No. 25-4014

United States Court of Appeals for the Ninth Circuit

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

Plaintiffs-Appellees,

– v. –

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(CIVIL ACTION NO. 3:25-CV-03070-JD)

BRIEF OF *AMICUS CURIAE* NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The National Academy of Arbitrators, the NAA is not a party to this proceeding, does not have any parent corporation or publicly held corporation that owns 10% or more of its stock, and is a professional association, not a corporation.

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INTEREST OF *AMICUS*[1]

The *National Academy of Arbitrators (Academy or NAA)* was founded in 1947 to ensure standards of integrity and competence for professional arbitrators of workplace disputes, including establishing canons of professional ethics,[2] and offering programs promoting the understanding and practice of arbitration.[3] As historians of the Academy observe, it has been "a primary force in shaping American labor arbitration."[4]

Arbitrators elected to Academy membership are only those with widely accepted practices and scholars who have made significant contributions to labor and employment relations. Currently, the Academy has more than 500 members in the United States and Canada. Members are prohibited from serving as advocates, consultants or associates for parties in the field, and from appearing as expert witnesses on behalf of labor or management.

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[1] Counsel for *amicus* who prepared this brief are members of the Academy. Other members of the organization assisted. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief. Counsel for parties in this proceeding have provided consent to filing of an *amicus* brief.

[2] Gladys Gruenberg, Joyce Najita & Dennis Nolan, *The National Academy of Arbitrators: Fifty Years in the World of Work* (1997). See, e.g., the tripartite Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, at: https://naarb.org/code-of-professional-responsibility/ .

[3] For the variety of topics discussed by arbitrators and advocates at the Academy's annual meetings, see https://naarb.org/proceedings-database/.

[4]Gruenberg, et al, *Fifty Years in the World of Work, supra*, at 26.

The traditional function of labor arbitration has been to resolve disputes over the interpretation and application of collective bargaining agreements (CBAs). More recently, arbitration has concerned the statutory rights of employees in the non-union workplace. The NAA has been a leader in developing professional standards and due process protections in both types of proceedings.[5]

On several occasions, the NAA as *amicus curiae* has contributed briefs on arbitration issues in the Supreme Court[6] and in appellate proceedings.[7] In offering the Academy's perspective, the organization emphasizes that it supports arbitration as an institution because arbitration is capable of providing workplace justice in accord with legislative intent, judicial precedent, and historic practice.

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[5] See, e.g., https://naarb.org/due-process-protocol/; https://naarb.org/guidelines-for-standards-of-professional-responsibility-in-mandatory-employment-arbitration/.

[6] See, e.g.,*Bissonnette v. LePage Bakeries Park St., LLC,,* 601 U.S. 246 (2024); *Southwest Airlines Co. v. Saxon*, 596 US 450 (2022); *Epic Sys. Corp. v. Lewis*, 584 US 497 (2018)*; 14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009); *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000); *Wright v. Universal Maritime Service Corp*., 525 U.S. 70 (1998); *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).

[7] *Michigan Fam. Res., Inc. v. Serv. Emps. Int'l Union Loc. 517M,* 475 F.3d 746 (6th Cir. 2007)*; Hooters of Am., Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999)*; Thomas v. City of N. Las Vegas,* 122 Nev. 82, 127 P.3d 1057 (2006)*; Moore v. Conliffe,* 7 Cal. 4th 634, 871 P.2d 204 (1994).

INTRODUCTORY

This case concerns the President's Executive Order (EO) 14251 issued on March 27, 2025.[8] The EO, the subject of the present appeal of a District Court injunction,[9] withdrew the right to engage in collective bargaining, and to grieve and to arbitrate disputes, for employees in a substantial number of federal agencies and departments. If the EO is upheld, unions and employees no longer will have rights that have been in effect for nearly 50 years, including the opportunity to grieve and arbitrate workplace disputes.

The President's EO relies on the national security exemption provided by 5 U.S.C. §7103(b)(1) of the Federal Service Labor-Management Relations Statute (FSLMRS) enacted in 1978.[10] Under the statute, the EO rests on a two-pronged determination: that a primary function of the designated agencies and departments lies in national security, intelligence and similar work; and, that collective bargaining and grievance arbitration is inconsistent with such work. It is the view

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[8] The White House, *Exclusions From Federal Labor-Management Relations Programs*, March 27, 2025, at: https://www.federalregister.gov/documents/2025/04/03/2025-05836/exclusions-from-federal-labor-management-relations-programs. Executive Order 14251, 90 Fed. Reg. 14553 (2025)

[9] *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, No. 25-CV-03070-JD, 2025 WL 1755442 (N.D. Cal. June 24, 2025) (AFGE v. Trump)*. On August 1, this court stayed the District Court's order (2025 WL 2180674).

