**ORAL ARGUMENT NOT YET SCHEDULED**
**Nos. 20-1400, 20-1402, 20-1403**

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

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NATIONAL TREASURY EMPLOYEES UNION, et al.

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

OFFICE OF PERSONNEL MANAGEMENT and
UNITED STATES DEPARTMENT OF AGRICULTURE

Intervenors.

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

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# BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## I. PARTIES

The U.S. Department of Agriculture ("USDA") was the sole party to a decision of the Federal Labor Relations Authority ("Authority") to issue a general statement of policy or guidance. Before rendering its decision, the Authority solicited and considered public comments, which included submissions from USDA, the National Treasury Employees Union ("NTEU"), the American Federation of Government Employees, AFL-CIO ("AFGE"), and the U.S. Office of Personnel Management ("OPM").

In this Court proceeding, NTEU, AFGE, and the American Federation of State, County and Municipal Employees ("AFSCME") (collectively, the "Unions") are the petitioners; and the Authority is the respondent. OPM and USDA are the intervenors.

## II. RULING UNDER REVIEW

The Unions seek review of the Authority's decision in *U.S. Department of Agriculture, Office of General Counsel*, 71 FLRA (No. 192) 986 (Sept. 30, 2020) (Member DuBester dissenting).

## III. RELATED CASES

This case was not previously before this Court or any other court. This case includes the lead case, *NTEU v. FLRA*, No. 20-1400, and two consolidated cases: *AFGE v. FLRA*, No. 20-1402, and *AFSCME v. FLRA*, No. 20-1403. Aside from

the consolidated cases, there are no other related cases currently pending before this Court or any court of which counsel for respondent is aware.

/s/ Noah Peters
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## GLOSSARY

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|---|---|
| **AFGE** | Petitioner, American Federation of Government Employees, AFL-CIO |
| **AFSCME** | Petitioner, American Federation of State, County and Municipal Employees |
| **APA** | The Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2020) |
| **Authority** | The Federal Labor Relations Authority's three-member adjudicatory body |
| **Pet'r Br.** | Petitioners' opening brief |
| **CBA** | Collective-bargaining agreement |
| **Continuance provision** | A CBA provision providing that, if renegotiations are requested but not completed before the existing CBA's original expiration date passes, then the existing CBA continues in force indefinitely until a new CBA takes effect |
| **The Decision** | *U.S. Department of Agriculture, Office of General Counsel*, 71 FLRA (No. 192) 986 (Sept. 30, 2020) (Member DuBester dissenting) |
| **FLRA** | Respondent, the Federal Labor Relations Authority |
| **General Statement** | A General Statement of Policy or Guidance issued by the Authority under 5 C.F.R. § 2427.5 |
| **JA** | Joint Appendix |
| **NTEU** | Petitioner, National Treasury Employees Union |
| **OPM** | Intervenor, U.S. Office of Personnel Management |

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| **Rollover provision** | A CBA provision providing that, at the end of the CBA's original term, the CBA will automatically continue in effect for additional, subsequent terms, unless a party timely requests to renegotiate the CBA |
| **The Statute** | The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) |
| **ULP** | Unfair Labor Practice |
| **USDA** | Intervenor, U.S. Department of Agriculture |

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The case concerns whether the Authority reasonably determined that an expiring collective bargaining agreement ("CBA") that is extended pursuant to an indefinite "continuance" provision should be treated similarly to an expiring CBA that is automatically extended pursuant to a fixed-duration renewal (or "rollover") provision.

Specifically, this case concerns, *first*, whether the Federal Labor Relations Authority (the "Authority") reasonably held that, when a provision in an expiring CBA states that the CBA will remain in effect indefinitely until the parties reach a new agreement (a "continuance provision"), a thirty-day window begins for an agency head to review the legality of the extended agreement's provisions on the first day of the extension. (*See* Joint Appendix ("JA") 100-02.)[1] *Second*, this case concerns whether the Authority reasonably held that on the first day of a CBA's extension due to a continuance provision, all government-wide regulations that became effective during the previous term of the CBA govern the parties immediately by operation of law, notwithstanding any conflicting provisions in the newly-extended CBA. (*Id.*)

[1] "Agency head review" is provided for in § 7114(c) of the Statute. It refers to the right of the agency head to review a CBA "within 30 days from the date the agreement is executed" to ensure that it is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation." 5 U.S.C. § 7114(c)(2).

The Authority had subject matter jurisdiction over the request for a general statement made by the U.S. Department of Agriculture ("USDA") under § 7105(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute") and the Authority's implementing regulation at 5 C.F.R. § 2427.5. A copy of the USDA's request is included at JA 1-4.

After receiving the USDA's request, the Authority solicited public comments through a notice in the Federal Register, and a copy of that notice appears at JA 5-6. The Authority's decision on review is published at 71 FLRA (No. 192) 986 (Sept. 30, 2020) (Member DuBester dissenting), and a copy of the decision appears at JA 99-104.

Petitioners, the National Treasury Employees Union ("NTEU"), the American Federation of Government Employees, AFL CIO ("AFGE"), and the American Federation of State, County and Municipal Employees ("AFSCME") (collectively, the "Unions") timely filed petitions for review within 60 days of the Authority's decision. 5 U.S.C. § 7123(a). The USDA and U.S. Office of Personnel Management ("OPM") timely intervened in this matter on November 30, 2020.

## STATEMENT OF ISSUES PRESENTED

1. Did the Authority reasonably hold that, just like when a CBA is extended via a rollover provision, the extension of an expiring CBA due to a continuance provision triggers a thirty-day window for an agency head to review the legality of the newly extended CBA's provisions?

2. Did the Authority reasonably hold that, just like when a CBA is extended via a rollover provision, upon the extension of an expiring CBA due to a continuance provision, all government-wide regulations that became effective during the previous term of the CBA take effect immediately as to parties by operation of law, notwithstanding potentially conflicting provisions in the newly-extended CBA?

3. Did the Authority reasonably grant USDA's request for a general statement of policy or guidance to address a recurring question concerning continuance provisions that the Authority had never before comprehensively addressed?

## RELEVANT STATUTORY PROVISIONS

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

## STATEMENT OF THE CASE

In federal-sector labor law, a "rollover" provision is a clause stating that, at the end of the CBA's original term, the CBA will automatically continue in effect for additional, subsequent terms, unless a party timely requests to renegotiate the CBA. *See Kan. Army Nat'l Guard, Topeka, Kan.*, 47 FLRA 937, 941 (1993) ("*Army*"). "[S]uch automatic renewal provisions typically operate based on a fixed anniversary date that constitutes the point at which the contract 'rolls over' or renews itself." *Id.* In *Army*, the Authority held that a CBA renewed via a rollover provision is subject to an additional period of agency-head review beginning "the day after the expiration of the

contractual window period for requesting renegotiation of the expiring agreement." *Id.* at 943. Moreover, the automatically-renewed agreement must comply with any government-wide rules or regulations that changed during the agreement's previous term. *Id.* at 942-43.

This case arose from USDA's request for a general statement of policy or guidance concerning whether—and, if so, when—an agency head may review the legality of an expiring agreement that is extended according to a continuance provision. (JA 2-3.) A "continuance" provision is a CBA term stating that, if renegotiations are requested but not completed before the existing CBA's original expiration date passes, then the existing CBA continues in force indefinitely until a new CBA takes effect. (JA 6.)

The Authority solicited public comments as to whether to grant USDA's request and, if the request were granted, what the Authority's guidance should be. (JA 5-6.) Among other comments, the Authority received submissions from NTEU (JA 7-15); AFGE (JA 61-65); USDA (JA 66-69); and OPM (JA 16-20). After considering USDA's request and the public comments (JA 100), the Authority assessed whether to grant the USDA's request for a general statement.

In assessing the USDA's request, the Authority acknowledged that, in the past, it had addressed the applications of §§ 7114(c) and 7116(a)(7) of the Statute "through means other than a general statement." (JA 100.) However, the Authority recognized that it may grant a request to "prevent a proliferation of cases involving the same or

similar question," even if other means—such as adjudication—are available for resolving the question. (*Id.* (quoting 5 C.F.R. § 2427.5(b)).) The Authority granted USDA's request based on its judgment that, in light of several then-recent government-wide regulatory actions, issuing a statement of policy or guidance would prevent a proliferation of cases concerning §§ 7114(c) and 7116(a)(7). (*Id.*)

After explaining the distinct roles that §§ 7114(c) and 7116(a)(7) play in requiring parties to comply with government-wide regulations under varying circumstances, the Authority addressed § 7116(a)(7) standing alone. (JA 100-01.) Section 7116(a)(7) makes it an unfair labor practice ("ULP") for an agency "to enforce any rule or regulation" (other than a rule or regulation implementing a prohibition on certain personnel practices) that "is in conflict with any applicable [CBA] if the agreement was in effect before the date the rule or regulation was prescribed." 5 U.S.C. § 7116(a)(7).[2] The Authority found that § 7116(a)(7) should apply to continuance provisions in the same way that it applies to rollover provisions. (JA 101.) Such equal treatment was appropriate because both continuance-provision and rollover-provision CBA extensions are generally triggered due to the parties' inaction. (*Id.*) In addition, such equal treatment would comport with the Authority's consistent

[2] Although an agency may violate § 7116(a)(7) by enforcing internal, agency-specific regulations that conflict with a preexisting CBA, *see, e.g.*, *USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 486 (2011), the Decision focused exclusively on situations where an agency may violate § 7116(a)(7) by enforcing *government-wide* regulations that conflict with a preexisting CBA.

practice of interpreting § 7116(a)(7) narrowly, in order to advance the Statute's purpose of barring negotiations in conflict with government-wide regulations. (*Id.*) (citing *U.S. Dep't of Def., Def. Contract Audit Agency, Cent. Region*, 37 FLRA 1218, 1228 (1990) ("*DCA*").) The Authority concluded that § 7116(a)(7)'s bar on enforcing certain rules and regulations should end as soon as the CBA's stated expiration date has passed—regardless of whether that expired CBA extended through a continuance or rollover provision. (JA 101-02.)

