observed, *NTEU 1987*'s analysis was overruled by the Supreme Court in *NFFE*. (JA 73, 75, 77-78.) In *NFFE*, the High Court concluded that the Statute was ambiguous as to whether union-initiated midterm bargaining was required, and rejected *NTEU 1987*'s contrary conclusion. *NFFE*, 526 U.S. at 98.

To the extent the Unions contend that the Statute unambiguously provides that zipper clauses are permissive bargaining subjects only, *NFFE* requires that this argument be rejected as well. *See Id.* at 100 (holding that "the Statute does not resolve the question of midterm bargaining, *nor the related question of bargaining about midterm bargaining*") (emphasis added).

In addition, several well-considered statements—from this Court, the Authority and even NTEU itself—strongly suggest that zipper clauses are mandatory subjects of bargaining. *See IRS II*, 29 FLRA at 166; *IRS III*, 838 F.2d at 568-70 (concurring statement of Edwards, J.,

joined by Silberman, J.) (contending that zipper clauses are mandatory subjects of bargaining in the federal sector); Brief for Petitioner, *Nat'l Treasury Emps. Union v. FLRA*, D.C. Cir. No. 03-1351, 2004 WL 960785, at 7-8 (same); *NTEU 2005*, 399 F.3d at 341-43 (faulting the Authority for failing to consider private-sector precedent holding zipper clauses to be mandatory subjects of bargaining).

The Unions cite *AFGE 1983* and *NTEU 2005* for the proposition that "if the [Authority's] ruling on the midterm bargaining right . . . is set aside, a zipper clause proposal would have to be considered a permissive subject of bargaining." (Br. at 43.) But this Court's decisions in *AFGE 1983* and *NTEU 2005* are inconsistent with any argument that zipper clauses are permissive subjects only. *AFGE 1983* held that, under the Statute, "[i]t is sensible to view all matters relating to conditions of employment as mandatory subjects of bargaining unless the Act explicitly or by unambiguous implication vests in a party an unqualified 'right.'" *AFGE 1983*, 712 F.2d at 647 n.27. *NTEU 2005* noted that "[s]ubsequent decisions by the [Authority] have adopted the reasoning of *AFGE* [*1983*] that limits permissive subjects of bargaining to 'unilateral rights specifically vested in one party.'" *NTEU 2005*, 399

F.3d at 340 (collecting cases). And *NTEU 2005* found that the Authority had acted arbitrarily in holding that proposals that would limit a party's ability to invoke the "covered by" defense were permissive subjects without considering its "unilateral rights" precedent. *Id*. at 340-41.

The Statute does not explicitly vest in unions an unqualified right to engage in midterm bargaining. *NFFE*, 526 U.S. at 92. Nor does it do so by "unambiguous implication." *Id*. at 98. Thus, *AFGE 1983* and *NTEU 2005* require the conclusion that zipper clauses are mandatory subjects of bargaining.

Moving to *Chevron* step two, the Unions fail to show that the Authority's Policy Statement is unreasonable. Under the Statute, "all matters relating to conditions of employment" are presumed to be mandatory bargaining subjects "unless the Statute explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right." *NTEU 2009*, 64 FLRA at 157. Authority and judicial precedent provide at least three reasons why union-initiated midterm bargaining cannot be considered a unilateral right.

*First,* the Statute does not expressly or by unambiguous implication create a right to union-initiated midterm bargaining. *NFFE*, 526 U.S. at 92-98. *Second*, any right to union-initiated midterm bargaining is not "unqualified." *See Interior*, 56 FLRA at 53 (noting significant limitations on the right to union-initiated midterm bargaining). *Third*, any right to midterm bargaining is not "unilateral." Like the "covered by" doctrine, the policies supporting the right to bargain midterm relate to "the parties' mutual obligation to bargain, not unilateral rights." *NTEU 2009*, 64 FLRA at 158.

In sum, the Unions' view would turn the Statute's structure on its head. It would exalt the right to midterm negotiations, holding that unions could never be forced to waive this unwritten right despite the fact that it appears nowhere in the Statute. At the same time, the Unions' position would effectively deprive the parties of the ability to comprehensively define their midterm bargaining obligations during term negotiations—despite the fact that good-faith term bargaining *is* an express statutory obligation. *See* 5 U.S.C. § 7114(b)(1). The Authority's careful analysis in the Policy Statement, by contrast, respects the Statute's structure by treating midterm bargaining

obligations just like any other "condition of employment"—as a mandatory subject for term negotiations. (JA 75-77.)

The Unions next contend that the Policy Statement is inconsistent with the Statute's purpose of "promoting collective bargaining." (Br. at 28.) But, as the Authority accurately observed, "requiring the parties *to engage in collective bargaining over* an additional topic" advances, rather than detracts from, the Statute's purpose of promoting collective bargaining. (JA 77 n. 47.) Indeed, this Court has held that the Statute's purposes of "contractual stability and repose" are undermined, not furthered, by "requiring essentially endless bargaining." *Navy*, 962 F.2d at 59.

Next, the Unions contend that the Authority's Policy Statement is contrary to the Statute's purpose of "equalizing the positions of labor and management at the bargaining table." (Br. at 30.) Once again, the precise opposite is true. The Authority's Policy Statement eliminates the arbitrary disparity that had developed in the Authority's case law between reopener and zipper clauses, whereby only reopener clauses could be bargained to impasse. (JA 71-72, 74, 77.)

Nor would requiring bargaining over zipper clauses eliminate the ability of unions to engage in midterm bargaining, as the Unions erroneously suggest. (Br. at 27-28). As the Authority's Policy Statement noted, unions may bargain to impasse reopener or zipper clauses, or a combination thereof, that allow for broad midterm bargaining over unforeseen issues. (JA 78 & n.50.)

The Unions contend that the Policy Statement is inconsistent with private-sector precedent. (Br. at 32-34.) Not so. Decades of NLRB precedent hold that zipper clauses are mandatory subjects that may be bargained to impasse. *Tomco Commc'ns, Inc.*, 567 F.2d at 879, *Litton Sys.*, 300 NLRB 324, 327-28 (1990); *Toledo Blade Co.*, 295 NLRB 626, 627 (1989).