[10] 5 U.S.C. §7101 *et. seq*.

of *amicus* Academy that neither the law nor the facts support a finding that collective bargaining and grievance arbitration threaten national security, and that injunctive relief is appropriate in this proceeding based on the merits of this statutory understanding.

Amicus Academy will consider the first prong of the determination by reviewing key features of the FSLMRS, particularly bargaining unit determinations,[11] to show how the EO departs from well-established principles of federal sector collective bargaining and arbitration that are compatible with protecting national security. The second prong reaches directly to the Academy's reason for being; that is, its deep involvement in the study and practice of grievance arbitration in both the private and public sectors, including the FSLMRS mandate that grievance arbitration be part of federal sector CBAs.[12] *Amicus* Academy respectfully submits that its experience will meaningfully inform the court of the realities on which this case turns.

The FSLMRS declares it to be in the "public interest" of the United States to "improve employee performance and the efficient accomplishment of the operations of the Government" for federal employees to bargain collectively with

[11] 5 U.S.C. §7112(b)(6).

[12] 5 U.S.C. §7121.

the federal employer.[13] This public interest is further served by requiring the government to arbitrate employee grievances.[14] The FSLMRS recognizes that the federal employer has "special requirements and needs" that differentiate it from a private employer, and that the law "should be interpreted in a manner consistent with the requirement of an effective and efficient Government."[15]

Toward that end, several statutory provisions assure that collective bargaining and grievance arbitration are compatible with national security, intelligence gathering and investigative work. In particular, at issue is whether the President properly applied his authority under Section 7103(b)(1) to exempt a federal agency or subdivision from statutory coverage when:

> (A) the agency or subdivision has as a *primary* function intelligence, counterintelligence, investigative, or national security work, *and*
>
> (B) the provisions of this chapter *cannot be applied* to that agency or subdivision in a manner *consistent* with national security requirements and considerations.[16]

As enacted, the FSLMRS excluded several agencies that, by their titles alone, demonstrate a role in protecting national security, among them the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of

[13] 5 U.S.C. §7101(a)(2).

[14] 5 U.S.C. §7121(a)(1).

[15] 5 U.S.C. §7101(b).

[16] 5 U.S.C. §7103(b)(1) (emphases added).

Investigation.[17] Soon after passage of the FSLMRS, President Carter issued an Executive Order exempting several subagencies, defined with near surgical precision, involved in military or intelligence gathering functions; for example, the U.S. Army Intelligence and Security Command, the Fleet Intelligence Center, Europe and Atlantic of the Navy Department, and the Defense Intelligence Agency, among others.[18] President Carter, by training and experience, was skilled in national security matters; a graduate of the Naval Academy, a senior officer in the nuclear submarine program, and a specialist in reactor technology and nuclear physics.[19]

Following President Carter, other Presidents also determined that a modest number of exemptions were warranted.[20] For example, President Reagan expanded the list of exempt agencies, specifying five operational units within the U.S. Marshals Service – Threat Analysis, Special Operations, Witness Security, and the like.[21] President Reagan's EO was challenged for the want of express findings justifying the exemptions. Applying the "presumption of regularity," the D.C.

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[17] 5 U.S.C. §7103(a)(3).

[18] Executive Order 12171, 44 Fed.Reg. 66565 (1979).

[19] https://www.cartercenter.org/about/experts/jimmy_carter.html.

[20] *AFGE v. Trump*, *supra,* slip op. p. 5.

[21] Executive Order 12559, 51 Fed.Reg. 18761 (1986).

Circuit held that express findings were not required as the exemptions were "presumed to be in the proper discharge of the office."[22] As a general principle, the "presumption of regularity" is strong, but can be rebutted.

In contrast to previous presidential action, President Trump's EO 14251 exempted entire Cabinet agencies and departments amounting to an estimated two-thirds of federal employment.[23] Among the many agencies excluded from the FSLMRS are the General Services Administration, the National Science Foundation, the Environmental Protection Agency and the Department of Veterans Affairs. The EO made additional provision for some departments; for example, the Secretary of Transportation can exempt the Federal Aviation Administration to afford the Secretary "maximum flexibility" to maintain an efficient workforce, stating:

> Where collective bargaining is incompatible with that mission, the Department of Transportation should not be forced to seek relief through grievances, arbitrations, or administrative proceedings.[24]

This reasoning, which draws no facial connection to national security, embodies the Trump Administration's claim that collective bargaining and

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[22] *Am. Fed'n of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989).

