ORAL ARGUMENT SCHEDULED FOR APRIL 4, 2019

No. 18-5289

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA 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 District of Columbia

BRIEF OF AMICI CURIAE REPRESENTATIVES ELIJAH E. CUMMINGS, PETER T. KING, WILLIAM (BILL) CLAY, SR., AND JIM LEACH IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Adina H. Rosenbaum
Adam R. Pulver
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

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Counsel for Amici Curiae Representatives Cummings, King, Clay, and Leach

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties and amici appearing before the district court and in this Court are listed in the Brief for the Union-Appellees. This brief is filed on behalf of amici curiae Representatives Elijah E. Cummings, Peter T. King, William (Bill) Clay, Sr., and Jim Leach.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Appellants and Brief for the Union-Appellees.

C. Related Cases

This case has not previously been before this Court or any other court, except the district court in which it originated. A related case is pending in this Court: *American Federation of Government Employees v. Trump*, No. 19-5006 (D.C. Cir.). Counsel for amici curiae are not aware of any other related cases currently pending in this Court or any other court.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CIRCUIT RULE 29(d) STATEMENT OF COUNSEL

Amici curiae Representatives Elijah E. Cummings, Peter T. King, William (Bill) Clay, Sr., and Jim Leach are filing a separate brief from the other amici curiae in support of Plaintiffs-Appellees because they have a different perspective and interests than the other amici. Representatives Clay and Leach are former members of Congress who were involved in enacting the Federal Service Labor-Management Relations Statute (FSLMRS), which established the current federal labor-management relations system. Representatives Cummings and King are current members of Congress who are interested in good governance. The Representatives' brief explains that the executive orders at issue in this case conflict with the framework for labor-management relations in the federal government established by Congress in the FSLMRS.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

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GLOSSARY

FSLMRS	Federal Service Labor-Management Relations Statute
FLRA	Federal Labor Relations Authority
JA	Joint Appendix

INTERESTS OF AMICI CURIAE[1]

Amici curiae Elijah E. Cummings, Peter T. King, William (Bill) Clay, Sr., and Jim Leach are a bipartisan group of current and former members of the United States Congress who are committed to a merit-based, non-partisan, effective federal workforce, and who believe that collective bargaining, the right to representation, and procedures to resolve workplace disputes fairly are vital to such a workforce. Representative Clay and Representative Leach were members of the House of Representatives when Congress enacted the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. § 7101, *et seq.*, in 1978, and served on the House Committee on Post Office and Civil Service, which had jurisdiction over the legislation. Representative Cummings and Representative King are current members of the United States House of Representatives. Representative Cummings is the Chairman of the House Committee on Oversight and Reform, which has jurisdiction over legislation relating to the federal civil service.

As former members of Congress who helped establish the current federal labor-management relations system, and as current members of Congress working

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

for good governance, amici have a strong interest in the proper interpretation and implementation of the FSLMRS. Amici believe that the executive orders at issue in this case—Executive Orders 13,836, 13,837, and 13,839—conflict with the FSLMRS's framework for labor-management relations in the federal government. Amici are filing this brief to explain that the Executive Orders are contrary to the FSLMRS, which provides federal employees with a right to collective bargaining, in good faith, and which reflects Congress's determination that such bargaining promotes the efficient conduct of government business and is in the public interest. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the FSLMRS as Title VII of the Civil Service Reform Act of 1978, "a comprehensive revision of the laws governing the rights and obligations of civil servants." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 91 (1983). The FSLMRS established "the first statutory scheme governing labor relations between federal agencies and their employees." *Id*. Before the FSLMRS, federal labor-management relations were governed by a program established by executive order, which was "management-oriented" and "susceptible to the whims of an incumbent President." 124 Cong. Rec. 25,613 (1978) (remarks of Rep. Clay). The FSLMRS "move[d] Federal labor relations from Executive order to statute," *Statement of Jimmy Carter on Signing S. 2640*