The Authority then determined that continuance-provision and rollover-provision CBA extensions should be treated the same for purposes of agency-head review under § 7114(c). Section 7114(c) provides that "[a]n agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency" 5 U.S.C. § 7114(c)(1), and that "[t]he head of the agency shall approve the agreement within thirty days from the date the agreement is executed if the agreement is in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation," *id.* § 7114(c)(2). Interpreting those statutory provisions, the Authority found that, just as § 7114(c) provides an agency head with an opportunity to review the legality of expired CBA provisions that continue in force due to a rollover CBA extension, § 7114(c) similarly permits agency-head review when a CBA is extended through a continuance provision. (JA 101-02.) The Authority concluded that in the case of continuance provisions, the period for agency-head

review would begin on the first day of the extension that is beyond the originally established CBA expiration date. (*Id.* & nn.29 & 33.)

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

## STATEMENT OF THE FACTS

This case concerns two sorts of clauses found in federal-sector CBAs. The basic question is whether they should be treated the same, or treated differently. A "rollover" clause states that, at the end of the CBA's original term, the CBA will automatically continue in effect for additional, subsequent terms, unless a party timely requests to renegotiate the CBA. *Army*, 47 FLRA at 941. "[S]uch automatic renewal provisions typically operate based on a fixed anniversary date that constitutes the point at which the contract 'rolls over' or renews itself." *Id.*

For over thirty years, the Authority has held that a CBA renewed via a rollover provision is subject to an additional period of agency-head review under 5 U.S.C. § 7114(c) beginning "the day after the expiration of the contractual window period for requesting renegotiation of the expiring agreement." *Army*, 47 FLRA at 943. And, the Authority has held, the automatically-renewed agreement must comply with any government-wide rules or regulations that changed during the agreement's previous term. *Id.* at 942-43.

A "continuance" provision, on the other hand, says that, if renegotiations are requested but not completed before the existing CBA's original expiration date

passes, then the existing CBA will continue in force indefinitely until a new CBA takes effect. (JA 6.) In practice, this means that an expired CBA with a continuance provision can be extended many years past its stated term, as federal-sector CBA negotiations typically take many years to complete. (*See*, *e.g.*, JA 2, 56).

The two types of clauses differ in that a continuance provision automatically extends the CBA indefinitely during the pendency of negotiations, while a rollover clause automatically extends the CBA for a fixed term without any request for renegotiation. In both cases, however, "a collective bargaining agreement automatically renews without further action by the parties"—in one case for a fixed term until renegotiation is requested, in the other for an indefinite term until renegotiated is completed. *Army*, 47 FLRA at 942.

On November 1, 2019, USDA requested that the Authority issue a general statement of policy or guidance concerning whether—and, if so, when—an agency head may review the legality of an expiring agreement that is extended according to a continuance provision. (JA 2-3.) The USDA also asked the Authority to address whether a CBA that is extended due to a continuance provision should be treated as having expired as of the date the extension occurred. (*Id.*)

After considering USDA's request and the public comments it received (JA 100), the Authority evaluated whether to grant the USDA's request for a general statement according to the criteria set forth at 5 C.F.R. § 2427.5. As in all previous cases concerning such requests, the Authority did not individually analyze all six of

§ 2427.5's criteria. Instead, as it has been its unbroken practice for nearly forty years, the Authority identified the most salient § 2427.5 criteria that, by themselves, afforded sufficient reason for granting or denying the request.[3]

In this case, the Authority determined that issuance of a general statement "would prevent the proliferation of cases involving the same or similar question." *See* 5 C.F.R. § 2427.5(b). The Authority found this factor to be compelling because of the "significant number of government-wide regulatory actions on topics of central importance to federal labor-management relations" that the federal government had enacted in preceding years. (JA 100 n.13 (identifying several such regulatory actions).) The Authority reasoned that, "[f]or parties whose conduct is governed by a continuance provision during renegotiations of their [CBA], the[] recent government-wide regulatory actions [would] prompt questions regarding the proper applications of §§ 7114(c) and 7116(a)(7)." (JA 100.) Thus, the Authority held that "issuing a general statement, . . . will 'prevent the proliferation of cases involving the same or similar question[s]' as the ones set forth in USDA's request." (*Id.* (alteration in original) (quoting 5 C.F.R. § 2427.5(b)).)

Turning to the substance of the request, the Authority noted that § 7116(a)(7)'s bar on implementing new government-wide regulations that conflict with a

[3] The Authority's responses to requests for general statements of policy and guidance are collected at https://www.flra.gov/resources-training/resources/policy-statements. In dealing with nearly 50 requests for such statements over the course of nearly forty years, the Authority has never once analyzed all six factors in a written decision.

preexisting CBA "lasts only for the [CBA]'s 'express term.'" (*Id.* (quoting *DCA*, 37 FLRA at 1228).) In other words, once a CBA expires, all government-wide regulations issued during the CBA's term become applicable to agencies and their employees immediately, by operation of law. (JA 100-01.) The Authority observed that this occurs even if an agency does not conduct agency-head review of an extension of the expired CBA pursuant to 5 U.S.C. § 7114(c). (*Id.*) With these principles in mind, the Authority examined the questions that USDA's request raised regarding § 7116(a)(7) in the context of CBAs with continuance provisions.

The Authority reiterated its previous determination that "§ 7116(a)(7) promotes the 'preservation, stability, and certainty' of [CBAs] by ensuring that they continue in force for their *express term* despite newly issued, conflicting government-wide regulations." (JA 101 (emphasis added) (quoting *DCA*, 37 FLRA at 1228).) The Authority also recognized that stability and certainty can only be achieved if a CBA's effectiveness and duration can be determined by reference to an unambiguous, concrete date. (*Id.* (citing *U.S. Dep't of the Interior, Redwood Nat'l Park, Crescent City, Cal.*, 48 FLRA 666, 671 (1993) ("*Interior*"); *U.S. Dep't of Def., Army Nat'l Guard, Camp Keyes, Augusta, Me.*, 34 FLRA 59, 64 (1989))). Thus, the Authority concluded that the extension of CBAs for an indefinite period of time pursuant to a continuance provision only minimally advances, and in some ways undermines, the policies of stability and certainty that animate § 7116(a)(7). (*Id.*)

Continuing its examination of § 7116(a)(7), the Authority reiterated that it "not only interprets, but also *applies* § 7116(a)(7) 'narrowly' in order to avoid undermining the 'policy of the Statute barring negotiations in conflict with [g]overnment-wide regulations.'" (*Id.* (emphasis in original) (quoting *DCA*, 37 FLRA at 1228).) The Authority concluded that joining an indefinite CBA extension (due to a continuance provision) with the original, definite CBA expiration date would not result in a concrete date after which government-wide regulations would become effective. (*Id.*) Thus, the Authority found that ignoring the originally-established expiration date that separated the CBA's expired, definite term from the CBA's subsequent indefinite extension under a continuance provision would be inconsistent with applying § 7116(a)(7) narrowly. (*Id.*)

Next, the Authority focused on the operation of agency-head review under § 7114(c). The Authority noted that it had previously addressed how to apply § 7114(c) in cases involving rollover provisions. In *Army*, the Authority held that agencies must have an opportunity to conduct agency-head review in the thirty-day period between the end of a CBA's original term and a subsequent rollover term. In so doing, the Authority stated that the predictable operation of agency-head review ensures that CBAs "conform to applicable laws and regulations." (*See* JA 101 (alterations in original) (quoting *Army*, 47 FLRA at 942)).) The Authority therefore held that unambiguous, knowable effective dates and CBA durations were critical to facilitating agency-head review and advancing its purpose of ensuring that CBAs

conform to applicable laws and regulations. And the Authority concluded that treating a CBA extension pursuant to a continuance provision as if the originally established, concrete expiration date for the CBA had *not* passed would fail to provide the predictability and certainty upon which effective agency-head review depended. (*Id.*)

Next, the Authority examined the ways in which a CBA that is in effect pursuant to a continuance provision is different from the CBA that was in effect immediately before the continuance provision was triggered. (JA 101 n.26.)