[23] *Am. Foreign Serv. Ass'n v. Trump, No. CV 25-1030 (PLF), 2025 WL 1387331 (D.D.C. May 14, 2025),* at p. 7.

[24] EO 14251, *supra,* §5(a).

grievance arbitration inherently threaten or impede national security by thwarting managerial flexibility and finality.

Consistent with this view, the Office of Personnel Management issued a "Guidance on Executive Order *Exclusions from Federal Labor-Management Programs" [Guidance]* on March 27 advising agencies that the EO is designed to assure "performance accountability."[25] The *Guidance* asserted that collective bargaining agreements (CBAs) "often create procedural impediments to terminating poor performers" by contractual provisions that allow extra time for underperforming employees to "demonstrate acceptable performance" and by "providing for binding arbitration...over whether personnel actions were justified."[26]

On March 27, the White House also issued a *Fact Sheet.*[27] The *Fact Sheet* maintains that, in the Administration's view, the FSLMRS "enables hostile Federal unions to obstruct agency management" by requiring that unions be given an

[25] https://www.opm.gov/policy-data-oversight/latest-memos/guidance-on-executive-order-exclusions-from-federal-labor-management-programs.pdf.

[26] *Id.* at 5.

[27] *Fact Sheet: President Donald J. Trump Exempts Agencies with National Security Missions from Federal Collective Bargaining Requirements,* March 27, 2025 (*Fact Sheet*), at: https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-exempts-agencies-with-national-security-missions-from-federal-collective-bargaining-requirements/

opportunity to bargain before the agency can implement changes...that bear on national security."[28] It reiterates that, "President Trump is taking action to ensure that agencies vital to national security can execute their missions without delay."[29] This claim is addressed in Section I of the Argument, *infra*.

Of grievance arbitration, the *Fact Sheet* contends that it "obstructs" or "interferes" with national security, noting that the largest federal union, the lead plaintiff in this case, is "widely filing grievances to block Trump policies," in contrast to unions that "work with him."[30] An underlying premise of the *Fact Sheet* is that a dispute brought under a CBA grievance and arbitration procedure contesting the lawfulness of an employment policy threatens national security, *per se*. That contention is addressed in Section II of the Argument, *infra*.

These views about bargaining and arbitration are echoed in the representations of counsel. In another case challenging the EO, a government filing opposing a union motion for injunctive relief stated:

> Employee performance is also critical in agencies with important national security roles. Many provisions in the Defendant agencies' CBAs make it more difficult to remove employees who perform poorly. For example, CBAs often require "performance improvement periods" (PIPs) of at least 60 days before agencies can propose removing an employee for poor performance...Even after that process,

[28] *Id.*

[29] *Id*. at 3.

[30] *id*. at 3.

> CBAs allow unions to grieve dismissals of poor performances to binding arbitration, with arbitrators overturning approximately three-fifths of removals they hear.[31]

In sum, there are two principal grounds on which the EO rests. First, that collective bargaining and related delay in personnel policy implementation impedes agency action and threatens national security even when the bargaining is over a matter bearing no relationship to national security. Second, that arbitration, which holds the possibility of arbitral decisions that management has abridged employee and union rights, so undermines an agency's ability to conduct its mission and ensure the adequacy of employee performance as to threaten national security even when the grievance has nothing to do with national security work.

Amicus Academy contends that when the grounds on which the EO rests are in error on the law and the facts, the "presumption of regularity" is rebutted and injunctive relief is appropriate.

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[31] *Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction* in *Nat'l Treasury Emps. Union v. Trump,* No. CV 25-0935 (PLF), 2025 WL 1443452 (D.D.C.) (*NTEU v Trump*). The reference to arbitrator dismissals is to Sherk, America First Policy Inst., *Union Arbitrators Overturn Most Federal Employee Dismissals* at 5 (2022). An injunction decision in *NTEU v. Trump* issued on April 28 (2025 WL 1218044) and was stayed on appeal on May 16 by the D.C. Circuit, No. 25-5157 (2025 WL 1441563).

ARGUMENT

I. Collective Bargaining Under the FSLMRS Does Not Threaten National Security

As the Introductory statement observed, the EO's abrogation of collective bargaining and grievance arbitration is predicated on claims that, in an agency with a "primary function" in national security, the obligation to bargain collectively with unions imposes inflexible requirements that threaten national security, irrespective of the work of the employees. But this claim must fail as it disregards other portions of the FSLMRS.

By operation of law, the employees affected by the EO - which deals with entire agencies and subagencies - are *not*, as an undifferentiated class, involved directly in national security work. This is so because the FSLMRS in Section 7112(b)(6) prohibits a bargaining unit from including, "any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security."[32] This provision, which is the statutory basis for assigning employees to union-represented bargaining units, establishes a presumption against the administration's overly broad claim.