Into Law, 14 Weekly Comp. Pres. Doc. 1765 (Oct. 13, 1978), and created a statutory federal labor-management program that "cannot be universally altered by any president," 124 Cong. Rec. 29,186 (1978) (remarks of Rep. Clay), and that provides "employees and their representatives rights that they ha[d] not enjoyed under the Executive order," 124 Cong. Rec. 38,718 (1978) (remarks of Rep. Ford); *see* H.R. Rep. No. 95-1403, at 5 (1978) ("Under the existing system of labor-management relations in the executive branch, the President, by Executive order, has complete authority to establish the labor-management program. Title VII establishes a new program and provides for greater employee and employee organization participation.").

Congress enacted the FSLMRS based on the recognition that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a). Congress determined that protecting employees' rights to organize and bargain collectively "safeguards the public interest," "contributes to the effective conduct of public business," and "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." *Id*. Accordingly, the statute removes agency discretion over many terms and conditions of employment, requiring them instead to be the subject of good-faith negotiations between the parties. As the district court below explained, "in contrast to workplace scenarios

in which rules and requirements can be unilaterally imposed upon workers by the management, under the FSLMRS, labor representatives and agency managers are obliged 'to consult and bargain' regarding the conditions of employment, and to proceed in 'good faith' during any such collective bargaining negotiations." Joint Appendix (JA) 124 (quoting 5 U.S.C. § 7103(a)(12)).

In the executive orders at issue in this case—Executive Order 13,836, 83 Fed. Reg. 25,329 (June 1, 2018) (the Collective Bargaining Procedures Order), Executive Order 13,837, 83 Fed. Reg. 25,335 (June 1, 2018) (the Official Time Order), and Executive Order 13,839, 83 Fed. Reg. 25,343 (June 1, 2018) (the Removal Procedures Order)—the President seeks to alter the negotiation-focused statutory scheme for federal labor-management relations established by Congress in the FSLMRS. The Executive Orders remove from the bargaining table numerous topics that Congress intended to be subject to negotiation between the parties—unilaterally limiting, for example, the amount, use, and method of authorizing official time. And by telling agencies what the outcome of collective bargaining should generally be with respect to various topics left on the table, the Executive Orders interfere with the prospect for good faith bargaining. Overall, the Executive Orders drastically reduce the scope and role of collective bargaining, undermining protections for the professional federal workforce and threatening the efficient conduct of government business.

In enacting the FSLMRS, "Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 107. The President's new Executive Orders seek to do the opposite, overriding the collective-bargaining system established by Congress. "Needless to say, the President is without authority to set aside congressional legislation by executive order[.]" *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999). The Executive Orders are contrary to the FSLMRS, and the district court's decision should be affirmed.

ARGUMENT

I. The Executive Orders Impermissibly Restrict the Scope of Bargaining.

The FSLMRS reflects Congress's determination that collective bargaining in the federal workforce is in the public interest, and it provides federal employees with the right to bargain collectively. By removing topics from the scope of collective bargaining and making unilateral decrees on issues that Congress intended to be resolved through such bargaining, the Executive Orders are incompatible with the bargaining-based statutory scheme adopted by Congress. *See Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 860 (D.C. Cir. 2006) ("The

right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over.").

A. The conflict between the Executive Orders and the FSLMRS's statutory scheme is dramatically demonstrated by the Official Time Order, which "completely reconceptualizes the terms and scope of bargaining regarding the right of employees to engage in union business during their paid working hours—a topic that the FSLMRS specifically covers." JA 134. In enacting the FSLMRS, Congress paid particular attention to the issue of official time, which allows employees to be paid for time spent engaging in labor-management activities during the working day. The FSLMRS addresses official time three ways. First, the statute explicitly provides employees with official time when "representing an exclusive representative in the negotiation of a collective bargaining agreement," 5 U.S.C. § 7131(a)—limited to the same number of employees that management sends to the negotiation—and likewise provides employees with official time "in any phase of proceedings" before the Federal Labor Relations Authority (FLRA), if the FLRA determines it to be appropriate, *id*. § 7131(c). Second, the statute provides that employees may not be authorized official time for "[a]ny activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues)." *Id*. § 7131(b). Finally, the statute provides that, except as