*First*, the Authority observed that a CBA extended indefinitely via a continuance provision is "merely a 'temporary stopgap' that one or both parties are working to change" through renegotiations. (JA 101 (quoting *Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 16 FLRA 281, 282 (1984)).) "As such, an indefinitely extended agreement lacks the parties' confidences in a way that an original, renegotiated, or rollover agreement does not." (*Id.*)

*Second*, the Authority observed that "when an agreement contains a continuance provision, parties that fail to initiate or complete renegotiations in time to reach a new agreement before the existing one expires know that such a failure will trigger the operation of the continuance provision." (*Id.*) Therefore, by their conduct, those parties effectively execute a new, extended agreement when they allow the continuance provision to go into effect. (*Id.*)

The Authority found that treating CBAs that are extended by a continuance provision as having been effectively executed when the continuance provision was triggered would comport with the Authority's decades-long treatment of CBA rollover provisions and promote consistent treatment of both types of provisions. (JA 102.) With both continuance and rollover provisions, the parties' *lack of action* leads to an additional term for the expiring CBA's provisions. (*Id.* (citing *Army*, 47 FLRA at 942-43).) Thus, the Authority concluded that both types of provisions should trigger the window for agency-head review.

In sum, the Authority concluded that (1) when a continuance provision extends the CBA's operation beyond the originally established, concrete expiration date, the first day after the original expiration date is the beginning of a new term for the CBA under §§ 7114(c) and 7116(a)(7); and (2) on that first day of the new CBA term, all government-wide regulations that became effective during the previous term of the CBA will govern the parties immediately by operation of law, and the thirty-day period for agency-head review will begin.

## SUMMARY OF ARGUMENT

This Court should defer to the Authority's interpretation of the application of §§ 7114(c) and 7116(a)(7) of the Statute to CBAs containing continuance provisions under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Contrary to the Unions' claims (Pet'r Br. 19-28), §§ 7114(c) and 7116(a)(7) do not speak directly to the precise questions answered by the Authority in

its Decision: 1) whether a CBA with a continuance provision should be subject to agency-head review on its specified expiration date, or whether such an expired agreement should be deemed to evade agency-head review indefinitely pursuant to the continuance clause, and 2) whether enforcement of government-wide rules and regulations issued during a CBA's specified term must be put off indefinitely due to a continuance provision.

Neither § 7114(c) nor § 7116(a)(7) speak "precisely" or "directly" to these highly-technical questions of federal-sector labor law, as required at *Chevron* step one. For example, as the Unions acknowledge, agency-head review under § 7114(c) is triggered by the day on which an "agreement" is "executed." 5 U.S.C. § 7114(c). The problem is that the Statute does not define the meaning of the term "executed" and, in the federal sector, CBAs may be executed in a variety of ways. For example, "executed" CBAs need not be signed, and some signed CBAs are still not considered "executed." *Fort Bragg Ass'n of Tchrs.*, 44 FLRA 852, 857-58 (1992) ("*Fort Bragg*") (signatures of local negotiators did not constitute "execution," where it was clear from the CBA's signature page that subsequent actions were also required). Some CBAs may result from orders of the Federal Service Impasses Panel. *See* 5 U.S.C. § 7119(c)(5)(B)(iii). In such cases, there may be no actual "agreement" between the parties at all, and no "execution" of any "agreement," but merely an order of the Impasses Panel. *AFGE 1985*, 778 F.3d at 857. Nonetheless, both the Authority and this Court have found that the imposition of a CBA on the parties by an Impasses

Panel order triggers the thirty-day period for agency-head review under § 7114(c). *Id.* at 851. Other CBAs may condition "execution" on the completion of union ratification procedures, or higher-level management approval. *See, e.g., Ass'n of Civilian Technicians Kentucky Long Rifle Chapter & Bluegrass Chapter*, 70 FLRA 968 (2018) ("*ACT Kentucky*"); *Dep't of Health and Human Servs.*, 12 FLRA 167, 169 (1983) ("*HHS*").

Moreover, the Statute does not speak to what the relevant "agreement" is in this context—the parties' original agreement, or the CBA that has been newly-extended by operation of the continuance provision. Just as there is no statutory text that speaks to the precise question of when a CBA extended pursuant to a rollover provision is "executed" for purposes of agency-head review under § 7114(c), there is no statutory text that speaks to this precise question in the context of continuance provisions.

In this case, the Authority reasonably applied the ambiguous text of § 7114(c) to continuance provisions—and, in particular, whether the extension of an expired CBA pursuant to a continuance provision should be treated as the execution of a new agreement subject to agency-head review. The Authority explained that "[o]nce a continuance provision of indefinite duration extends an agreement's operation, that newly extended agreement is, in a meaningful sense, no longer the same one that was 'in effect' before the extension occurred." (JA 101.) "Moreover, when an agreement contains a continuance provision, parties that fail to initiate or complete renegotiations in time to reach a new agreement before the existing one expires know

that such a failure will trigger the operation of the continuance provision." (*Id.*) "Therefore, by their course of conduct, those parties effectively execute a new, extended agreement when they allow the continuance provision to go into effect." (*Id.*)

In sum, the Authority held that just as a newly rolled-over agreement is "executed" on the date that the rollover provision becomes effective, *Army*, 47 FLRA at 943, so an expired CBA newly extended via a continuance clause is "executed" on the first day of extension period. (JA 102.) This result is fully consistent with the Authority's treatment of rollover provisions in *Army*. Just as there is no statutory text that speaks to the precise question of when a CBA extended pursuant to a rollover provision is "executed" for purposes of agency-head review under § 7114(c), leaving the Authority to fill the statutory gap, *see Army*, 47 FLRA at 941-43, there is no statutory text that speaks to this precise question in the context of continuance provisions.

To the extent that the Unions' insistence that "§ 7114(c) requires the 'execution' of a new agreement as a prerequisite to agency head review," (Pet'r Br. 15), would defeat the Authority's treatment of continuance provisions in its Decision, it would equally doom Authority precedent in the context of rollover provisions. For over thirty years, the Authority has held that CBAs with rollover provisions are subject to agency-head review each time they are extended—even though, strictly speaking, there has been no "new agreement" that has been "executed," but merely

the automatic renewal of a previously-executed CBA. *Army*, 47 FLRA at 941-43. Thus, if the Unions are correct that agency-head review is available only upon "execution" of a "new agreement," and a previous agreement that is automatically extended past its stated expiration date is not "new," then *Army* and the many cases applying it would have to be overruled.

Section 7116(a)(7) similarly fails to precisely address when a CBA remains "in effect"—during its express term only, or during its express term plus any continuance period. Section 7116(a)(7) makes it a ULP for an agency to enforce regulations that conflict with provisions of CBAs that were "in effect" before the rule was prescribed. "In effect" is, however, an ambiguous phrase. For example, even expired CBAs remain "in effect" for certain purposes. *See e.g., U.S. Border Patrol, Livermore Sector, Dublin, Cal.*, 58 F.L.R.A. 231, 233 n.5 (2002) (noting that CBA provisions on both mandatory and permissive bargaining subjects remain "in effect" after CBA's expiration, although either party may terminate permissive subjects unilaterally).

The term "in effect" is especially ambiguous in the context of a CBA whose stated term has expired and which continues in force via an automatic rollover or continuance provision. That is because, under Authority precedent, "the execution and effective dates of an automatically renewed agreement often operate differently than in the context of an initial or renegotiated agreement." *Army*, 47 FLRA at 942. In *Army*, for example, the Authority concluded that considerations of "the orderly and predictable operation of automatic renewal provisions of [CBAs]" required using a

different test to determine the effective date of a renewed agreement than would be used to determine the effective date of an initial or renegotiated agreement. *Id.* at 943.

All of which is to state the obvious: the statutory phrase "in effect" is ambiguous, and interpreting it requires the Authority to apply its expertise and considered judgment to the complexities of federal-sector labor law. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) ("*BATF*"). Indeed, if the Unions are correct about the meaning of "in effect" for purposes of § 7116(a)(7) (*see* Pet'r Br. 15-16), then thirty years of Authority precedent interpreting § 7116(a)(7) in the context of rollover provisions would have to be overturned. Such rolled-over agreements were, strictly speaking, "in effect before the date the rule or regulation was prescribed," 5 U.S.C. § 7116(a)(7), but consistent Authority precedent holds that, nonetheless, the rollover provision does not preclude government-wide rules from becoming effective. *DCA*, 37 FLRA at 1228 ("[w]e interpret section 7116(a)(7) to provide that preexisting [CBA] provisions are to govern for the express term of the [CBA] of which they are a part, but that provisions of a renewed agreement do not operate to override Government-wide regulations existing on the effective date of the new term of the collective bargaining agreement."); *Gen. Servs. Admin. Nat'l Capital Region*, 42 FLRA 121, 131 (1991) ("*GSA*") ("an automatic [one]–year renewal would not preclude the enforcement of a Government-wide regulation if the regulation was in effect on the date of the new term of the [CBA]."); *U.S. Dep't of Com. Pat. & Trademark Office*, 65 FLRA 817, 818, 819 (2011) ("*PTO*").