The Federal Labor Relations Authority (FLRA), the agency that administers the FSLMRS, has years of experience applying the exemptions under Section

[32] 5 U.S.C. §7112(b)(6).

7112(b)(6) to decide whether employee positions shall be included in bargaining unit determinations. For the FLRA, "*national security*" and "*security work"* covers "the security of the [g]overnment in domestic and foreign affairs, against or from espionage, sabotage, subversion, foreign aggression, and any other illegal acts which adversely affect the national defense,"[33] including protecting the nation's critical infrastructure from terrorist attacks.[34] In other unit determination decisions, the FLRA has considered "*intelligence"* and *"counter intelligence work*" involving matters such as concealment, deception and sabotage prevention.[35]

Rather than acknowledge the significant role long played by the FLRA's unit determinations in preserving national security under Section 7112(b)(6), the EO's reliance on the national security exclusion in Section 7103(b)(1) is based on a blanket assumption affecting multiple classifications. For the administration, because a *primary* function of a part of the agency is devoted to national security, the exacting, job-by-job bargaining unit determinations required by Section

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[33] *Dep't of Energy, Oak Ridge Operations, Oak Ridge, Tennessee Activity & Nat'l Ass'n of Gov't Emps., Loc. R5-181 Petitioner & Off. & Pro. Emps. Int'l Union, Afl-Cio Intervenor,* 4 F.L.R.A. 644, 654-56 (1980), citing *Cole v. Young*, 351 U.S. 536 (1956) (summary discipline based on unsupported claim of national security contrary to statutory employee protection).

[34] *Soc. Sec. Admin. Baltimore, Maryland & Am. Fed'n of Gov't Emps.,* 59 F.L.R.A. 137 (2003).

[35] *United States Nuclear Regul. Comm'n & Nat'l Treasury Emps. Union,* 66 F.L.R.A. 311 (2011).

7112(b)(6) of the FSLMRS need not be undertaken. As a result, the EO nullifies a statutory procedure that is a complementary and essential feature of the FSLMRS when read as a whole.

The VA is an example that illustrates the excessive reach of the EO. The VA employs more than 480,000 people, the largest of the 18 cabinet-level departments subject to the EO, with most employees working in the VA's extensive network of hospitals, clinics and nursing homes.[36] Applying the premise of the EO that a *primary function* of the VA entails national security, no matter how modest that function might be, it follows that *all* doctors, nurses, nurses' aides, therapists, janitors, clerical office staff, data entry clerks, timekeepers, maintenance and trades personnel - that is, *all* employees unless excepted by the agency, not the FLRA - in *any and all* VA facilities are barred from union access to collective bargaining and grievance arbitration. By this logic, offered without evidentiary proof, the EO declares that bargaining and grievance procedures for *all* VA personnel are inconsistent with national security.

[36]Desilver, *What the data says about federal workers*, Pew Research Center, January 7, 2025 at: https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/#which-federal-departments-and-agencies-employ-the-most-people; Hersey, *VA ends contracts for most of Its unionized employees*, Stars and Stripes, August 7, 2025 at: https://www.stripes.com/veterans /2025-08-06/va-employees-unions-veterans-18686050.html.

The EO's approach is contrary to the FSLMRS, not only to the unit determination process under Section 7112(b)(6), but also to a proper reading of Section 7103(b)(1). Given the text and structure of the FSLMRS, employees *without* national security functions in these agencies can be exempted from collective bargaining pursuant to Section 7103(b)(1) if, but only if, collective bargaining for them would be inconsistent with national security. To support a finding of inconsistency, as the administration claims, one would need to find that agency management is hindered as to national security requirements by alleged bargaining delays and the enforcement of contract terms in arbitration. The argument does not withstand scrutiny for the reasons that follow.

The model of collective bargaining the FSLMRS adopts, exclusive representation by majority rule, draws on the private sector model set forth in the National Labor Relations Act (NLRA).[37] The NLRA requires bargaining on a broad range of subjects bearing upon wages, hours, and working conditions, but there is no express provision for managerial rights. Under the NLRA, management must bargain in good faith to the point of impasse over any statutory subject before it may act, unless management is faced with an "economic exigency" requiring immediate action.[38]

[37] 29 U.S.C. §151-169.