otherwise provided, "any employee representing an exclusive representative," or "any employee in an appropriate unit represented by an exclusive representative," "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest," for time spent "in connection with any … matter covered by this chapter." *Id.* § 7131(d). In this way, Congress made "all other matters concerning official time for unit employees engaged in labor-management relations activity subject to negotiation between the agency and the exclusively recognized labor organization involved." H.R. Rep. No. 95-1403, at 59. As a member of the conference committee explained, the statute makes clear that "neither defining 'internal business' nor agreeing to grant official time for non-internal business was a matter of agency discretion. Instead, the granting of official time is subject to negotiations between the parties." 124 Cong. Rec. 38,717 (1978) (remarks of Rep. Ford).

In the years since the FSLMRS's enactment, some members of Congress have introduced bills to limit the scope of permissible official time under 5 U.S.C. § 7131(d). In 1997, for example, a bill introduced in the House of Representatives would have limited official time to certain activities related to grievances and meetings with management officials requested or approved by the agency, and would have limited official time for any employee to no more than fifty percent of

the employee's paid time. *See* H.R. 986, 105th Cong. (1997). Similarly, in 2017, a bill introduced in the House of Representatives would have prohibited granting an employee official time for purposes of engaging in any political activity, including lobbying activity. *See* H.R. 1364, 115th Cong. (2017). Congress did not pass any of these bills. Instead, Congress has maintained the framework established in the FSLMRS, leaving the amount of official time received under section 7131(d)—and the matters for which it can be used—to negotiation and agreement between the parties.

The Official Time Order conflicts with the bargaining-based framework for official time established by Congress in section 7131(d). Whereas section 7131(d) "provide[s] for the negotiability of official time proposals," *Am. Fed'n of Gov't Emps. v. FLRA*, 798 F.2d 1525, 1530 (D.C. Cir. 1986), the Executive Order unilaterally decrees that employees will not be able to receive official time for certain labor-management activities and unilaterally places caps on the amount of official time available to employees. Specifically, the Executive Order dictates that official time may not be used for lobbying activities or for preparing or pursuing certain grievances. Exec. Order No. 13,837 §§ 4(a)(i) & (a)(v). And it limits official time to 25 percent of working time, allowing employees to exceed 25 percent official time only for the purposes for which official time is mandatory under sections 7131(a) and (c), but counting any time spent in excess of the cap for

those mandatory purposes against the following year. *Id.* § 4(a)(ii). These unilaterally imposed restrictions are incompatible with section 7131(d), which commits the determination of the official time to be granted to "the agency and the union together." *Am. Fed'n of Gov't Emps.*, 798 F.2d at 1530.

In addition, the Official Time Order imposes a procedural requirement on official time, forbidding employees to use official time without receiving advance written authorization from their agency, except in circumstances to be determined by the Office of Personnel Management and the agency. Exec. Order No. 13,837 § 4(b). However, recognizing that, "[b]y using the term 'shall' [in section 7131(d)] and thereby making the grant of official time mandatory, … Congress intended for representatives of labor organizations to be able to use and schedule that time in a meaningful way," the FLRA has determined that the "scheduling of official time … must be determined bilaterally." *Nat'l Treasury Emps. Union & U.S. Dep't of Commerce Patent & Trademark Office*, 52 FLRA 1265, 1284 (1997); *see also id.* at 1287 (explaining that "the scheduling of official time" includes "the ability to use official time without advance scheduling or permission from the supervisor"). Accordingly, although the parties to bargaining could agree to add conditions on the scheduling of official time, the FSLMRS does not allow the employer to impose such conditions on its own.