The Unions next accuse the Authority of failing to "sensibly explain its departure" from *Interior*. (Br. at 38.) But *Interior* did not consider whether midterm bargaining was a "unilateral right specifically vested in one party" within the meaning of *AFGE 1983* and *NTEU 2005*. As the Authority correctly recognized in the Policy Statement (JA 76), the "dispositive question" as to whether zipper clauses are permissive or mandatory subjects of bargaining "is not

whether the proposal involves a 'statutory right' *but whether that right is 'unilateral.'" NTEU 2005*, 399 F.3d at 342 (emphasis added). And the Authority properly determined that *Interior*'s analysis was insufficient to establish midterm bargaining as a "unilateral right." (JA 75.)

The Unions misunderstand the Authority's finding that zipper clauses may be an "appropriate technique . . . to assist in any negotiation" under 5 U.S.C. § 7114(a)(4) as having been based on an observation that zipper clauses may be used as a "bargaining chip." (Br. at 44.) But the Authority held that zipper clauses may be an "appropriate technique" because they allow the parties to specify the scope and timing of their negotiations, not because they provide a bargaining chip. (JA 77.)

Finally, the Unions contend that the Authority failed to adequately explain why it chose to issue the Policy Statement. (Br. at 38-40.) But the Authority correctly noted that the question of whether zipper clauses are mandatory subjects of bargaining "has persisted for decades without a clear answer," and that by resolving this question, it would "provide guidance with 'general applicability' under the Statute

on a matter that currently confronts parties in the context of a labor-management relationship." (JA 74-75 (quoting 5 C.F.R. § 2427.5(c).) The Unions provide no basis for questioning those determinations; indeed, they admit both points in asserting their own standing to challenge the Policy Statement. (Br. at 19-21.) Nor was the Authority's previous refusal to issue a policy statement regarding what the Unions admit was a "separate . . . issue" (Br. at 38) inconsistent with its decision to issue its Policy Statement holding that zipper clauses are required bargaining subjects. (JA 76 n.36.)

Denial of the Petitions for Review is therefore appropriate.

## STANDARD OF REVIEW

The Authority is responsible for interpreting and administering the Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Technicians., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*")). "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of

public sector labor relations." *Libr. of Cong. v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983) ("*Library*"); *see also* 5 U.S.C. § 7105(a)(2)(E) ("[t]he Authority shall . . . resolve[] issues relating to the duty to bargain in good faith[.]")

"Because the 'Congress has clearly delegated to the Authority the responsibility in the first instance to construe the [Statute],'" this Court "reviews the Authority's interpretation of the [Statute] under the two-step framework announced in *Chevron*[.]" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*") (alteration in original) (quoting *Library*, 699 F.2d at 1284). At *Chevron* step one, the Court must determine "whether Congress has directly spoken to the precise question at issue.'" *Chevron*, 467 U.S. at 842. In doing so, the Court applies "traditional tools of statutory construction." *NTEU 2014*, 754 F.3d at 1042 (internal quotation marks omitted). If the statute is silent or ambiguous, the Court moves to step two. *Id.*

At *Chevron* step two, "the question for the [C]ourt is whether the agency's interpretation is based on a permissible construction of the statute in light of its language, structure, and purpose." *Id.* (internal

quotation marks omitted). The Court will "defer to an agency's interpretation of a statute so long as it is reasonable." *Id.*

*Chevron* step two analysis "overlaps with" the Administrative Procedure Act's arbitrary and capricious standard. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 96 (D.C. Cir. 2005) (internal quotation marks omitted). "Under this highly deferential standard of review, the court presumes the validity of agency action, and must affirm unless the [Authority] failed to consider relevant factors or made a clear error in judgment[.]" *Cellco P'ship v. Fed. Com. Comm'n*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (internal quotation marks and citations omitted).

The Authority, like other agencies, "is free to alter its past rulings and practices" so long as it provides a "reasoned explanation" for doing so. *Loc. 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]" *Id.* (internal quotation marks omitted). The reason for such 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.

## ARGUMENT

### I. The Policy Statement Satisfies *Chevron* Step One

#### A. The Supreme Court Has Unanimously Rejected the Unions' Argument That the Statute Unambiguously Requires Midterm Bargaining

Relying closely on *NTEU 1987*, and quoting extensively from that opinion, the Unions argue that the Authority's Policy Statement fails at *Chevron* step one because the Statute requires midterm bargaining. (Br. at 23-34.) In support, the Unions cite the Statute's failure to distinguish between term and midterm bargaining (Br. at 25-26), its pro-bargaining purpose (*id*. at 26-32), and private-sector precedent (*id*. at 32-34). These are the exact same arguments relied upon in *NTEU 1987*. *Compare NTEU 1987*, 810 F.2d at 298, 301 (arguing that the Statute does not distinguish between midterm and term bargaining); 298-299 (emphasizing the Statute's pro-bargaining purpose); 299-300 (urging that NLRB precedent requires midterm bargaining).

But, as the Policy Statement correctly observed, these arguments were rejected—unanimously—by the Supreme Court in *NFFE*. (JA 73, 75, 77-78.) *NFFE* noted "that the Statute itself does not expressly address union-initiated midterm bargaining." *NFFE*, 526 U.S. at 92. The Supreme Court then proceeded to consider, at length, the Statute's text, structure, history, and underlying policies, as well as NLRB precedent. *Id*. at 92-98. After exhausting these traditional tools of statutory construction, the Court "f[ound] ambiguity created by the Statute's use of general language that might, or might not, encompass various forms of midterm bargaining." *Id*. at 98.

"That kind of statutory ambiguity," the Supreme Court held, "is inconsistent both with the Fourth Circuit's absolute reading of the Statute [in *SSA*] and also with the D.C. Circuit's similarly absolute, but opposite, reading [in *NTEU 1987*]." *Id*. The Supreme Court "conclude[d] that Congress 'left' the matters of whether, when, and where midterm bargaining is required 'to be resolved by the agency charged with the administration of the statute in light of everyday realities.'" *Id*. at 99 (quoting *Chevron*, 467 U.S. at 865-66). In so doing,

the Supreme Court decisively rejected the Unions' *Chevron* step one argument.

Thus, the Unions' charge that the Authority "failed to exhaust all the traditional tools of statutory construction" (Br. at 23) misses the mark. The Supreme Court has already exhausted those tools and found "that the Statute does not resolve the question of midterm bargaining" but instead "delegates to the Federal Labor Relations Authority the legal power to determine whether the parties must engage in midterm bargaining." *NFFE*, 526 U.S. at 100, 88.