[38] Gorman & Finkin, *Labor Law: Analysis and Advocacy*, §20.12 at 710-711

The "unilateral action rule," which bars employers from acting without bargaining on mandatory subjects under the NLRA, is a critical element in private sector labor relations. This rule insures that unions have a voice on terms and conditions of employment that employers otherwise could adopt or abandon at will.[39] In the seminal Supreme Court decision on the issue, the Court explained that acting unilaterally "must of necessity obstruct bargaining, contrary to the congressional policy."[40]

While the law for federal employees borrows from the private sector model by incorporating a duty to bargain, it differs significantly to accommodate special features of the federal sector by permitting a broad range of unilateral action in the exercise of managerial rights. In particular, in at least three ways, management rights were of evident concern in the legislative process that led to enactment of the FSLMRS.[41]

(2013) ("Employer Defenses in Cases of Unilateral Action").

[39] Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 737-745 (1973).

[40] *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962).

[41] *See Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978,* 842-843 (1979) (remarks of the sponsor, Rep. Clay).

First, any union demand that is inconsistent with a federal law or government-wide rule or regulation cannot be a subject of bargaining.[42]

Second, if there is no law or government-wide rule or regulation on point, but there is an agency rule or regulation, bargaining is allowed *only* if the FLRA has determined that "no compelling need...exists for the rule or regulation."[43] "Only" means only.[44] It is impossible to conceive of an agency rule or regulation grounded in national security functions that would not preclude compulsory bargaining.

Third, absent a government-wide or a compelling agency rule, the scope of bargaining is further constrained by an expansive reservation of management rights expressly reserved by law.[45] The FSLMRS provides that agency management is given unilateral control over a range of personnel decisions – to assign, select, direct, retain – and is authorized to "take whatever actions may be necessary to carry out the agency mission during emergencies."[46] Only the "procedures" by

[42] 5 U.S.C. §7117(a)(1). See, e.g., *Coordinating Comm. of Unions*, 29 F.L.R.A. 1436 (1987) (work week demand not negotiable).

[43] 5 U.S.C. §7117(a)(2).

[44] *FLRA* v. *Aberdeen Proving Ground*, 485 U.S. 409, 412 (1988).

[45] 5 U.S.C. §7106.

[46] 5 U.S.C. §7106(a)(2)(D).

which authority is exercised are, in part, negotiable.[47] And, as to the "technology, methods, and means of performing work," bargaining is discretionary "at the election of the agency."[48]

Under this statutory regime an agency with uniformed personnel, the National Guard for example, could refuse to bargain over whether its civilian employees must wear uniforms on the job.[49] In another case, a proposal that performance standards be "fair, objective, job-related, and measurable" was not negotiable because it intruded too deeply on management's right to set those standards.[50] In still another, the FLRA found non-negotiable a proposal that professional employees of the Patent Office would be excused from accountability for failing to meet a performance standard due to the action of another employee over whom the target employee had no control.[51]

Even proposals for procedural protections that would seem negotiable are not negotiable if they would "directly interfere" with a management right; for

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[47] 5 U.S.C. §7106(b)(2).

[48] 5 U.S.C. §7106(b)(1).

[49] *Am. Fed'n of Gov't Emps., Loc. 2986, AFL-CIO v. Fed. Lab. Rels. Auth.,* 775 F.2d 1022 (9th Cir. 1985).

[50] *Am. Fed'n of Gov't Emps., Loc. 3748, AFL-CIO v. Fed. Lab. Rels. Auth,* 797 F.2d 612 (8th Cir. 1986).

[51] *Pat. Off. Pro. Ass'n v. Fed. Lab. Rels. Auth.*, 47 F.3d 1217 (D.C. Cir. 1995).

example, allowing a time respite before a disciplinary interview on discharge of a firearm,[52] or preventing the agency from "acting at all" to deal with an employee arrested for drunk driving.[53] These and other matters are reserved to managerial discretion and the agency is free to act unilaterally.[54]

In brief, unlike the private sector, where the unilateral action rule can block *decisions* to make substantive changes in working conditions writ large, federal sector unions may bargain only over the *effects* of a wide range of work-related decisions after the decisions have been made. Under *this* statutory regime, how can unions, in the words of the *Fact Sheet*, "obstruct agency management" in making changes affecting national security when management's freedom of action is so broadly preserved and matters of national security cannot be negotiated?[55]

Undeterred by express statutory limits, the *Fact Sheet* relies on two examples to claim that collective bargaining and grievance arbitration obstruct an agency and threaten national security. Rather than buttress the EO, however, these are excellent examples of how well the system of collective bargaining and

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[52] *U.S. Dep't of Just., I.N.S. v. Fed. Lab. Rels. Auth.* v. *FLRA*, 975 F.2d 219 (5th Cir. 1992).