In sum, the Unions cannot point to statutory text unambiguously forbidding agency-head review from taking place where a CBA's stated term has expired and the agreement is extended via a continuance provision, or requiring that the provisions of an expired CBA extended past its stated term by a continuance provision must supersede conflicting government-wide rules and regulations. As such, the Decision survives *Chevron* step one.

The Decision survives *Chevron* step two because the Authority reasonably determined that a CBA extension due to a continuance provision is sufficiently similar to a CBA extension due to a rollover provision as to warrant similar treatment under §§ 7114(c) and 7116(a)(7) of the Statute. (JA 100-02.) In making that determination, the Authority considered not only the general wording in a typical continuance or rollover provision, but also compared the practical effects of both continuance-provision and rollover-provision extensions and whether they gave rise to different policy concerns under the Statute. (*Id.*) Having undertaken a thorough inquiry, the Authority reasonably decided to treat continuance provisions the same as rollover provisions for purposes of §§ 7114(c) and 7116(a)(7). (*Id.*)

While the Unions attempt to assail that conclusion by positing that continuance provisions are distinct because they "extend[] the existing contract by agreement of the parties," (Pet'r Br. 22), rollover provisions *do exactly the same thing*, but for a fixed term. The language used to create continuance provisions does not make them meaningfully different from rollover provisions. Nor are

continuance-provision extensions and rollover-provision extensions necessarily executed in different ways. As the Authority correctly observed, both types of extensions often take effect based on the parties' inaction. (JA 101-02.) Thus, Unions' characterization of continuance provisions merely demonstrates the fundamental similarity between continuance and rollover provisions, as the Decision recognized. (JA 101-02.)

The Court should also reject the Unions' argument that the Decision disturbs exclusive representatives' "right[s] to preservation of the status quo" after a CBA expires. (Pet'r Br. 18.) As the Unions recognize, the Statute itself protects a union's right to preserve the status quo following a CBA's expiration (Pet'r Br. 6 (citing *Fed. Aviation Admin., Nw. Mountain Region, Seattle, Wash.*, 14 FLRA 644, 647 (1984) ("*FAA*"))), and that right finds protection in § 7116(a)(1) and (5) of the Statute, *FAA*, 14 FLRA at 649. Nothing in the Decision disturbs these status-quo protections under § 7116(a)(1) and (5), so the Unions are incorrect in claiming that the decision denied them the "right to preservation of the status quo . . . as contemplated by the Statute" following a CBA's expiration. (Pet'r Br. 18.)

Moreover, the Authority carefully considered the interests of the contracting parties in stability and certainty, and concluded that its interpretation of continuance provisions best served those interests. (JA 101.) Its Decision creates clear rules regarding when agency-head review may take place and when new government-wide rules go into effect. By contrast, the Unions' interpretation would put off to an

uncertain future date—often, many years (JA 2, 56)—the implementation of government-wide regulations, creating a chaotic patchwork in which it would be impossible to predict with any certainty when a government-wide rule would apply to a given bargaining unit.

Finally, the Authority reasonably exercised the flexibility embedded in 5 C.F.R. § 2427.5's criteria in deciding to grant USDA's request for a policy statement. (JA 100.) Contrary to the Unions' argument (Pet'r Br. 29), that regulation does not require the Authority to expressly analyze all six criteria before deciding whether to grant a request. In fact, the Authority has never, during the forty years that the regulation has been in effect, analyzed a request for a policy statement by expressly analyzing all six criteria. At most, the Authority has addressed three criteria in a single case. A requirement that the Authority shall "consider" various factors before deciding whether to issue a general statement, 5 C.F.R. § 2427.5, "does not equate to a mandate that such consideration must be spelled out on the record." *United States v. Pyles*, 862 F.3d 82, 90 (D.C. Cir. 2017) (discussing the requirement that district court's "Shall consider" sentencing factors listed in 18 U.S.C. § 3553(a).)

As the broad terms of § 2427.5 suggest and permit, the Authority uses a flexible approach in deciding whether to issue a policy statement based on the facts and circumstances of each case. The regulation does not prescribe a particular weight for any given criterion and says nothing about how the Authority must balance the six highly-subjective factors it sets out. 5 C.F.R. § 2427.5. Thus, the regulation permits

the Authority to focus on the most salient criteria in a given case, and to find that those criteria alone suffice to decide whether to grant a request. That is what the Authority did in the Decision, as it reasonably found that, given the many significant government-wide rules that had been promulgated in the recent past, granting USDA's request and issuing a general statement would likely "prevent the proliferation of cases involving the same or similar question." 5 C.F.R. § 2427.5(b); (*see also* JA 100.) The Unions offer no basis for second-guessing the Authority's predictive judgment about the likely proliferation of disputes involving the same subject.

## STANDARD OF REVIEW

The Authority is responsible for interpreting and administering the Statute. *See BATF*, 464 U.S. at 97; *Ass'n of Civilian Technicians., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron,* 467 U.S. at 842–43 (1984).) In particular, Congress directed the Authority to "provide leadership in developing policies and guidance relating to" the Statute. *See* 5 U.S.C.§ 7105(a)(1). And it "took the unusual step of prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient Government'—that clearly invites the Authority to exercise its judgment." *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) ("*AALJ*") (quoting 5 U.S.C. § 7101(b).)

Congress intended that the Authority would "develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the Statute." *BATF*, 464 U.S. at 97. The Authority is thus entitled to "considerable deference" when it exercises its "special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *Id.* (internal quotation marks omitted).

"Because the 'Congress has clearly delegated to the Authority the responsibility in the first instance to construe the [Statute],'" the 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 *Libr. of Cong. v. FLRA*, 699 F.2d 1280, 1284 (D.C. Cir. 1983)). Under *Chevron* step one, the Court considers "whether Congress has spoken directly to the precise question at issue." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 96 (D.C. Cir. 2005). "The Congress may foreclose an agency's interpretation in one of two ways: '[E]ither by prescribing a precise course of conduct other than the one chosen by the agency, or by granting the agency a range of interpretive discretion that the agency has clearly exceeded.'" *NTEU 2014*, 754 F.3d at 1042 (alteration in original) (quoting *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011)). If the statute is silent or ambiguous, this 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.* (quoting *Am. Fed'n Gov't Emps. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)). The Court "need not conclude that the Authority's interpretation of the Statute is 'the only one it permissibly could have adopted,'" *id.* (quoting *Chevron*, 467 U.S. at 843 n.11), or "'even the interpretation deemed most reasonable'" by the Court, *id.* (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)); *see also Am. Forest & Paper Ass'n v. Fed. Energy Regul. Comm'n*, 550 F.3d 1179, 1183 (D.C. Cir. 2008) ("Step two of *Chevron* does not require the best interpretation, only a reasonable one."). On the contrary, the Court will "defer to an agency's interpretation of a statute so long as it is reasonable." *Id.* (citing *Chevron*, 467 U.S. at 844; *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014)).

*Chevron* step two analysis "overlaps with" the Administrative Procedures Act's (the "APA") arbitrary and capricious standard. *Shays*, 414 F.3d at 96 (quoting *Chamber of Com. v. Fed. Election Comm'n*, 76 F.3d 1234, 1235 (D.C. Cir. 1996)). "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); *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44–45 (1983); *Arent v. Shalala*, 70 F.3d 610, 616 (D.C. Cir. 1995).

With respect to Authority policy statements specifically, this Court defers to the Authority's interpretations of the Statute so long as the Authority's "reading [of the Statute] is sufficiently plausible and reasonable to stand as the governing law." *Am. Fed. Gov't Emps., AFL-CIO v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985) ("*AFGE 1985*"). The Court's task, in reviewing the Authority's interpretation of its Statute, is "deciding, whether, given the existence of competing considerations that might justify either interpretation, the Authority's interpretation is *clearly contrary to statute* or is an *unreasonable* one." *Id.* at 861 (emphasis in original).

The Court also defers to the Authority's reasonable interpretation of its own ambiguous regulations where the "'character and context of the [Authority's] interpretation entitles it to controlling weight.'" *Nat'l Lifeline Ass'n v. Fed. Com. Comm'n*, 983 F.3d 498, 507 (D.C. Cir. 2020) (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019)).

## ARGUMENT

### I. THE AUTHORITY'S REASONABLE APPLICATION OF §§ 7114(c) AND 7116(a)(7) TO CONTINUANCE CLAUSES SATISFIES *CHEVRON*.

Although they do not say so explicitly (Pet'r Br. 21-28), it appears that the Unions are arguing that the Decision is not entitled to *Chevron* deference because §§ 7114(c) and 7116(a)(7) speak to the precise questions of 1) whether a CBA containing a continuance provision is subject to agency-head review upon its extension pursuant to that clause, and 2) whether government-wide rules that became

effective during a CBA's stated term may not be enforced when an expired CBA remains in force via a continuance provision. That is, the Unions' view seems to be that in this case inquiry stops at *Chevron* step one because Congress has unambiguously spoken to the precise questions in this case.