This Court, of course, is bound by decisions of the Supreme Court. *Winslow v. Fed. Energy Regulatory Comm'n*, 587 F.3d 1133, 1135 (D.C.Cir.2009) ("[v]ertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'" (quoting U.S. Const., art. III, § 1)); *We the People Found., Inc. v. United States*, 485 F.3d 140, 144 (D.C. Cir. 2007) ("we must follow . . . binding Supreme Court precedent"); *United States v. Dorcely*, 454 F.3d 366, 375 (D.C.Cir.2006) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as

authoritative."). *NFFE* forecloses the Unions' argument that the Statute unambiguously requires midterm bargaining.

### B. The Statute Does Not Speak Directly to Whether Zipper Clauses Are Mandatory Subjects of Bargaining

To the extent the Unions contend that the Statute unambiguously provides that zipper clauses are permissive bargaining subjects only, *NFFE* requires that this argument be rejected. That is because *NFFE* held not only "that the Statute does not resolve the question of midterm bargaining," but also that it does not resolve "the related question of bargaining about midterm bargaining." *NFFE*, 526 U.S. at 100.

In addition, several well-considered statements—from this Court, the Authority and even NTEU itself—strongly suggest that zipper clauses are mandatory subjects of bargaining.

As far back as 1987, the Authority emphasized that "a union may contractually agree to waive its right to initiate bargaining in general by a 'zipper clause', that is, a clause intended to waive the obligation to bargain during the term of the agreement on matters not contained in the agreement." *IRS II*, 29 FLRA at 166.

Building on that statement, two D.C. Circuit judges with extensive labor law backgrounds urged that zipper clauses were

mandatory subjects of bargaining under the Statute. *IRS III*, 838 F.2d at 568-70 (concurring statement of Edwards, J., joined by Silberman, J.). Judges Edwards and Silberman dismissed as "utterly specious" the argument that the zipper clauses are permissive subjects of bargaining in the federal sector. *Id*. at 570. They noted that "literally scores of cases from the private sector hold[] that a union may waive its right to bargain during the term of an agreement, either pursuant to bargaining history, or by agreeing to something like a contractual 'zipper clause[.]'" *Id*. at 568 (citation omitted). And they found that "[f]ederal agency employers who wish to avoid continuous bargaining during the term of an agreement are free, just as are their private sector counterparts, to negotiate contract provisions to ensure this result." *Id*. at 570.

In its brief in *NTEU 2005*, NTEU urged at length that zipper clauses were mandatory bargaining subjects. Brief for Petitioner, *Nat'l Treasury Emps. Union v. FLRA*, D.C. Cir. No. 03-1351, 2004 WL 960785, at 7-8. In NTEU's view, "it is axiomatic in the private sector that proposals seeking 'zipper' or 'reopener' clauses, which define whether and to what extent there will be bargaining during the term of an agreement, are mandatory subjects of bargaining." *Id*. at 8.

"Moreover, every indication is that there is a mandatory obligation to bargain over these types of clauses in the federal sector, too." *Id.*

In *NTEU 2005*, this Court also suggested that zipper clauses were required bargaining topics. *NTEU 2005* rejected the Authority's determination that NTEU's "proposals to define the scope of the duty to bargain mid-term constitute only a permissive subject of bargaining." *NTEU 2005*, 399 F.3d at 336. And it faulted the Authority for "fail[ing] to explain (or even to discuss) the relationship between the Union proposals at issue and both [Authority] and private sector precedent regarding zipper and reopener clauses." *Id.* at 341. The Court noted that "the Union's proposals are arguably more analogous to zipper clauses than they are to reopeners," and cited NLRB precedent holding zipper clauses to be mandatory bargaining subjects. *Id.* at 343 (citing *Tomco Commc'ns, Inc.*, 567 F.2d at 879).

These statements would make little sense if the Statute directly addressed zipper clauses and foreclosed the conclusion that they are mandatory subjects of bargaining. Instead, they strongly suggest that proposals regarding zipper clauses, like all other proposals concerning "conditions of employment" that the Statute does not unambiguously

define as permissive subjects, are required bargaining topics. *See NTEU 2009*, 64 FLRA at 157.

The Unions assert that, "if the [Authority's] ruling on the midterm bargaining right . . . is set aside, a zipper clause proposal would have to be considered a permissive subject of bargaining." (Br. at 43.) In support, they cite *AFGE 1983* and *NTEU 2005*. Both of those decisions, however, are incompatible with any argument that zipper clauses are permissive subjects only.

In *AFGE 1983*, this Court considered whether the scope of a negotiated grievance procedure is a mandatory or permissive subject of bargaining under the Statute. The Statute provides that "any [CBA] shall provide procedures for the settlement of grievances[.]" 5 U.S.C. § 7121(a)(1). It then says that "[a]ny [CBA] *may* exclude any matter from the application of the grievance procedures which are provided for in the agreement," *id.* § 7121(a)(2) (emphasis added), and lists five categories of matters that *must* be excluded from a grievance procedure, *id.* § 7121(c). Based on those provisions, the union argued that any proposal to limit the scope of a CBA's grievance procedure beyond the

five categories listed in § 7121(c) was a permissive subject only. *AFGE 1983*, 712 F.2d at 644.

The Court rejected that argument. It found that § 7106 of the Statute, in dealing with management rights, "demonstrates that Congress knew how to write a provision defining permissive subjects of bargaining unambiguously." *Id.* at 646. "Moreover, Congress linked the permissive subjects of bargaining to unilateral rights specifically vested in one party." *Id.*

In particular, the Court found that comparing § 7106 with § 7121, dealing with grievance procedures, was "telling." *Id.* That is because "[§] 7106(a) explicitly designates certain itemized subjects as *management* rights," while "[§] 7106(b)(1) explicitly permits negotiation 'at the election of the agency.'" *Id.* By contrast, § 7121(a) "does not speak of *union* rights; it describes in neutral terms a clause that must be included in every [CBA]," while § 7121(b), "again in neutral language, permits grievance procedure scope to be narrowed in '[a]ny [CBA].'" *Id.*