[53] *Def. Logistics Council of Am. Fed'n of Gov't Emps. Locs. v. Fed. Lab. Rels. Auth.* v. *FLRA*, 810 F.2d 234 (D.C. Cir. 1987).

[54] *U.S. Dep't of Just., I.N.S. v. Fed. Lab. Rels. Auth.*, 995 F.2d 46 (5th Cir. 1993).

[55] *Fact Sheet*, *supra*.

arbitration works under the FSLMRS, and contradict the claims made by the administration.

The first case involves employees of Immigration and Customs Enforcement (ICE). The *Fact Sheet* claims that "ICE could not modify cybersecurity policies" without exhausting the duty to bargain in a matter affecting internal security.[56] No citation is given, but apparently the case referred to is *U.S. Immigration & Customs Enforcement*.[57] At issue was ICE's unilateral termination of employee email access to the agency's network, contrary to a long time practice. The union took the dispute to arbitration. The arbitrator sustained the grievance and ordered ICE to bargain. ICE challenged the award before the FLRA, relying on a statutory provision which prohibits the enforcement of awards contrary to law.[58] The law at issue was the Federal Information Security Management Act (FISMSA).[59] ICE argued that, under the FISMSA, the agency was given absolute discretion in matters of information security. The FLRA disagreed as no provision of the FISMSA accorded such discretion, a point conceded by ICE.

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[56] *Id.*

[57] *United States Dep't of Homeland Sec. U.S. Immigr. & Customs Enf't & Am. Fed'n of Gov't Emps. Nat'l Immigr. & Customs Enf't Council 118*, 67 F.L.R.A. 501 (2014).

[58] 5 U.S.C. §7122(a)(1).

[59] 44 U.S.C. §3501 et. seq.

The nub of the *Fact Sheet's* objection to the FSLMRS was the delay caused by bargaining related to cybersecurity. But the FLRA's decision concluded that the agency was not seeking to quickly implement a time-sensitive national security policy. Rather, ICE waited six months to implement a policy it unilaterally adopted. Hence, both the arbitrator and the FLRA rejected the agency's claim that it needed to act expeditiously, observing that the agency had a right to act quickly under the bargaining agreement, but failed to exercise its right.

The *Fact Sheet* also points to a second case, at the Veterans Administration, claiming that the union sought bargaining to block implementation of the Veterans Affairs Accountability and Whistleblower Act.[60] Apparently this claim refers to *AFGE Nat'l Veterans Affairs Council & Veterans Administration.*[61] The statute relied upon by the VA provided authority to the agency to "remove, demote, or suspend" a covered employee if such action is warranted for misconduct or poor performance.[62] Nevertheless, the FLRA concluded that, in implementing the Accountability Act, there were procedural features that were negotiable without displacing management's statutory authority over discipline, and, further, that the

[60] 38 U.S.C. §714.

[61] *Am. Fed'n of Gov't Emps. Nat'l Veterans Affs. Council 53 & United States Dep't of Veterans Affs.*, 71 F.L.R.A. 410 (2019), *reh'g den*. 71 FLRA No. 142 (2020).

[62] 38 U.S.C. §714(a)(1).

Accountability Act did not extend sole and exclusive discretion to the VA on procedural matters. If the EO's concern is protecting national security, the administration leaves unexplained how a union's reliance on the dispute resolution procedure that Congress expressly enacted to implement the FSLMRS and the Accountability Act somehow blocks its implementation, unless, perhaps, the basic objection is to the FSLMRS itself.

In the final analysis, both of the allegedly archetypical examples the administration relies upon to show the deleterious effects of collective bargaining on national security refute the claim. As shown above, the alleged inflexibility imposed by the unilateral action is rule drawn from the NLRA, not the FSLMRS, and there lies the error in the premise of the EO.

Dramatically illustrating the EO's mistaken objection, unions representing private sector employees who work for private contractors retained by federal agencies can lawfully bargain with private employers because the EO does not apply. Employees for private sector enterprises now outnumber federal employees by a ratio of more than two to one with over five million private employees engaged in federal work.[63] In these relationships, private employers who contract with now-exempt agencies are subject to a bargaining process under the NLRA

[63]https://www.govexec.com/management/2003/09/contractor-workforce-grows-as-civil-service-shrinks/14879/.

that includes a unilateral action rule, as well as grievance and arbitration procedures, without apparent ill effect. Yet, these private federal contractors are required by the NLRA and CBAs to bargain collectively with their unionized employees doing federal work.[64]

II. Grievance Arbitration Under the FSLMRS Does Not Threaten National Security

Federal policy favoring labor arbitration has deep legal and experiential roots.[65] The Supreme Court has recognized arbitration to be an integral element in the system of collective bargaining and workplace self-government. Indeed, the Congress so valued grievance procedures that it made them mandatory in all federal sector CBAs.[66] But the EO and the government's explanatory statements disregard this intent.