The Unions' *Chevron* step one argument is meritless. Neither §§ 7114(c) nor 7116(a)(7) expressly address rollover or continuance provisions. *See Chevron*, 467 U.S. at 843 (noting that the question at step one is whether "the statute is silent or ambiguous with respect to the specific issue" addressed by the agency). The Authority had previously filled the Statute's gap with respect to rollover provisions by developing a body of caselaw specifically concerning the application of §§ 7114(c) and 7116(a)(7) to such provisions. *See PTO*, 65 FLRA at 818, 819 (rollover provisions in the context of § 7116(a)(7)); *DOD*, 37 FLRA at 1228 (same); *Army*, 47 FLRA at 941 (rollover provisions in the context of § 7114(c)). The Unions apparently agree that it was appropriate for the Authority to fill that statutory gap, because they spend seven pages of their brief explaining how precedent related to rollover provisions does not apply to continuance provisions. (*See* Pet'r Br. 21-28.)

What the Unions appear to not realize is that the question at *Chevron* step one is not whether it was appropriate for the Authority to fill the Statute's gap related to continuance provisions by treating them the same as rollover provisions—that's a step two question. Instead, what is relevant under *Chevron* step one is that the gap exists. *See Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the

agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.")

The Unions' argument also fails at *Chevron* step two. It was reasonable for the Authority to find that rollover-provision CBA extensions and continuance-provision CBA extensions are sufficiently similar in relevant respects that the two types of clauses should be treated the same for purposes of §§ 7114(c) and 7116(a)(7). The Authority's Decision thus merits the Court's deference under *Chevron* step two. *See NTEU 2014*, 754 F.3d at 1042 (*Chevron* step two asks whether the agency's interpretation is based on a *permissible* construction of the statute in light of its language, structure, and purpose). Denial of review of the Petitions is therefore appropriate.

### A. The Court's review of the Decision does not end at *Chevron* step one because the Statute does not precisely address how §§ 7114(c) and 7116(a)(7) apply to continuance provisions.

#### 1. Section 7114(c) does not address the precise question of how continuance provisions should be treated.

The Unions' attempt to cut off this Court's review of the Decision at *Chevron* step one is unavailing, because the Statute does not speak directly to precise question of how continuance provisions should be treated for purposes of agency head review under § 7114(c). Section 7114(c) provides agency-head review is triggered by the day on which an "agreement" is "executed." 5 U.S.C. § 7114(c). However, the Statute

does not define when an "agreement" is considered to be "executed." And in the federal sector, when an agreement is "executed" depends on the circumstances.

For example, in the federal sector, "executed" CBAs need not be signed, and some signed CBAs are still not considered "executed" under § 7114(c). *Fort Bragg*, 44 FLRA at 857-58 (signatures of local negotiators did not constitute "execution," where it was clear from the CBA's signature page that subsequent actions were also required). Some CBAs may result from orders of the Federal Service Impasses Panel. *See* 5 U.S.C. § 7119(c)(5)(B)(iii). In such cases, there may be no "agreement" between the parties at all, and no "execution" of any agreement. Nonetheless, "[t]his court and the Authority have interpreted the term 'agreement' as used in the head of the agency provision, to include all terms—whether achieved by negotiation or imposed by the Impasses Panel." *AFGE 1985*, 778 F.3d at 857. And, both the Authority and this Court have found that the imposition of a CBA on the parties by an Impasses Panel order triggers the 30-day period for agency-head review under § 7114(c). *Id.* at 851. Other CBAs may condition "execution" on the completion of union ratification procedures, or higher-level management approval. *See, e.g., ACT Kentucky*, 70 FLRA at 968, 969; *HHS*, 12 FLRA at 169 (document that was signed, but still subject to final approval by higher-level manager, could not serve as a bar to election petition.)

In order to account for the variety of ways in which a CBA may come into force under the Statute, the Authority has over time provided its own definition of what it means for an agreement to be "executed" through case law. Ultimately, the

Authority has determined a CBA is considered "executed" as of "the date on which no further action is necessary to finalize the agreement." *Army*, 47 FLRA at 940.

It is in this context that the Authority considered when agency-head review is appropriate in the case of a CBA that is renewed via a rollover provision. The Authority determined that, in such cases, an agency-head may review a CBA every time the expiration date for the agreement ends and rolls over. *Id.* at 942. In doing so, *Army* recognized that "the principles that apply to the operation of section 7114(c) in the context of an initial or renegotiated agreement are incompatible with some of the fundamental aspects of agreements that are the result of automatic renewal." *Id.* In particular, *Army* emphasized the need for clear expiration dates of automatically-renewed agreements to facilitate agency head review, recognizing that "[t]he purpose of section 7114(c) is to ensure that collective bargaining agreements conform to applicable laws and regulations." *Id.* "That purpose," *Army* explained, "applies to automatically renewed agreements as well as to initial or renegotiated agreements." *Id.*

In the Decision, the Authority addressed the similarly ambiguous situation of whether and when a CBA extended pursuant to a continuance provision is subject to agency-head review. (JA 101.) Just as there is no statutory text that speaks to the precise question of when a CBA extended pursuant to a rollover provision is "executed" for purposes of agency-head review under § 7114(c), there is no statutory text that speaks to this precise question in the context of continuance provisions. Moreover, the Statute does not speak precisely to what the relevant "agreement" is in

this context—the parties' original agreement, or the CBA that has been newly-extended by operation of the continuance (or rollover) provision.

Thus, similar to *Army*, the Authority in its Decision applied the text of § 7114(c) to the circumstance of continuance provisions. In doing so, the Authority explained that "Once a continuance provision of indefinite duration extends an agreement's operation, that newly extended agreement is, in a meaningful sense, no longer the same one that was 'in effect' before the extension occurred." (JA 101.) "Moreover, when an agreement contains a continuance provision, parties that fail to initiate or complete renegotiations in time to reach a new agreement before the existing one expires know that such a failure will trigger the operation of the continuance provision." (*Id.*) "Therefore, by their course of conduct, those parties effectively execute a new, extended agreement when they allow the continuance provision to go into effect." (*Id.*) And just as a newly rolled-over agreement is "executed" on the date that the rollover provision becomes effective, *Army*, 47 FLRA at 943, so an expired CBA newly extended via a continuance clause is "executed" on the first day of extension period. (JA 102.)

To the extent that the Unions' insistence that "§ 7114(c) requires the 'execution' of a new agreement as a prerequisite to agency head review" (Pet'r Br. 15) would defeat the Authority's application of § 7114(c) in the context of continuance clauses, it would equally doom the Authority's previous applications of § 7114(c) in the context of rollover provisions. That is because, for over thirty years, the

Authority has held that CBAs with rollover provisions are subject to agency-head review each time they are extended—even though, strictly speaking, there has been no "new agreement" that has been "executed," but merely the automatic renewal of a previously-executed CBA. *Army*, 47 FLRA at 941-43; *compare* Pet'r Br. at 15-16. Under the Unions' interpretation, *Army* and decades of Authority decisions adhering to its treatment of rollover provisions would have to be discarded.

The implication of the Unions' argument was fleshed out by one public commenter, who stated his view that "the [S]tatute contemplates one agreement, one execution of that agreement, and one review of that agreement by the agency head." (JA 021). That is essentially the same view that the Unions would have the Court take. (*See* Pet'r Br. at 15-16, 34). Such an interpretation is at odds with the Authority's decades-old precedent, which permits an additional round of agency-head review when an agreement is extended pursuant to a rollover provision. *Army*, 47 FLRA at 941-43. Indeed, the commenter hinted that his interpretation was inconsistent with Authority precedent, as he expressly declined to consider "the validity of pre-existing FLRA decisions addressing agency head review of agreements that automatically renew upon expiration" under his interpretation. (JA 021.)

In addition to being inconsistent with decades of Authority precedent, the Unions' argument ignores the fact that, in the Statute, Congress "took the unusual step of prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective

and efficient Government.'" *AALJ*, 397 F.3d at 962 (quoting 5 U.S.C. § 7101(b).) That is, the Statute *itself* demands that its text be interpreted in practical manner that is attuned to "the special requirements and needs of the Government." 5 U.S.C. § 7101(b). In its Decision, the Authority, consistent with its precedent, did just that—it applied the broad terms of § 7114(c) to practical realities of continuance clauses in light of the animating purpose of agency-head review: "ensuring that collective-bargaining agreements conform to applicable laws and regulations." (JA 101 (formatting omitted) (quoting *Army*, 47 FLRA at 942.))

As the application of § 7114(c) to CBAs extended via continuance clauses is ambiguous, this Court cannot dispose of the Petitions at *Chevron* step one and should proceed to step two.