Thus, in assessing the Statute, this Court found that "[i]t is sensible to view all matters relating to conditions of employment as

mandatory subjects of bargaining unless the Act *explicitly* or by *unambiguous implication* vests in a party an unqualified 'right.'" *Id.* at 647 n.27 (emphasis added). "A 'right' is a logical candidate for a permissive subject of bargaining, one that a party may—but need not—put on the bargaining table." *Id.* "[S]ubjects falling within the ambit of [§] 7106 (which defines management rights) or [§§] 7102 and 7114 (which define employees' rights and unions' rights of representation) should be 'permissive' subjects of bargaining; other 'conditions of employment' are appropriately ranked in the mandatory category." *Id.*

In this case, Congress did not explicitly vest in unions an unqualified right to engage in midterm bargaining. Instead, as the Unions appear to concede (Br. at 23-24), and as the Supreme Court has expressly held, *NFFE*, 526 U.S. at 92, the Statute is silent on the topic. Nor does the Statute vest in unions a right to engage in midterm bargaining by "unambiguous implication"; once again, the Supreme Court in *NFFE* expressly found ambiguity regarding whether the Statute gave unions a right to engage in midterm bargaining. *NFFE*, 526 U.S. at 98.

In *NTEU 2005*, this Court further indicated that midterm bargaining is not a "unilateral right." The Court found that "[m]any provisions of the [Statute] confer benefits and impose obligations in varying degrees on labor and management." *NTEU 2005*, 399 F.3d at 339. "Not all of these provisions constitute 'statutory rights' that must be waived before they are negotiable." *Id.* at 340. It noted that "[s]ubsequent decisions by the [Authority] have adopted the reasoning of *AFGE* [*1983*] that limits permissive subjects of bargaining to 'unilateral rights specifically vested in one party.'" *Id.* (collecting cases).

*NTEU 2005* considered the Authority's decision in *NTEU 2003* holding that proposals that would limit the agency's ability to invoke the "covered by" defense were permissive subjects only. *NTEU 2003*, 59 FLRA at 220. The Authority had reasoned that the "covered by" doctrine was a "statutory right" because it derives from "the Statute's purposes of stability and repose[,]" and any proposal that requires a party to waive a statutory right is a permissive subject of bargaining. *Id.*

This Court, however, rejected the Authority's analysis. *NTEU 2005*, 399 F.3d at 340-41. In its view, the issue was "not whether

[NTEU's] proposals seek a 'partial[ ] waive[r]' of the 'covered by' doctrine or whether the latter 'flows from the Statute.'" *Id.* at 341. Instead, the "dispositive question" was "whether the 'covered by' defense is a unilateral right *explicitly* or by *unambiguous implication* conferred by the Statute." *Id.* at 342, 341 (emphasis added).

In deciding that unions had a right to engage in midterm bargaining in *Interior*, the Authority similarly did not consider whether such bargaining was a "unilateral right" within the meaning of *AFGE 1983*. Instead, *Interior* grounded the midterm bargaining right solely on policy considerations—that is, its conclusions that midterm bargaining "furthers Congress's goal of promoting and strengthening collective bargaining in the federal workplace" and "will not result in significant costs or disruptions that would outweigh the benefits of such bargaining." *Interior*, 56 FLRA at 52. That is very much like the Authority's reasoning in *NTEU 2003* that the "covered by" defense was a statutory right because it furthers "the Statute's purposes of stability and repose." *NTEU 2003*, 59 FLRA at 220.

But *AFGE 1983* and *NTEU 2005* hold clearly that such generalized policy considerations are not enough to create a "unilateral

right." Instead, the Statute must vest a unilateral right in a party either "explicitly or by unambiguous implication.'" *NTEU 2005*, 399 F.3d at 340 (quoting *AFGE 1983*, 712 F.2d at 647 n.27.)

In sum, the Unions fail to show that the Policy Statement runs afoul of *Chevron* step one. If anything, *Chevron* step one analysis forecloses the Unions' position that zipper clauses are permissive subjects only.

## II. The Policy Statement Satisfies *Chevron* Step Two

Moving to *Chevron* step two, the Unions fail to show that the Authority's Policy Statement is arbitrary, capricious, or in any way unreasonable.

### A. Holding Zipper Clauses to Be Mandatory Subjects of Bargaining Is Consistent with the Statute's Structure

The Policy Statement's determination that zipper clauses are mandatory subjects of bargaining is consistent with the Statute's overall structure, the "unilateral rights" doctrine, and both Authority and judicial precedent. (JA 76-77.) A determination that zipper clauses are merely permissive subjects, by contrast, would be inconsistent with the statutory scheme, contrary to the unilateral rights doctrine, and at odds with applicable precedent.

Under the Statute, "all matters relating to conditions of employment" are presumed to be mandatory bargaining subjects "unless the Statute explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right." *NTEU 2009*, 64 FLRA at 157 (citing *NTEU 2005*, 399 F.3d at 340 and *AFGE 1983*, 712 F.2d at 646-47 & n.27, 649). The Authority has recognized that "[m]atters relating to the parties' mid-term bargaining relationship plainly relate to conditions of employment." *Id*. Thus, as the Policy Statement correctly noted, finding zipper clauses to be mandatory subjects of negotiation "is consistent with the Authority's previous recognition that matters relating to the parties' midterm-bargaining relationship plainly relate to conditions of employment." (JA 76.)

Holding that zipper clauses are mandatory subjects of bargaining is also consistent with the Statute's presumption "that all matters relating to conditions of employment are mandatory subjects of bargaining unless the text explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right." (*Id*. (citing *NTEU 2009*, 64 FLRA at 157).) Authority and judicial precedent provide at

least three reasons why union-initiated midterm bargaining cannot be considered a unilateral right.

*First,* the Statute does not expressly or by unambiguous implication create a right to bargain midterm. The Supreme Court has squarely held that the Statute does not explicitly create a right to union-initiated midterm bargaining. *NFFE*, 526 U.S. at 92. And the Supreme Court, after exhausting traditional tools of statutory construction, found that the Statute does not grant unions a right to engage in midterm bargaining by unambiguous implication. *Id*. at 98. To the contrary, the Court found "ambiguity created by the Statute's use of general language that might, or might not, encompass various forms of midterm bargaining." *Id*.