The *Fact Sheet* asserts that arbitration "obstructs" or "interferes" with national security when recourse is had by non-national security workers.[67] As

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[64] See, e.g., *Vectrus Systems Corp. v. Teamsters Local 631*, 2019 WL 3365841, (D.Nev. 2019), aff'd 808 Fed.Appx. 573 (9th Cir. 2020). In *Vectrus Systems*, an arbitration decision by one of the authors of this brief confirmed the bargaining obligation of a private sector contractor working at the Nevada nuclear test site.

[65] *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960); *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).

[66] 5 U.S.C. §7121.

[67] *Fact Sheet, supra.*

support, the administration relies on a 12-page report of the America First Policy Institute (AFPI)[68] to argue that arbitration makes it difficult to dismiss federal employees for "poor performance" and thus threatens national security.

Two claims are conflated in this attack: one direct, that the substance of arbitral awards undermines national security; the other systemic, that arbitration so impedes the removal of poorly performing workers as to threaten national security.

The direct attack can be dismissed out-of-hand. Under the FSLMRS, either party in arbitration can challenge an award on the ground that it is "contrary to any law, rule, or regulation."[69] By its terms, this provision includes any law, rule, or regulation dealing with national security or like functions. The FSLMRS therefore has an effective mechanism to prevent any arbitration award from interfering with national security, a subject, in any event, that is rarely touched upon in arbitration.

Case law under the FSLMRS, matters of public record, demonstrates that arbitration does not interfere with or constrain agency action taken on national security grounds. The advanced search function of the FLRA's comprehensive online compilation of all awards appealed to the FLRA identified 2,324 challenges

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[68] James Sherk, *Union Arbitrators Overturn Most Federal Employee Dismissals* (Sept. 14, 2022), at: https://www.courtlistener.com/docket/69821136/26/national-treasury-employees-union-v-donald-j-trump/.

[69] 5 U.S.C. § 7122(a)(1)

from 1980 through 2025.[70] Of these, a search for key terms in the FSLMRS's national security exemption finds only *five* awards in the past 45 years with possible relevance: three mention "security clearances"[71] and two mention "internal security practices."[72] The sparse arbitral record should not be surprising.

Most important, the FSLMRS excludes from arbitration a dismissal or suspension of an employee made "in the interests of national security."[73] Moreover, the Supreme Court has insured that disciplinary reviews in CBA arbitrations are consistent with the deferential management standard that applies to non-union

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[70] The search of "Authority Decisions" posted on FLRA.gov was conducted by a member of the team of law students noted in the text accompanying n. 82, *infra*.

[71] These are: *United States Info. Agency,* 32 F.L.R.A. 739 (1988) (whether arbitrator had jurisdiction to decide the rights, if any, of an employee after his removal as a temporary guide to an agency exhibit); *Bremerton Metal Trades Council & United States Dep't of the Navy Puget Sound Naval Shipyard & Intermediate Maint. Facility Bremerton, Washington,* 62 F.L.R.A. 391 (2008) (whether the shipyard violated the Family Medical Leave Act by denying the grievant's use of sick leave after his security clearance was revoked); *United States Nuclear Regul. Comm'n & Nat'l Treasury Emps. Union Chapter 208*, 65 F.L.R.A. 79 (2010) (whether the agency could bar a union representative from communicating with an employee during an investigatory security clearance interview).

[72] These are: *U.S. Dep't of Def. Def. Mapping Agency Aerospace Ctr. St. Louis, Missouri & Nat'l Fed'n of Fed. Emps. Loc. 182,* 46 F.L.R.A. 298 (1992) (arbitrator determined that placement of an employee following loss of his security clearance was a matter for the agency's determination); *U.S. Dep't of Def. Def. Logistics Agency Def. Distribution Depot, Red River Texarkana, Texas & Nat'l Ass'n of Gov't Emps., Loc. R14-52,* 56 F.L.R.A. 62 (2000) (whether it was a management right to designte positions for random drug testing).

[73] 5 U.S.C. §7121(c)(3) *incorporating* 5 U.S.C. §7532.

federal employees who may appeal their cases to the Merit Systems Protection Board (MSPB).[74] This includes, as the Supreme Court held, a bar to the MSPB reviewing the substance of an underlying security clearance determination in the course of considering an employee's termination.[75]

Next, *amicus* Academy's analysis turns to the administration's systemic claim which is grounded on two assertions. First, that unions have negotiated limits on "performance improvement periods" of 60 days before employees can be removed for poor performance; and, second, that unions arbitrate to thwart removal of employees.[76] The latter is rooted exclusively in the findings of the AFPI report, cited above. Neither assertion withstands scrutiny.