The Official Time Order's unilateral restrictions on when, how, and how much official time may be used threaten not only the parties' right to negotiate over these topics, but also the larger federal labor-management relations scheme established in the FSLMRS. As Representative Clay explained in discussing the reasons for granting official time, the FSLMRS "imposes heavy responsibilities on labor organizations and on agency management." 124 Cong. Rec. 29,188 (1978) (remarks of Rep. Clay). Official time helps labor organizations and their representatives to fulfill these responsibilities, enabling employees to engage in labor-management activities during the day without having to take leave. The Official Time Order's unilateral limits on official time will discourage employees from exercising the labor rights provided to them by Congress, reduce employees' availability to engage in representational activities, and impede labor organizations' ability to perform their duties under the statute.

B. Although they provide a stark example of the ways in which the Executive Orders attempt to narrow the scope of collective bargaining, the Executive Orders' provisions on official time are not the only ones that make unilateral decrees on topics that the FSLMRS makes subject to collective bargaining. For example, the Removal Procedures Order excludes disputes from negotiated grievance procedures that cannot be excluded without collective bargaining.

The FSLMRS provides that "any collective bargaining agreement shall provide procedures for the settlement of grievances," and that, except for certain matters as to which employees may elect between administrative remedies, such "procedures shall be the exclusive administrative procedures for resolving" covered disputes. 5 U.S.C. § 7121(a)(1). The statute contains two exceptions to the grievance procedures: when a complaint concerns one of five specific matters listed in the statute, *id.* § 7121(c), and if a matter is excluded through a collective bargaining agreement, *id.* § 7121(a)(2). The Removal Procedures Order purports to add a blanket exclusion from grievance procedures of disputes concerning performance ratings and incentive pay. Exec. Order 13,839 § 4(a). These disputes, however, are not among the five specifically excluded by Congress. 5 U.S.C. § 7121(c). Accordingly, neither the President nor an agency official may exclude them unilaterally. They can be excluded only if the parties agree to do so through the collective bargaining process.

Moreover, the Official Time Order unilaterally forbids employees from using agency phones, computers, meeting spaces, or other agency resources without charge when acting on behalf of a labor organization, except if such use is generally available without charge for non-agency business by employees. Exec. Order 13,837 § 4(a)(iii). Under the FSLMRS, however, labor organizations' use of office space and equipment is subject to bargaining between the parties as a matter

affecting conditions of employment. *See, e.g.*, *Dep't of Health & Human Servs.*, *Social Security Admin. & Am. Fed'n of Gov't Emps.*, 41 FLRA 1268, 1278 (Aug. 26, 1991). The Official Time Order attempts an end-run around such bargaining, to the detriment of employees' efficient and effective exercise of their representational rights. *See also* Exec. Order 13,837 § 4(a)(iv) (prohibiting reimbursement for expenses incurred while employees are performing representational activities); Exec. Order 13,839 § 4(c) (forbidding agencies from generally allowing an employee more than thirty days to show acceptable performance, except if the agency determines otherwise in its sole discretion).

C. Appellants contend that the Executive Orders' removal of topics from the scope of bargaining is permissible because the Orders apply government-wide, and 5 U.S.C. § 7117(a) provides that "the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." *See* Br. for Appellants 47–59. According to Appellants, section 7117(a) permits the President to issue executive orders unilaterally eliminating federal employees' right to bargain collectively going forward on any matter relating to federal employment, as long as he eliminates that right for all federal civil service employees, and as long as the executive order does not restate statutory management rights but

foreclose bargaining over appropriate arrangements for employees adversely affected by those rights. *See Office of Pers. Mgmt. v. FLRA*, 864 F.2d 165, 168 (D.C. Cir. 1988).