*NTEU 2009*, which dismissed the argument that the "covered by" defense is a unilateral right, also requires rejecting the argument that midterm bargaining is a "unilateral right." "Unlike provisions of the Statute that explicitly grant parties various rights, nothing in the Statute explicitly sets forth a right to raise a 'covered by' defense, or to decline to bargain mid-term over a proposal that would limit a party's ability to raise such a defense." *NTEU 2009*, 64 FLRA at 157. *NTEU*

*2009* thus held that "Congress knew how to write a provision defining permissive subjects of bargaining unambiguously," and had failed to do so with respect to the "covered-by" doctrine. *Id*. at 158.

So too, the Authority correctly found in its Policy Statement that "the Statute does not, on its own, explicitly or by unambiguous implication vest either party with a unilateral right to engage in midterm bargaining." (JA 76.)

*Second*, any right to midterm bargaining is not "unqualified." Instead, it is limited by the "covered by" doctrine, under which parties are not obligated to bargain over matters "covered by" the parties' term agreement, as well as the doctrine of waiver. *Interior*, 56 FLRA at 53 ("an agency is not required to bargain during the term of a [CBA] on matters that are 'contained in or covered by' an agreement" or "where the union has waived its right to bargain over the subject matter involved."). The Supreme Court in *NFFE* made this same point, noting that "the D.C. Circuit's analysis [in *NTEU 1987*] implicitly concedes the need to make at least *some* midterm bargaining distinctions, when it assumes that the midterm bargaining obligation does not extend to matters that are covered by the basic contract." *NFFE*, 526 U.S. at 98.

*Third*, any right to midterm bargaining is not "unilateral." Like the "covered by" doctrine, the policies supporting the right to bargain midterm relate to "the parties' mutual obligation to bargain, not unilateral rights." *NTEU 2009*, 64 FLRA at 158. Indeed, *NTEU 2009* itself referred to "the mutual obligation to bargain mid-term." *Id.* So too, in recognizing a right to bargain midterm, *Interior* emphasized the parties' mutual interest in "cooperatively resolving disputes" and "more focused negotiations," as well as the need to "maintain[] the mutuality of the bargaining obligation prescribed in the Statute." *Interior*, 56 FLRA at 51-52. Because the right to midterm bargaining recognized in *Interior* flows from "a mutual obligation to bargain," it is not a "unilateral right specifically invested in one party." *Id.*, at 55 n.12; *NTEU 2009*, 64 FLRA at 157.

In sum, the Authority correctly held that, "because neither party would be required to waive a statutory right, any proposal concerning midterm bargaining would come within the default rule that all matters relating to conditions of employment are mandatory subjects of bargaining." (JA 76-77.)

The Unions do not offer any analysis that would undercut this conclusion, much less show it was unreasonable. Instead, they point to a passage from *NTEU 1987* stating that "the statutory scheme protects governmental needs, not by restricting the circumstances of bargaining, but by limiting the areas that are subject to bargaining." (Br. at 25 (quoting *NTEU 1987*, 810 F. 2d at 301).) But the Authority was not required to specifically consider observations from a 33-year old judicial opinion that was overruled more than 20 years ago. (JA 73 n.14 (noting that *NTEU 1987* was overruled by *NFFE*).)

In addition, this passage does not speak to whether the parties themselves may "restrict[] the circumstances of bargaining," or are required to bargain over proposals to do so. *NTEU 1987*, 810 F. 2d at 301; *compare IRS III*, 838 F.2d at 568-70 (concurring statement of Edwards, J., joined by Silberman, J.) (noting that treating zipper clauses as mandatory subjects of bargaining is consistent with *NTEU 1987*). Authority precedent, however, *does* speak directly to this question. It holds that "[m]atters relating to the parties' mid-term bargaining relationship plainly relate to conditions of employment," and thus come within the Statute's broad "presumption that all matters

relating to conditions of employment are mandatory subjects of bargaining unless the Statute explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right." *NTEU 2009*, 64 FLRA at 157.

Requiring the parties to engage in term negotiations regarding their midterm bargaining obligations is consistent with the Statute's structure in another respect. As the Authority pointed out, the Statute explicitly sets forth an obligation engage in term negotiations. (JA 75.) "Indeed, in the long history of litigation over these issues, there has been universal agreement that the obligation to 'meet and negotiate in good faith for the purposes of arriving at a collective[-]bargaining agreement' compels bargaining over negotiable proposals for a term CBA." (JA 75 n.32 (quoting 5 U.S.C. § 7114(a)(4).)

The Statute does not, however, speak directly to whether its bargaining obligation extends to midterm supplements. *NFFE*, 526 U.S. at 98. Indeed, four justices of the Supreme Court, along with the Fourth Circuit, found that the Statute expressly *prohibited* union-initiated midterm bargaining. *NFFE*, 526 U.S. at 101-08 (O'Connor, J., dissenting); *Energy*, 106 F.3d at 1163. In light of that indeterminacy, it

was entirely consistent with the Statute's structure to hold—as the Authority did—that "the Statute leaves midterm-bargaining obligations to the parties to resolve as part of their term negotiations." (JA 75-76.)

Under the Unions' proffered alternative, by contrast, the parties would almost *never* comprehensively define their midterm bargaining obligations during term negotiations. While the parties might *expand* their bargaining obligations via reopener provisions, requiring midterm bargaining over matters that were "covered by" the term agreement, *see NTEU 2009*, 64 FLRA at 158-59, only in the rarest of cases would they *limit* or otherwise define their midterm bargaining obligations. That is because, as NTEU proclaimed in its public comment, "NTEU has never agreed to a proposal that would eliminate its statutory right to midterm bargaining on topics not covered by the existing agreement." (JA 47.) Further, NTEU "*would never* agree to such a proposal" if zipper clauses were not held to be mandatory subjects of bargaining. (*Id.* (emphasis added).)

Thus, the Unions' view would turn the Statute's structure on its head. It would exalt the right to midterm negotiations, holding that unions could never be forced to waive this unwritten right despite the

fact that it appears nowhere in the Statute. At the same time, it would effectively deprive the parties of the ability to comprehensively define their midterm bargaining obligations during term negotiations—despite the fact that good-faith term bargaining *is* an express statutory obligation. *See* 5 U.S.C. § 7114(b)(1) ("[t]he duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation . . . to approach the negotiations with a sincere resolve to reach a [CBA].").