**2. Section 7116(a)(7) does not address the precise question of how continuance provisions should be treated.**

Contrary to the Unions' argument (Pet'r Br. 26-27), § 7116(a)(7) does not expressly address when a CBA should be considered "in effect" for purposes of prohibiting agencies from "enforc[ing] any rule or regulation . . . in conflict with any applicable [CBA] if the agreement was in effect before the date the rule or regulation was prescribed." 5 U.S.C. § 7116(a)(7). In particular, § 7116(a)(7) fails to precisely address when a CBA remains "in effect"—during its express term only, or during its express term plus any continuance period. Thus, § 7116(a)(7) does not speak to the precise question at issue. *See NTEU 2014*, 754 F.3d at 1041.

Notably, even expired CBAs remain "in effect" for certain purposes. *E.g.*, *U.S. Border Patrol, Livermore Sector, Dublin, Cal.*, 58 FLRA 231, 233 & n.5 (2002) (noting that CBA provisions on both mandatory and permissive bargaining subjects remain "in effect" after CBA's expiration, although either party may terminate permissive subjects unilaterally). The term "in effect" is especially ambiguous in the context of a CBA whose stated term has expired and which continues in force via an automatic rollover or continuance provision. That is because, under Authority precedent, "the execution and effective dates of an automatically renewed agreement often operate differently than in the context of an initial or renegotiated agreement." *Army*, 47 FLRA at 942. In *Army*, for example, the Authority concluded that considerations of "the orderly and predictable operation of automatic renewal provisions of [CBAs]" required using a different test to determine the effective date of a renewed agreement than would be used to determine the effective date of an initial or renegotiated agreement. *Id.* at 943.

To bring clarity to when § 7116(a)(7)'s bar ends, the Authority has long held the view that the bar lasts only during a CBA's "express term." *DCA*, 37 FLRA at 1228 ("[w]e interpret section 7116(a)(7) to provide that preexisting collective bargaining agreement provisions are to govern for the express term of the collective bargaining agreement of which they are a part, but that provisions of a renewed agreement do not operate to override Government-wide regulations existing on the effective date of the new term of the collective bargaining agreement."); *GSA*, 42

FLRA at 131 ("an automatic 1–year renewal would not preclude the enforcement of a Government-wide regulation if the regulation was in effect on the date of the new term of the collective bargaining agreement."); *PTO*, 65 FLRA at 818, 819.

As it had in those earlier cases dealing with rollover provisions, the Authority here applied the text of § 7116(a)(7) to continuance provisions. The Authority explained that "[o]nce a continuance provision of indefinite duration extends an agreement's operation, that newly extended agreement is, in a meaningful sense, no longer the same one that was 'in effect' before the extension occurred." (JA 101.) "Rather than serving as a source of predictable, fixed expectations, an indefinitely extended agreement is merely a 'temporary stopgap' that one or both parties are working to change." (*Id.*) (quoting *Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 16 FLRA 281, 282 (1984).)

The Authority had previously "explained that § 7116(a)(7) promotes the 'preservation, stability, and certainty' of collective-bargaining agreements by ensuring that they continue in force for their express term despite newly issued, conflicting government-wide regulations." (*Id.*) (quoting *DCA*, 37 FLRA at 1228.) Thus, "unless a collective-bargaining agreement contains unambiguous, concrete dates regarding its effectiveness and duration, the agreement does not bolster 'stability' or 'certainty.'" (*Id.*) (quoting *Interior*, 48 FLRA at 671). In particular, "agreements that are in effect due to indefinite continuance provisions lack unambiguous, concrete dates establishing their durations." (*Id.*)

In addition, the Authority "not only interprets, but also *applies* § 7116(a)(7) 'narrowly' in order to avoid undermining the 'policy of the Statute barring negotiations in conflict with [g]overnment-wide regulations.'" (*Id.*) (emphasis in original) (quoting *DCA*, 37 FLRA at 1228.) "But," the Authority explained, "continuance provisions of indefinite duration, when added to an agreement's original term, are inconsistent with applying § 7116(a)(7) narrowly." (*Id.*) Thus, the Authority held that, for purposes of § 7116(a)(7), with respect to "a continuance provision extends the agreement's operation beyond the originally established, concrete expiration date, the first day of the extension period that is beyond the original expiration date marks the beginning of a new term for the agreement." (JA 102.)

The Unions' reading of the statutory phrase "in effect" in § 7116(a)(7) (Pet'r Br. 15-16) would require that CBAs extended via rollover provisions supersede government-wide rules and regulations issued during the CBA's term. A CBA extended via a rollover provision was equally "in effect" prior to its extension, to the same extent as a CBA extended via a continuance provision. Consistent Authority precedent holds that, nonetheless, the rollover term does not preclude government-wide rules from becoming effective. *See DCA*, 37 FLRA at 1228 (rollover provisions in the context of § 7116(a)(7)); *PTO*, 65 FLRA at 818, 819 (same).

* * * * *

Reflecting on *Chevron* review, Judge Silberman once observed that "[i]f a case is resolved at the first step of *Chevron*, one must assume a situation where either a

petitioner has brought a particularly weak case to the court of appeals, or the agency is sailing directly against a focused legislative wind." Laurence H. Silberman, *Chevron-the Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 826 (1990). As he noted, "Neither eventuality occurs very often." *Id.* And this is not such a rare case—the Authority here did not "sail[] directly against a focused legislative wind," but interpreted the ambiguous text of §§ 7114(c) and 7116(a)(7) in a manner that advanced several important legislative policies that have guided its interpretation of those provisions for decades—such as facilitating agency-head review and the predictable application of government-wide laws and regulations by ensuring that CBAs contain unambiguous, concrete dates regarding their effectiveness and duration. (JA 101.) Thus, the Court's analysis must continue to *Chevron* step two.

### B. The Authority's reasonable interpretation of §§ 7114(c) and 7116(a)(7) in the context of CBAs extended due to continuance provisions satisfies *Chevron* step two.

Denial of the Petitions is appropriate at *Chevron* step two because the Authority's reading of §§ 7114(c) and 7116(a)(7) and application to the facts of continuance clauses "is sufficiently plausible and reasonable to stand as the governing law." *AFGE 1985*, 778 F.2d at 856. The Authority thoroughly explained the reasons why unambiguous, knowable effective dates and durations were critical for the "predictability" on which the successful operation of agency-head review under § 7114(c) depends. (JA 101.) The Authority also reasonably determined that government-wide rules should replace conflicting CBA provisions once the original

term of the agreement ends, even if the CBA contains a continuance provision. Not only is that decision consistent with the Authority's long-standing policy of narrowly interpreting the § 7116(a)(7)'s bar on an agency's enforcement of rules, it is also consistent with the Authority's treatment of rollover provisions.

### 1. The Authority reasonably interpreted § 7114(c) in the context of CBAs with continuance provisions

As the Authority found, the purpose of agency-head review is "ensuring that collective-bargaining agreements conform to applicable laws and regulations." (*Id.* (alterations omitted) (quoting *Army*, 47 FLRA at 942).) That policy goal can only be achieved when there are predictable intervals at which an agency-head may review a CBA. (*Id.*) That is why the Authority reasonably found that, "unambiguous, knowable effective dates and durations are critical to fulfilling purposes" of § 7114(c). In determining how to set effective dates and durations in the context of continuance provisions, the Authority reasonably used the same standard it had applied with respect to rollover provisions in the context of § 7114(c).

The Unions' arguments against the Authority's interpretation of § 7114(c) in the context of continuance provisions rest almost entirely on the Unions' strenuous insistence that rollover provisions and continuance provisions operate in starkly different ways. (*See* Pet'r Br. 22-24.) Fundamentally, however, both rollover provisions and continuance provisions extend the operation of an expiring CBA's constituent parts for an additional term. (JA 101-102.) Indeed, the Unions' attempts

to highlight the differences between continuance provisions and rollover provisions only highlight their basic similarities.

*First*, the Unions argue that continuance-provision CBA extensions lack the "'execution' of a new agreement." (Pet'r Br. 15; *see also id.* at 21.) But this argument ignores that "execution" looks different in different contexts. *See*, *e.g.*, *AFGE 1985*, 778 F.3d at 851 (imposition of a CBA on the parties by order of the Impasses Panel triggers the 30-day period for agency-head review under § 7114(c)); *ACT Kentucky*, 70 FLRA at 968-69; *Fort Bragg*, 44 FLRA at 857-58.

To the extent that the Unions attempt to equate "execution" with "signing," and argue that continuance-provision CBA extensions are unique because they often do not require additional signatures before taking effect, the same is true of rollover-provision CBA extensions. *See e.g.*, *AFGE, Nat'l Council of EPA Locs., Council 238*, 59 FLRA 902, 903 n.3 (2004) (describing rollover provision that "automatically extended" a CBA for one-year increments unless a party timely requested renegotiations, without requiring the parties to sign these extensions). As the Authority noted in *Army*, rollover provisions generally "provide[] that the contract shall continue in effect after its expiration date if no action to amend or terminate it is taken within a specified period prior to its expiration date." *Army*, 47 FLRA at 941. "Such automatic renewal provisions typically operate based on a fixed anniversary date that constitutes the point at which the contract 'rolls over' or renews itself." *Id.*

Thus, this attempted ground of distinction only underscores the fundamental similarity between the two types of clauses.