Congress provided by law for requiring a performance improvement plan as a pre-condition to removal of an employee for poor performance.[77] Consistent with general norms of human resource management, the statute "encourages" employee participation in establishing performance standards.[78] The law also provides that a

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[74] *Cornelius v. Nutt*, 472 U.S. 648 (1985).

[75] *Department of Navy v. Egan*, 484 U.S. 518 (1988).

[76] *Government Opposition to Motion for Preliminary Injunction* quoted in the Introductory, *supra,* n. 31.

[77] 5 U.S.C. §§4302, 4303 (providing for appraisal standards, with 30 days' notice of unacceptable performance, subject to extension).

[78] 5 U.S.C. §4302(a)(2).

union may negotiate the manner in which an agency fulfills that obligation; that is, management must agree that the negotiated standards of performance conform to the agency's needs.[79] The Federal Circuit has recognized that a union's role in bargaining for standards for performance improvement mitigates the impracticality of adopting standards employee-by-employee.[80] Negotiations with a union, subject to arbitration and FLRA review, aids efficient management and does not obstruct it.

This leaves the second basis cited by the administration, the AFPI report. The sponsor, as its name suggests, is not a neutral, scholarly body engaged in disinterested social science research. Nevertheless, it is the sole source of evidence proffered as support for the systemic claim that arbitrators block employee terminations. A detailed analysis of the report is provided in a recent article by the authors of this brief.[81] As the article demonstrates, the AFPI's methodology and reasoning is based on insufficient data and polemics, not social science.

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[79] 5 U.S.C. §7106(b)(2),(3).

[80] *Salmon v. Soc. Sec. Admin.*, 663 F.3d 1378 (Fed. Cir. 2011).

[81] Finkin and Winograd, *There's No There There: The Trump Administration's Use of Misleading Empirical Evidence to End Collective Bargaining for Most Federal Employees*, Verdict, July 17, 2025 at: https://verdict.justia.com/2025/07/17/theres-no-there-there-the-trump-administrations-use-of-misleading-empirical-evidence-to-end-collective-bargaining-for-most-federal-employees.

Amicus Academy returns to the longstanding endorsement by Congress and the Supreme Court that arbitration is an effective means for resolving workplace disputes, as much in the federal sector as in the private sector. Arbitration deals with disputes that commonly arise under employer rules and policies that, absent arbitration, would have to be resolved at greater cost in money, time, and efficiency in other fora.

The point is made clear by the work of a team of students in the College of Law of the University of Illinois at Urbana-Champaign. The students searched the comprehensive database of CyberFeds, a subscription service that contains federal sector arbitration awards drawn from the records of federal sector agencies and unions.[82] In the student research, all awards were categorized for four of the now exempted agencies over considerable periods of time: Homeland Security (2000-2024), FAA (2000-2024), Veterans Affairs (2000-2025), and IRS (2000-2015). The students found a total of 1,139 awards dealing with a wide variety of common workplace issues. These issues included not only disciplinary action for misconduct and poor performance, but several hundred contract application disputes over scheduling, leaves of absence, vacations, overtime, job changes,

[82] https://www.cyberfeds.com/.

assignments, promotions, wages, benefits, and similar matters. Arbitration in the federal sector is thus concerned not with national security, but with bread-and-butter workplace issues for federal employees.[83]

CONCLUSION

From the sweeping nature of the President's EO and related government announcements, the administration appears to believe that Congress erred in 1978 by allowing federal employees to bargain collectively and to arbitrate their grievances. Yet the administration has not urged Congress to repeal the law. Instead, the administration has seized on an overly broad interpretation of "national security" to swallow almost the whole of the statute, including grievance arbitration procedures that resolve disputes of an everyday nature. The law and the facts demonstrate that there has been no adverse impact by the FSLMRS on national security, and the "presumption of regularity" attached to the EO is rebutted forcefully by the facts.

The arbitration of employee grievances in the federal sector has performed as Congress expected it would. As *amicus* Academy has shown, the administration should not be allowed to make an end run around a statute that has served its

[83] The spreadsheets prepared by the law student group are maintained by counsel for *amicus* Academy. A complete set has been served on counsel of record for the parties and is available for the court's review upon request.

intended purposes for nearly a half-century without compromising national security. In this setting, the plaintiff unions are likely to prevail on the merits of their challenge to the EO.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font and contains 5,998 words.

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