The Unions' skewed view of the Statute's framework fails to make sense of it. By contrast, the Authority's careful analysis in the Policy Statement respects the Statute's structure by treating midterm bargaining obligations just like any other "condition of employment"—as a mandatory subject for term negotiations. (JA 75-77.)

### B. The Policy Statement Promotes the Statute's Purposes

Again relying heavily on *NTEU 1987*, the Unions next contend that the Policy Statement is inconsistent with the Statute's purposes of "promoting collective bargaining" and "equalizing the positions of labor and management at the bargaining table." (Br. at 26-32.) These arguments are without merit.

"Congress's intent in enacting the [Statute] was to establish a collective bargaining regime in which agencies and unions would reach binding and stable [CBAs]." *Internal Revenue Serv. v. FLRA*, 963 F.2d 429, 439 (D.C. Cir. 1992) ("*IRS 1992*"). "Stable and enforceable [CBAs] protect the interests of the agency and bargaining unit employees alike." *Id.* at 439-40. And, "[t]o the extent that the parties are required to adhere to the specific conditions of employment mutually established in their agreement during the life of such agreement, stability at the work place is thereby fostered." *Navy*, 962 F.2d at 59 (internal quotation marks omitted).

Thus, *Navy* held that the parties can, in their term contract, define the circumstances under which "impact and implementation" bargaining may take place, and in so doing, partially or fully waive their right to engage in such bargaining. *Id.* at 58. "[W]here a matter that would otherwise be a mandatory subject of bargaining is 'covered by' or 'contained in' a [CBA], the parties are absolved of any further duty to bargain about that matter during the term of the agreement." *Id.* at 53.

So too in this case, the Statute's broad pro-bargaining purpose—and, in particular, its intent to foster contractual stability, reliance and repose—is furthered by requiring the parties to bargain over proposals to precisely define their midterm bargaining obligations. As the Authority accurately observed, "requiring the parties *to engage in collective bargaining over* an additional topic" advances, rather than detracts from, the Statute's purpose to promote collective bargaining. (JA 77 n. 47.)

The D.C. Circuit too has held that the Statute's purposes of "contractual stability and repose" are undermined, not furthered, by "requiring essentially endless bargaining." *Navy*, 962 F.2d at 59. Indeed, "[s]table and enforceable [CBAs] . . . . provide a far more effective bulwark for protecting employees' interests than do the relatively abstract statutory entitlements" championed by the Unions in this case. *IRS 1992*, 963 F.2d at 439-40. By insisting on the right to engage in midterm bargaining, but depriving the parties of the ability to define the scope of such bargaining, "the [Unions] guard[] the building blocks of collective bargaining at the expense of the edifice

itself"—reflecting an approach to collective bargaining that this Court has decisively rejected. *Id*. at 440.

Next, the Unions contend that the Authority's Policy Statement is contrary to the Statute's purpose of "equalizing the positions of labor and management at the bargaining table." (Br. at 30.) Once again, the precise opposite is true. The Authority's Policy Statement eliminates the arbitrary disparity that had developed in the Authority's case law between reopener and zipper clauses, whereby only reopener clauses may be bargained to impasse. (JA 71-72, 74.) That is, before the Authority's Policy Statement, parties could not bargain to impasse regarding "proposals that *limit* midterm bargaining"—zipper clauses—and the Panel lacked jurisdiction impose such provisions on the parties. (JA 72.) However, the parties could bargain to impasse regarding "reopener proposals that *broaden* midterm bargaining"—reopener clauses—and the Panel could freely impose such provisions on the parties. (*Id*.)

With its Policy Statement, the Authority corrected that arbitrary disparity and clarified that "*all* proposals concerning midterm-bargaining obligations (including zipper clauses) are mandatory

subjects for negotiation that may be bargained to impasse. (JA 78.) As the Authority noted, there is simply no reason why reopener clauses should be treated as mandatory subjects of bargaining but zipper clauses should not. (JA 77.) Recognizing both as mandatory bargaining subjects therefore "equaliz[es] the positions of labor and management at the bargaining table" by eliminating a fundamental disparity between labor and management regarding midterm bargaining obligations. (Br. at 30.)

For example, just as "adding a reopener clause to a CBA may allow the parties to expedite bargaining by presently avoiding topics of little immediate concern that could unnecessarily and inefficiently broaden and prolong term negotiations," so too "adding a zipper clause to a CBA may provide management with an assurance that its other contractual commitments will not be interpreted as imposing an ongoing midterm-bargaining obligation." (JA 77 (internal quotation marks omitted).) And requiring bargaining over both zipper and reopener clauses allows management negotiators to "have greater confidence that, if they agree to union-favored proposals that recognize additional midterm bargaining obligations for the agency, then those

obligations can be counterbalanced with an appropriately tailored zipper clause" and thus promotes focused, efficient, and equitable collective bargaining. (*Id.*)

Notably, the Unions make no effort to justify the disparate treatment of reopener clauses versus zipper clauses. No previous Authority decision has attempted to do so either. Instead, before issuing the Policy Statement, the Authority had repeatedly ducked the question. *NTEU 2009*, 64 FLRA at 159 n.10; *Interior*, 56 FLRA at 54.

The Unions assume that requiring bargaining over zipper clauses would eliminate the ability of unions to engage in midterm bargaining. (Br. at 27-28). But, as the Authority noted, that simply is not true. (JA 78 & n.50.) Agencies must still bargain regarding the "impact and implementation" of management decisions that alter conditions of employment during a CBA's term. (JA 76 n.39.) And unions may bargain to impasse over reopener or zipper clauses, or a combination thereof, that allow for broad midterm bargaining over problems that are "unforeseen and unforeseeable at the time of term negotiations." (JA 78 & n.50; *compare* Br. at 34.)

And, even apart from any reopener provision, parties may always "mutually agree[] to reopen their existing agreements to address the current circumstances." (*Id.*) Indeed, at this very moment, agencies across the federal government are engaged in midterm bargaining over a wide array of subjects at the President's direction. *See* OPM, Guidance for Implementation of *Executive Order 14003 -Protecting the Federal Workforce* (Mar. 5, 2021)[3] (directing the heads of agencies to reopen CBAs and engage in midterm bargaining on numerous issues).