As an initial matter, Appellants' interpretation of section 7117(a) as it relates to official time and grievance procedures cannot be reconciled with Congress's treatment of those topics in sections 7131 and 7121. As discussed above, section 7131 specifically dictates when employees *must* be granted official time, *see* 5 U.S.C. §§ 7131(a) & (c), when employees may *not* be granted official time, *see id*. § 7131(b), and when official time is subject to negotiation, *see id*. § 7131(d). "Viewed through the lens of this carefully crafted and painstakingly negotiated scheme, [Appellants'] interpretation of the statute makes no sense." *Office of Pers. Mgmt.*, 864 F.2d at 168. To allow the President to move topics from the category of matters for which official time is subject to negotiation to the category of matters for which official time may not be granted would be to "grant to management the protection that it was unable to secure from Congress." *Id.* It would allow the executive branch to "circumvent" section 7131(d), *id*., and to determine the amount of official time granted according to presidential decree, rather than granting it in the "amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest," as section 7131(d) provides. *See Am. Fed'n of Gov't Emps.*, 798 F.2d at 1530 (rejecting an

interpretation of the FSLMRS that "assume[d] that Congress' explicit provision for official time [in section 7131(d)] was not meant to be a meaningful guarantee").

Likewise, Congress expressly stated in section 7121 which matters are exempt from the requirement that complaints be subject to negotiated grievance procedures. The statute specifies that section 7121's provisions on grievances do not apply to:

> (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 [concerning national security];
> (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.

5 U.S.C. § 7121(c). Other matters can only be excluded through a collective bargaining agreement. *Id*. § 7121(a)(2). To interpret section 7117(a) to allow the President unilaterally to exclude other topics from the grievance procedures—as the Removal Procedures Order purports to do, Exec. Order 13,839 § 4(a)—would upend Congress's careful delineation of the matters that are exempt from the grievance procedures and the matters that can only be excluded through collective bargaining.

Appellants cite *IRS v. FLRA*, 996 F.2d 1246 (D.C. Cir. 1993), to argue that government-wide rules can foreclose bargaining over issues the FSLMRS expressly makes negotiable. There, however, the Court held that "if a government-

wide regulation under section 7117(a) is itself the only basis for a union grievance—that is, *if there is no pre-existing legal right upon which the grievance can be based*—and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation." *Id.* at 1252 (emphasis added). "When the government promulgates such a regulation," the Court explained, "it will not be hoisted on its own petard." *Id.* The Court did not hold that, when a government-wide rule is *not* itself the basis for the grievance, the President can permissibly issue a rule that exempts from grievance procedures matters that the FSLMRS requires to be subject to such procedures unless a collective bargaining agreement provides otherwise. Section 7117 should not be read to allow the President to subvert Congress's decision to exempt only certain matters from the grievance procedures and to require bargaining if other matters are to be excluded.

More broadly, Appellants' expansive interpretation of section 7117(a) is irreconcilable with the FSLMRS's statutory scheme as a whole. The FSLMRS reflects Congress's recognition of the importance of "statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." 5 U.S.C. § 7101(a)(1). It is implausible that, in seeking to protect collective bargaining, and

in crafting a complicated and detailed framework for labor-management relations, Congress simultaneously adopted an "omnipotent veto exception" that allows the President to unilaterally decide that any topic (or topics) will be a non-negotiable management right. *Office of Pers. Mgmt.*, 864 F.2d at 170. As the district court noted, "it is hard to even *imagine* a rational statutory exception that is *intentionally* designed to swallow the rule." JA 153. And it is particularly unimaginable that, in carefully crafting a statutory labor-management relations system, Congress allowed the President to issue rules that alter core elements of the FSLMRS's statutory scheme. Yet here, the Executive Orders do not just regulate issues related to conditions of employment that would otherwise be subject to collective bargaining, such as smoking or drug testing; they target the labor-management relationship itself, undermining employees' abilities to exercise their representational rights and raise complaints if their rights are violated.

This Court should not adopt an interpretation of section 7117(a) that "impute[s] to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Office of Pers. Mgmt.*, 864 F.2d at 168 (citation omitted). The Executive Orders' attempts to unilaterally limit the scope of bargaining under the FSLMRS should be rejected.