*Second*, the Unions contend that when continuance provisions take effect, a previous CBA term simply "*remains* in full force" (Pet'r Br. 16, 22; *see also id.* at 23, 27 (using very similar wording)), and the Unions contend that this characteristic is unique to continuance provisions. But, in fact, parties use the same words to describe the operation of rollover provisions. *See e.g., In re USDA, Office of the Gen. Counsel*, 20 FSIP 012, 2020 WL 2768911, at *Attach. Art. 3 (May 11, 2020) (providing for one-year rollovers with the wording, "The Agreement *shall remain in effect* for additional [one]-year periods. . . ." (emphasis added)). Indeed, *Army* noted that a rollover provision typically "provides that the contract *shall continue in effect* after its expiration date if no action to amend or terminate it is taken within a specified period prior to its expiration date." *Army*, 47 FLRA at 941 (emphasis added). Thus, this attempted distinction also fails.

*Third*, the Unions argue that continuance provisions are distinct because they "extend[] the existing contract." (Pet'r Br. 22.) But as discussed earlier, rollover provisions do the same thing. *See, e.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Danbury, Danbury, Conn.*, 55 FLRA 201, 209 (1999) ("*FCI Danbury*") (reciting CBA's duration article, which described both a one-year-rollover provision and a continuance provision as effecting "exten[sions]" of the CBA).

*Fourth*, the Unions contend that only rollover provisions "renew[]" a CBA. (Pet'r Br. 23.) But as noted in the preceding paragraph, parties may, with equal effectiveness, describe rollovers as extensions. The words "renewal" and "extension" are not uniquely identifying characteristics of either rollover or continuance provisions. *See FCI Danbury*, 55 FLRA at 209.

*Fifth*, the Unions assert that rollovers are distinct because, contrary to the holding in the Decision, "it is . . . not the 'lack of action' before the rollover occurs that triggers agency[-]head review of automatically renewed CBAs." (Pet'r Br. 24.) But this assertion ignores the clear holding of the Authority in *Army*, with respect to rollover provisions, that agency-head review may begin at "the point at which the time limits for making a request to renegotiate the [CBA] expired *with no timely request forthcoming*," not the date on which the rollover term would begin. *Army*, 47 FLRA at 943 (emphasis added). As noted in *Army*, rollover provisions generally "provide[] that the contract shall continue in effect after its expiration date if *no action to amend or terminate it is taken* within a specified period prior to its expiration date." *Army*, 47 FLRA at 941 (emphasis added).

*Sixth*, the Unions argue that a continuance provision does not "create a new contract." (Pet'r Br. 24-25.) But a continuance-provision extension is no less a new contract than a rollover-provision extension of an expiring CBA is a new contract. (*See* JA 101). In fact, the Unions' argument is quite similar to arguments that the Authority rejected in applying § 7116(a)(7) to rollover-provision CBA extensions. *See,*

*e.g.*, *DCA*, 37 FLRA at 1225-29 (union unsuccessfully argued to Authority that, because parties did not conduct any new negotiations since CBA's first term, rollover extension was not a new CBA, for purposes of § 7116(a)(7)). Both continuances and rollovers extend the effectiveness of expiring CBA provisions for an additional time period *without effecting substantive changes* to those provisions. (*See* JA 101.)

*Seventh*, the Unions assert that "any 'execution' of a continuance provision is baked into the [CBA's] initial execution as a provision of that [CBA]." (Pet'r Br. 25.) But, *yet again*, that same feature can be found in rollover provisions, which are undoubtedly contract terms that are put into force by virtue of the initial execution of the CBA containing them. *See*, *e.g.*, *Army*, 47 FLRA at 941.

*Finally*, the Unions' argument that the Decision is at odds with the purpose of § 7114(c) (Pet'r Br. 25-26) is meritless. The purpose of agency-head review is to ensure that CBA provisions do not conflict with existing law, and to ensure that such review is done at predicable intervals. (JA 101; *see also AFGE 1985*, 778 F. 2d at 858.) Permitting agency-heads to conduct that review after the end of the CBA's stated term fulfils both of those policy goals. It does not contravene the intent of the parties who negotiated the end-date of the CBA, who presumably intended the express term and concrete end date they negotiated to mean something. (JA 101) (noting that "an indefinitely extended agreement is merely a 'temporary stopgap' that one or both parties are working to change," one which lacks the parties' confidences in a way that an original, renegotiated, or rollover agreement does not.") Nor would

agency-head review unduly disrupt any stability provided by a CBA with a continuance clause, because the review would occur only once—within thirty days of the CBA's originally established, concrete expiration date. (JA 102.) Under the Decision, agency-head review would not then again happen until after the parties concluded negotiations on their next CBA. The purpose of § 7114(c) is therefore fulfilled by the Decision, and the Court should deny the Petitions.

The Authority has found that the primary benefit of § 7116(a)(7) is that it provides stability by "ensuring that [CBAs] continue in force for their express term despite newly issued, conflicting government-wide regulations." (JA 101 (citations omitted).) Stability, however, cannot be achieved unless the term of a CBA includes "concrete dates regarding its effectiveness and duration." (*Id.*) Postponing the enforcement of government-wide rules for an indefinite period beyond the express term of a CBA while the parties negotiate—a process that often takes the better part of a decade (JA 2, 56)—does not, therefore, create predictability or stability, but rather a chaotic patchwork which makes it impossible to determine *ex ante* when any particular government-wide rule would become applicable to a given bargaining unit. (JA 101.) Nor does it comport with the Authority's narrow interpretation of § 7116(a)(7)'s limits on the enforcement of government-wide rules. (*Id.*) The Authority therefore reasonably determined that the originally-established, concrete term of a CBA containing a continuance provision should determine when § 7116(a)(7)'s bar would lapse.

### 2. The Authority reasonably interpreted § 7116(a)(7) in the context of CBAs with continuance provisions

The Authority's decision to allow for the enforcement of government-wide rules after the CBA's stated term has ended is consistent with the way it treats rollover provisions. The Authority has long held that the § 7116(a)(7) bar to the enforcement of government-wide rules ends each time the CBA expires and rolls over. Applying the same logic to continuance provisions, the Authority reasonably held that the § 7116(a)(7) bar on the enforcement of government-wide rules should end once, with the initial term of the CBA. Thereafter, the § 7116(a)(7) bar would apply to any newly promulgated government-wide regulations until the parties completed their CBA negotiations.

The Unions challenge the wisdom of the Authority's interpretation of § 7116(a)(7) by again attempting to distinguish rollover and continuance provisions. Once again, that challenge is unavailing. The Unions argue, for example, that when continuance provisions take effect, a previous CBA term simply "remains in full force and effect." (Pet'r Br. 27 (citing JA 103).) But, in fact, parties use the same words to describe the operation of rollover provisions. *See e.g., In re USDA, Office of the Gen. Counsel*, 20 FSIP 012, 2020 WL 2768911, at *Attach. Art. 3 (May 11, 2020) (providing for one-year rollovers with the wording, "The Agreement *shall remain in effect* for additional [one]-year periods. . . ." (emphasis added)). Indeed, *Army* noted that a rollover provision typically "provides that the contract *shall continue in effect* after its

expiration date if no action to amend or terminate it is taken within a specified period prior to its expiration date." *Army*, 47 FLRA at 941 (emphasis added).

The Unions' argument that the Decision changed unions' rights to "preservation of the status quo . . . consistent with the Statute's purposes" (Pet'r Br. 18-19), as protected by § 7116(a)(1) and (5) is unavailing. The Decision did not affect the parties' obligations to preserve the *status quo* following a CBA's expiration, *see FAA*, 14 FLRA at 647-49, and any claim to the contrary is inaccurate. Indeed, the Decision does not mention § 7116(a)(1) and (5) at all.

In a similar vein, the Unions are incorrect in arguing that the Decision "undermines the Statute's goal of 'ensur[ing] repose and stability in bargaining relationships.'" (Pet'r Br. 27 (quoting *Dep't of Justice v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017) (citation omitted)). Instead, the Decision promotes stability by giving parties a single date certain on which government-wide rules that conflict with CBA provisions will become effective—the date when the CBA's stated term expires. (JA 101.) New government-wide rules promulgated after that date will not become effective until the parties execute an agreement that terminates or supersedes the extended agreement that the continuance provision put into effect. (JA 102.) The Authority carefully considered the interests of the contracting parties in stability and certainty, and concluded that its interpretation of continuance provisions best served those interests. (JA 101.) Its Decision creates clear rules regarding when agency-head review may take place and when new government-wide rules go into effect. By

contrast, the Unions' interpretation would put off to an uncertain future date—often, many years (JA 2, 56)—the implementation of government-wide regulations, creating a chaotic patchwork in which it would be impossible to predict with any certainty when a government-wide rule would apply to a given bargaining unit. As the Authority observed, "We cannot conclude that Congress intended for time-sensitive actions to be delayed by whatever length of time it takes agencies and unions to renegotiate new agreements." (JA 101.)