### C. The Policy Statement Is Supported by Private-Sector Precedent

Once again echoing *NTEU 1987*, the Unions next contend that the Authority should have "seriously considered" private-sector precedent regarding midterm bargaining, as reflected in *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (2d Cir. 1952). (Br. at 34 (quoting *NTEU 1987*, 810 F.2d at 300).) But, as Judges Edwards and Silberman observed in rejecting a similar argument, "the principle enunciated in *Jacobs Manufacturing Co.* does not impose an absolute requirement

[3]*Available at* https://www.chcoc.gov/sites/default/files/3-5-2021%20Guidance%20Memo%20for%20Implementation%20of%20EO%2014003%20Protecting%20the%20Federal%20Workforce.pdf

that parties to a [CBA] always must negotiate with respect to mandatory subjects of bargaining during the term of an agreement." *IRS III*, 838 F.2d at 568 (concurring statement of Edwards, J., joined by Silberman, J.). On the contrary, "literally scores of cases from the private sector hold[] that a union may waive its right to bargain during the term of an agreement, either pursuant to bargaining history, or by agreeing to something like a contractual 'zipper clause.'" *Id.* Thus, as Judges Edwards and Silberman correctly concluded, the argument that zipper clauses are permissive subjects only in the federal-sector is "utterly specious." *Id.* at 570.

Indeed, longstanding NLRB precedent holds that zipper clauses are mandatory subjects that may be bargained to impasse. *Tomco Commc'ns, Inc.*, 567 F.2d at 879, *Litton Sys.*, 300 NLRB at 327–28; *Toledo Blade Co.*, 295 NLRB at 627; *cf.* MATTHEW BENDER & CO., INC., 1 DRAFTING THE UNION CONTRACT § 19.02 (2020) ("it appears safe to assume that a zipper clause is a mandatory subject of bargaining."). NTEU itself has acknowledged that "it is axiomatic in the private sector that proposals seeking 'zipper' or 'reopener' clauses, which define whether and to what extent there will be bargaining during the term of

an agreement, are mandatory subjects of bargaining." Brief for Petitioner, *Nat'l Treasury Emps. Union v. FLRA*, D.C. Cir. No. 03-1351, 2004 WL 960785, at 8.

Thus, the Unions' argument that the Policy Statement is contrary to private-sector precedent is incorrect. Instead, the precise opposite is true—holding that zipper clauses are permissive subjects only would contradict private-sector precedent.

### D. The Authority Reasonably Explained Why It Was Departing from *Interior*

The Unions next accuse the Authority of failing to "sensibly explain its departure" from *Interior*. (Br. at 38.) But *Interior* did not consider whether midterm bargaining was a "unilateral right specifically vested in one party" within the meaning of *AFGE 1983* and *NTEU 2005*. Nor did *Interior* consider whether zipper clauses were mandatory or permissive bargaining subjects. On the contrary, it expressly *declined* to do so. *Interior*, 56 FLRA at 54.

This Court could scarcely have been clearer in stating that the "dispositive question" as to whether zipper clauses are permissive or mandatory subjects of bargaining "is not whether the proposal involves a 'statutory right' *but whether that right is 'unilateral.'*" *NTEU 2005*,

399 F.3d at 342 (emphasis added). The Authority, unlike the Unions, thus correctly recognized that the pertinent question is not whether midterm bargaining "flows from the Statute," *id* at 341, but whether the Statute's "text explicitly or by unambiguous implication vests in a party an unqualified, or 'unilateral,' right" to engage in midterm bargaining. (JA 76.)

The Authority correctly determined that *Interior*'s analysis was insufficient to establish midterm bargaining as a "unilateral right." (JA 75.) While *Interior* had found that the Statute does not distinguish between midterm and term bargaining obligations, the Authority noted a key distinction between the two: the mutual obligation to engage in term bargaining is clearly established in the Statute, while the mutual obligation to bargain midterm is not. (*Id.*) The Authority rightly observed that there is "universal agreement that the obligation to 'meet and negotiate in good faith for the purposes of arriving at a [CBA]' compels bargaining over negotiable proposals for a term CBA." (*Id.* n.32 (quoting 5 U.S.C. § 7114(a)(4).) In sharp contrast, *NFFE* had squarely held that the Statute is ambiguous as to whether it requires union-initiated midterm bargaining. (*Id.* (citing *NFFE*, 526 U.S. at

98).) Indeed, as noted *supra*, the general policy considerations regarding mutual bargaining obligations that *Interior* relied upon fall well short of establishing midterm bargaining as a "unilateral right." *NTEU 2009*, 64 FLRA at 157-58; *compare Interior*, 56 FLRA at 51-52.

Thus, it would be contrary to Authority and judicial precedent to treat midterm bargaining as a "unilateral statutory right" when the Statute says nothing about it. (JA 75-76.)

### E. The Authority Properly Found Zipper Clauses to Be An "Appropriate Technique" to Assist in Negotiations

In its Policy Statement, the Authority found further support for treating zipper clauses as mandatory subjects in § 7114(a)(4) of the Statute, which says that the parties "may determine appropriate techniques, consistent with the provisions" of § 7119—concerning bargaining impasses—"to assist in any negotiation." (JA 77).

The Unions contend that the Authority found zipper clauses an "appropriate technique" merely because they could serve as a "bargaining chip." (Br. at 44.) But that was not the Authority's rationale. Instead, the Authority held that zipper clauses were an "appropriate technique" because they would help the parties precisely define the contours of their midterm bargaining obligations and, in so

doing, would permit them to decide when to address certain topics of negotiation—i.e., during term negotiations, during midterm bargaining, or some combination thereof. (JA 77.) Requiring the parties to comprehensively define the scope and timing of midterm negotiations promotes efficient and focused bargaining, and "zipper clauses" are an "appropriate"—indeed, necessary—technique to create such efficiencies. (*Id.*; *see also* JA 4.) The Unions have no response to this analysis.

## III. After Avoiding the Issue for Two Decades, the Authority Reasonably Decided to Issue a Policy Statement Clarifying That Zipper Clauses Are Mandatory Subjects of Bargaining

Finally, the Unions contend that the Authority failed to adequately explain why it was issuing a policy statement in the first place. (Br. 38-40.) This argument is incorrect as well.

The Authority's decision to exercise its statutory power to "provide leadership in establishing policies and guidance relating to matters under" the Statute, 5 U.S.C. § 7105(a)(1), is within the Authority's sound discretion. After all, it is "[t]he Authority" that is "responsible for carrying out the purpose of" the Statute. *Id.*

The Authority has issued regulations listing six factors that guide it in deciding whether to issue a policy statement. *See* 5 C.F.R.