II. The Executive Orders Interfere With the Duty to Bargain in Good Faith.

The FSLMRS does not just require agencies and unions to engage in collective bargaining: It requires them to bargain "in good faith." The Executive Orders interfere with this requirement by establishing ahead of time what the outcome of certain negotiations should generally be and requiring agencies to commit the time and resources necessary to achieve those predetermined outcomes.

The collective bargaining scheme established by the FSLMRS depends on agencies and unions engaging in meaningful negotiation. Congress's goal in establishing a new federal labor-management relations system was not for agencies and unions to go through empty motions, present proposals on a take-it-or-leave-it basis, and have all issues decided by an impasse panel. The goal was for the parties to give and take to try to reach an agreement. As this Court has noted, "[s]tructuring collective bargaining so that labor and management meet to negotiate terms until they reach an accord or an impasse," as Congress did in the FSLMRS, "only makes sense on the assumption that each side's evolving bargaining position will reflect a series of tradeoffs that move the parties toward a mutually satisfactory end point." *Chertoff*, 452 F.3d at 860.

Accordingly, the FSLMRS requires the parties to negotiate in good faith, 5 U.S.C. § 7114(a)(4), and provides that the duty to negotiate in good faith

includes the obligation "to approach the negotiations with a sincere resolve to reach a collective bargaining agreement." *Id.* § 7114(b)(1). As this Court has explained, the duty to bargain in good faith "means that parties must 'enter into discussions with an open mind and a sincere intention to reach an agreement consistent with the respective rights of the parties.'" *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 245 (D.C. Cir. 1993) (quoting *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C. Cir. 1969)).

The Executive Orders constrain agencies' abilities to come to the bargaining table with an open mind by telling agency negotiators what outcome they are expected to reach in their negotiations on certain topics. *See* Exec. Order No. 13,836 § 5(a); Exec. Order No. 13,837 § 3(a); Exec. Order No. 13,839 § 3. For example, the Collective Bargaining Procedures Order requires agencies to "begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay [and] set reasonable time limits for good-faith negotiations." Exec. Order No. 13,836 § 5(a). It then tells the agencies that "a negotiating period of 6 weeks or less to achieve ground rules, and a negotiating period of between 4 and 6 months for a term CBA under those ground rules, should ordinarily be considered reasonable." *Id.* The Official Time Order provides that "[n]o agency shall agree to authorize any amount of taxpayer-funded union time under [5 U.S.C. § 7131(d)] unless such time is reasonable, necessary, and in

the public interest." Exec. Order No. 13,837 § 3(a). It then informs agencies that agreements authorizing official time under section 7131(d) "that would cause the union time rate in a bargaining unit to exceed 1 hour"—that is, that would cause the average official time per employee to be over one hour per year—should "ordinarily not be considered reasonable, necessary, and in the public interest." *Id*. And the Removal Procedures Order provides that, "[w]henever reasonable in view of the particular circumstances, agency heads shall endeavor to exclude from the application of any grievance procedures negotiated under [5 U.S.C. § 7121] any dispute concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance." Exec. Order. 13,839 § 3.

Each of the Orders tells agencies to "commit the time and resources necessary" to achieve these provisions' objectives (or, in the case of the Official Time Order, "to strive for" the objective). Exec. Order No. 13,836 § 5(a); Exec. Order No. 13,837 § 3(a); Exec. Order No. 13,839 § 3. Moreover, the Orders impose various consequences if the agencies fail. The Official Time Order requires the head of any agency that agrees to a proposal that would cause employees to receive more than an average of an hour of official time per year to report and explain the benefits and costs of the agreement to the President through the Director of the Office of Management and Budget. Exec. Order No. 13,837 § 3(b)(i). The agency head cannot delegate the requirement of reporting to the