At *Chevron* step two, the question is not whether the Authority came to the correct balance of competing factors—it is whether it considered the relevant factors and came to a reasonable balance. "Step two of *Chevron* does not require the best interpretation, only a reasonable one." *Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1183 (D.C. Cir. 2008); *see also Chevron*, 467 U.S. at 866 (question at step two is not "the wisdom of the agency's policy" but "whether it is a reasonable choice within a gap left open by Congress."). The Authority's interpretation fulfills the spirit and purpose of § 7116(a)(7), and the Court should defer to its reasonable conclusions concerning that section.

## II. THE COURT SHOULD AFFORD *KISOR*/*AUER* DEFERENCE TO THE AUTHORITY'S REASONABLE DECISION TO ISSUE A GENERAL STATEMENT UNDER 5 C.F.R. § 2427.5.

Separate from the merits of the Authority's decision, the Unions contend that the Authority should have waited for the continuance-clause issue to arise in a concrete bargaining dispute, rather than issuing a general statement of policy and

guidance. (Pet'r Br. 1, 28-32.) But the Authority's decision to exercise its statutory power to "provide leadership in establishing policies and guidance relating to matters under" the labor-relations 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.*

Here, the Authority reasonably predicted that the large number of government-wide rules promulgated in recent years would lead to a proliferation of individual disputes about when those rules could be implemented, and the Authority reasonably predicted that a general statement could help efficiently settle that legal issue and prevent the need for multifarious administrative adjudication. (JA 100.) The Unions offer no basis for second-guessing the Authority's predictive judgment about the likely proliferation of disputes involving the same subject. And that judgment about forestalling proliferation of cases is a ground for issuing a general statement of policy and guidance under the Authority's regulations. 5 C.F.R. § 2427.5(b). The Authority's "policy-laden" determination was "within the field of [its] expertise," *Bd. of Cty. Comm'rs of Wash. Cty. v. U.S. Dep't of Transp.*, 955 F.3d 96, 99 (D.C. Cir. 2020), and the Court should reject the Unions' attempt to second-guess that predictive determination.

The Unions err in asserting that the Authority "should have, but did not, consider" other relevant factors. (Pet'r Br. at 31.) A requirement that the Authority shall "consider" various factors before deciding whether to issue a general statement,

5 C.F.R. § 2427.5, "does not equate to a mandate that such consideration must be spelled out on the record." *United States v. Pyles*, 862 F.3d 82, 90 (D.C. Cir. 2017) (discussing the requirement that district court's "Shall consider" sentencing factors listed in 18 U.S.C. § 3553(a)); *see also Bd. of Cty. Comm'rs of Wash. Cnty.*, 955 F.3d at 99 (without analyzing multiple contentions offered by a party seeking a statutory waiver, an agency could reasonably deny the waiver based on an implicit conclusion that two particular criteria "outweighed all of the other points"). The Unions offer no support for the bare assertion that the Authority failed to consider any of the relevant factors. That the Authority's statement expressly focused on one factor—preventing a proliferation of cases—indicates that the Authority determined that this factor was the most important one tipping the balance in favor of issuing a statement here. The Unions offer no basis for concluding that the Authority abused its discretion in making the determination.

Section 2427.5 of the Authority's regulations, in listing six factors that guide the Authority in deciding whether to issue a general statement or not, does not dictate the manner in which the considerations should be applied. *See* 5 C.F.R. § 2427.5. The regulation does not specify the weight of any particular factor or the method of balancing various factors against one another. Indeed, Section 2427.5 does not even

specify whether an affirmative response to a particular consideration would counsel *in favor of* or *against* issuing a general statement.

The Authority's practice spanning forty years and nearly fifty different policy statement requests has been consistent. Based on the facts and circumstances of each case, the Authority focuses on the most salient criterion or criteria in evaluating whether to grant a policy statement request. Indeed, in its 40-year history, the Authority has *never* addressed all six factors. *See e.g.*, *Interpretation & Guidance*, 15 FLRA 564, 564 (1984) (granting request without specifically addressing any § 2427.5 criteria), *aff'd*, *Am. Fed'n Gov't Emps., AFL-CIO v. FLRA*, 778 F.2d 850, 851 (D.C. Cir. 1985); *Nat'l Treasury Emps. Union*, 3 FLRA 623, 624 (1980) (addressing only criterion (a)). At most, the Authority has addressed three criteria in a single case. *Decision on Request for Gen. Statement of Policy or Guidance*, 2 FLRA 649, 651-52 (1980) (addressing 5 C.F.R. § 2427.5(a), (b), and (c)).

This Court should defer to the Authority's interpretation and application of the regulation that it promulgated. *Nat'l Lifeline Ass'n*, 983 F.3d at 507. The Authority's decision that issuing a general statement in this case satisfied the pertinent § 2427.5 criteria was the Authority's "authoritative position" because it was captured in an officially-published Authority decision. (*See* JA 100.) The decision implicated the Authority's substantive expertise because it required the Authority to evaluate whether issuing a general statement would advance the Authority's mandate to

"provide leadership in establishing policies and guidance relating to matters under the [Statute]." *See* 5 U.S.C. § 7105(a)(1).

Further, the Authority's decision not to address all six considerations, and to analyze only those that provided sufficient bases on their own to grant or deny a request, reflects the Authority's "fair and considered judgment," *id.* (quoting *Kisor*, 139 S. Ct. at 2417), because it was consistent with every decision that the Authority has ever issued concerning a policy statement request. This unbroken practice reflects a considered and settled view on the proper application of § 2427.5's considerations. The Authority's decision to grant USDA's request under § 2427.5 (a) and (b) was therefore reasonable. *Nat'l Lifeline Ass'n*, 983 F.3d at 507 (quoting *Kisor*, 139 S. Ct. at 2416).

The Unions assert that the Authority's policy statement will "inject confusion into this area, causing proliferation of related disputes and cases." (Pet'r Br. at 30). But the Authority's policy statement definitively resolves the legal issues it addresses. There is no doubt that the Authority will resolve any future disputes that the Unions may wish to bring on this subject using the principles articulated in its Decision. And the clarity of the Authority's guidance here will deter frivolous disputes in concrete cases. Indeed, that is why the Unions have sought review of the Authority's Decision in this Court. (*Cf.* Pet'r Br. at 18) ("After the [Authority's] decision, the Unions will face unnecessary and illegal agency head review.").

The Unions assert that "[t]he legal question at issue here would be more appropriately resolved in the context of a concrete dispute concerning an actual continuance provision." (Pet'r Br. at 30.) But the Unions fail to explain how additional factual context in a particular dispute would change the Authority's definitive legal conclusion regarding the proper interpretation of the statutory phrase "collective-bargaining agreement."

Nor was the Authority's decision to grant USDA's request for a policy statement about continuance provisions inconsistent with its previous decision to deny a separate USDA request concerning rollover provisions. (Pet'r Br. 29 (citing *USDA, Office of Gen. Counsel*, 71 FLRA 504, 504 (2019)).) As the Authority recognized in its decision denying USDA's request about rollover provisions, parties may turn to existing precedent to understand the application of § 7116(a)(7) in the context of rollover CBAs. *USDA, Office of Gen. Counsel*, 71 FLRA at 504 n.7 (citing *U.S. Dep't of Com., Pat. & Trademark Office*, 65 FLRA 817, 819 (2011) (reviewing Authority precedent on applying § 7116(a)(7) in the context of rollover CBAs)). In contrast, the Decision was the first time that the Authority systematically analyzed the applications of §§ 7114(c) and 7116(a)(7) to CBAs that were extended pursuant to continuance provisions. These divergent circumstances justified the Authority's differing treatment of USDA's two requests.

Moreover, that the Authority previously declined to issue a "similar policy statement" (Pet'r Br. at 29), did not obligate the Authority to forever forego doing so

once the Authority concluded that a statement would usefully resolve a legal issue likely to be presented in a proliferation of cases. Nothing in the statute or the Authority's regulations required the Authority to take the wait-and-see approach the Unions would have favored.

## CONCLUSION

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

Respectfully submitted,

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 12,615 words excluding exempt material.

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

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 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
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Federal Labor Relations Authority

# ADDENDUM

Relevant Statutes and Regulations

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**5 U.S.C. § 706**
**Scope of review**

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

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

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

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

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

**5 U.S.C. § 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. § 7114(c)**
**Representation rights and duties**

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

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

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

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

**5 U.S.C. § 7116(a)**
**Unfair labor practices**

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

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

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

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

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

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

**5 U.S.C. § 7119(c)(5)(B)**
**Negotiation impasses; Federal Service Impasses Panel**

(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 subp[o]enas 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.

**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.

**18 U.S.C. § 3553(a)**
**Imposition of a sentence**

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or

policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

**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.