§ 2427.5. Those regulations do not specify the weight of any particular factor or the method of balancing various factors against one another. *Id.* This Court defers to the Authority's interpretation and application of its own ambiguous regulations. *Nat'l Lifeline Ass'n v. Fed. Com. Comm'n*, 983 F.3d 498, 507 (D.C. Cir. 2020).

As the Authority observed (JA 74-75), its regulations suggest that issuing a general statement of policy or guidance is appropriate where "resolution of the question presented would have general applicability under the" Statute, and where "the question currently confronts parties in the context of a labor-management relationship." *See* 5 C.F.R. § 2427.5(c)-(d).

The Authority correctly noted that the question of whether zipper clauses are mandatory subjects of bargaining "has persisted for decades without a clear answer." (JA 74.) Resolving this question, the Authority found, would "provide guidance with 'general applicability' under the Statute on a matter that currently confronts parties in the context of a labor-management relationship[.]" (*Id.* 74-75 (quoting 5 C.F.R. § 2427.5(c)).) The Unions present no basis for questioning those

determinations; indeed, they admit both points in asserting their own standing to challenge the Policy Statement. (Br. at 19-21.)

Instead, the Unions point to the Authority's decision in November 2019 not to issue a policy statement confined solely to midterm bargaining. (Br. at 38 (citing *U.S. Office of Personnel Management*, 71 FLRA 423 (2019)).) But, as the Unions admit, that request involved a "separate . . . issue" from whether zipper clauses are mandatory subjects of negotiation. (*Id.*)

In addition, the Authority provided a detailed explanation for why it chose to issue a Policy Statement regarding zipper clauses where it had declined to issue one regarding midterm bargaining in general. The Authority noted that "the previous request did not concern zipper clauses, and the precedent on which the Authority based its previous denial [*NTEU 2009* and *Interior*] did not resolve whether zipper clauses were within the duty to bargain." (JA 76 n.36.) "In the request at issue here," by contrast, "the question of the parties' obligations to negotiate zipper clauses has been squarely raised." (*Id.*) "And because those obligations depend, in some respects, on whether the Statute itself compels midterm bargaining, we find it necessary to address the

Statute's midterm-bargaining requirements in order to properly evaluate whether zipper clauses are mandatory subjects of bargaining." (*Id.*)

The Unions contend that this explanation "had nothing to do with the regulatory construct governing requests for general statements of policy or guidance" (Br. at 40), but that simply is not true. The Authority correctly noted that its precedent—*NTEU 2009* and *Interior* in particular—provided guidance on the general duty to bargain midterm, but they "did not resolve whether zipper clauses were within the duty to bargain." (JA 76 n.36.) Indeed, both of those decisions *expressly declined* to consider whether zipper clauses were mandatory subjects of bargaining. *NTEU 2009*, 64 FLRA at 159 n.10; *Interior*, 56 FLRA at 54. Thus, the Authority did not "depart from its regulatory conclusion[] in *OPM*" in issuing the Policy Statement. (Br. at 40; *compare U.S. Office of Personnel Management*, 71 FLRA at 423.)

Further, the Unions provide no basis for challenging the Authority's conclusion that it was "necessary to address the Statute's midterm-bargaining requirements in order to properly evaluate whether zipper clauses are mandatory subjects of bargaining" (JA 76

n.36), nor could they. NTEU itself analyzed the midterm-bargaining right in arguing, in its public comment, that zipper clauses were permissive subjects only. (JA 43-44.) And the Supreme Court in *NFFE*, the D.C. Circuit in *NTEU 2005*, and the Authority in *Interior* and *NTEU 2009* all found it necessary to consider the required scope of midterm bargaining under the Statute in order to properly evaluate whether proposals to expand or narrow such bargaining were mandatory subjects of negotiation. *See NFFE*, 526 U.S. at 99-101; *NTEU 2005*, 399 F.3d at 340-41; *Interior*, 56 FLRA at 50; *NTEU 2009*, 64 FLRA at 157.

## CONCLUSION

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

Respectfully submitted,

/s/Noah Peters
NOAH PETERS
Solicitor
REBECCA J. OSBORNE
Deputy Solicitor
SARAH C. BLACKADAR
Attorney
FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW
Washington, DC 20424
(202) 218-7908

April 16, 2021

## FED. R. APP. P. RULE 32(A) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Century Schoolbook font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 12,900 words excluding exempt material.

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

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

# ADDENDUM

## Relevant Statutes and Regulations

## TABLE OF CONTENTS

U.S. Const., art. III, § 1

**Judicial Power, Tenure and Compensation**

Section 1**.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

5 U.S.C. § 7101(b)

**Findings and purpose**

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

5 U.S.C. § 7105(a)

**Powers and Duties of the Authority**

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

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

> (A) determine the appropriateness of units for labor organization representation under section 7112 of this title;
>
> (B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise

administer the provisions of section 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. § 7114(a)(4), (b)

**Representation Rights and Duties**

(a)(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.

(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.

5 U.S.C. § 7119(b), (c)

**Negotiation Impasses; Federal Service Impasses Panel**

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse--

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either--

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may--

(i) hold hearings;

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

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

5 U.S.C. § 7121

**Grievance Procedures**

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(a)(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that--

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented

by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning--

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected--

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

5 U.S.C. § 7123(a)

**Judicial review; Enforcement**

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

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

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

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

29 U.S.C. § 158(d)

**Unfair Labor Practices**

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees

subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

> (A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.
>
> (B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.
>
> (C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

5 C.F.R. § 2427.2(a)

**Requests for General Policy 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.

5 C.F.R. § 2427.4

**Submissions from Interested Parties**

Prior to issuance of a general statement of policy or guidance the Authority, as it deems appropriate, will afford an opportunity to interested parties to express their views orally or in writing.

5 C.F.R. § 2427.5

**Standards Governing Issuance of General Statements of Policy or Guidance**

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

> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question;
>
> (c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor–Management Relations Statute;
>
> (d) Whether the question currently confronts parties in the context of a labor-management relationship;
>
> (e) Whether the question is presented jointly by the parties involved; and
>
> (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.