President to anyone, including the negotiators who were in the room. *Id.* The Collective Bargaining Order instructs agencies that are unsuccessful in negotiating ground rules within "a reasonable period" to "expeditiously" bring the issue to mediation and then the Federal Service Impasses Panel. Exec. Order No. 13,836 § 5(a). Similarly, the Removal Procedures Order provides that, if an agreement cannot be reached, the agency must, to the extent legal, "promptly request" mediation and then, if necessary, bring the issue to the Federal Service Impasses Panel. Exec. Order. 13,839 § 3. In addition, "[w]ithin 30 days after the adoption of any collective bargaining agreement that fails to achieve" the Order's goal of excluding certain disputes concerning decisions to remove employees from negotiated grievance procedures, the agency must "provide an explanation to the President, through the Director of the Office of Personnel Management." *Id*.

As the district court explained, these Executive Orders effectively tell agency negotiators "that they must enter into the negotiating arena wielding predetermined goals, and must be prepared to fight to the death on these prescribed issues, in a manner that … is not meaningfully susceptible to the open 'give and take' negotiating process that the duty to bargain in good faith anticipates." JA 147 (citation omitted). Rather than instructing agencies to come into negotiations with an open mind—as good faith bargaining requires—the Executive Orders make

clear that they expect the agency negotiators to reach certain results, with consequences if they do not.

Appellants defend the Executive Orders by saying that they just set "goals for agencies to strive to achieve in negotiations," Br. for Appellants 36, and arguing that agencies are allowed to engage in hard bargaining to achieve their goals, *id*. at 38. However, although agencies are allowed to maintain their bargaining positions as negotiations proceed, they are not allowed to come to the bargaining table with a "closed mind," having predetermined the outcome of bargaining. *Sign & Pictorial Union Local 1175*, 419 F.2d at 731. And the Executive Orders make clear that the objectives they set forth are more than just aspirations for the agency to keep in mind during the give and take of negotiations; they are instructions of the endpoint the agency is expected to reach in all but unusual circumstances.

Appellants also contend there is "no basis to assume" that the Executive Orders will cause negotiators to violate their duty to bargain in good faith. Br. for Appellants 39. It is unrealistic, however, to consider agency representatives truly free to keep their mind open to different options when the President has set forth specific objectives for them to meet and instructed them to commit the time and effort necessary to satisfy those objectives. It is even more unrealistic when they have been told to expeditiously bring the issue to mediation and the Federal

Service Impasses Panel or when agreeing to alternatives would require their agency head to write a letter to the President explaining the agency's failure to achieve the President's goals. And while the Orders require agencies to "commit the time and resources necessary … to fulfill their obligation to bargain in good faith," Exec. Order 13,837 § 3(a); *see also* Exec. Order 13,836 § 5(a); Exec. Order 13,839 § 3, the duty to bargain in good faith is not merely about time and resources: It is about participating in the give and take of negotiation as part of a "sincere resolve" to reach agreement. 5 U.S.C. § 7114(b)(1); *cf. NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 484–85 (1960) (explaining that collective bargaining "is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'").

As the district court explained, "commands that are likely to cause agency representatives to pursue a certain outcome with such dogged determination that the agency negotiator effectively 'come[s] to the bargaining table with a closed mind[,]' impinge upon the duty to act in good faith." JA 132 (quoting *Sign & Pictorial Union Local 1175*, 419 F.2d at 731). In the FSLMRS, Congress created a federal labor-management scheme based on negotiation between the parties, in which agencies and unions are supposed to come together to bargain with open minds. The Executive Orders' provisions requiring agencies to commit the time and resources to achieve certain pre-established objectives interfere with the

system of bargaining established by Congress, and the district court correctly rejected them.

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Adam R. Pulver
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Amici Curiae Representatives Cummings, King, Clay, and Leach

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 29(a)(5), 32(a)(5), and 32(a)(6) as follows: The type face is fourteen-point Times New Roman font, and the word count is 5,091 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I certify that on February 26, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum