[ORAL ARGUMENT NOT YET SCHEDULED]

No. 25-5157

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

NATIONAL TREASURY EMPLOYEES UNION,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, et al.,

Defendants-Appellants.

On appeal from the United States District Court
for the District of Columbia

APPELLEE'S PETITION FOR REHEARING EN BANC

JULIE M. WILSON
General Counsel

PARAS N. SHAH
Deputy General Counsel

ALLISON C. GILES
Assistant Counsel

JESSICA HORNE
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
800 K Street N.W.,
Suite 1000
Washington, D.C. 20001
(202) 572-5500

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RULE 40 STATEMENT

The Court should grant rehearing en banc because this case presents a question of exceptional importance: whether the Congress that codified federal-sector collective bargaining intended to allow the President to dismantle its statutory system through a narrow national-security exemption—and to allow it where the President states that he is using the exemption to punish unions who do not support him and to make federal employees easier to fire. If the government's position prevails, there is no national-security exemption that the President could make—no matter how outlandish or pretextual—that would be subject to judicial review or exceed his statutory authority.

1. Congress passed the Federal Service Labor-Management Relations Statute of 1978 (the Statute) to codify federal labor relations and to safeguard it from the whims of any President; to promote collective bargaining; and to strengthen federal labor unions. *See* 5 U.S.C. § 7101(a); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983).

This Court's 2-1 decision to stay the district court's emergency relief pending appeal might very well end federal-sector collective

bargaining. In practical terms, the ruling—which was based strictly on an equities analysis (A2 n.1)—effects what the district court aimed to prevent: it will kill federal-sector unions.

Executive Order No. 14,251, *Exclusions from Federal Labor-Management Relations Programs* (the Executive Order), strips collective-bargaining rights from federal workers in over thirty agencies or subdivisions, such as the Environmental Protection Agency and the Internal Revenue Service (IRS). A7. In all, it takes about two-thirds of federal workers out of the Statute's coverage. *Id.* For NTEU, that means "65.9% of all NTEU-represented employees, or approximately 104,278 employees." A46.

The panel's stay will allow agencies to continue to ignore federal-sector unions like NTEU—to refuse to bargain with them or to engage with them—all while federal workers are under unprecedented attack. That includes the impending large-scale reductions-in-force. This Court's stay means that the one-dozen NTEU-represented agencies that that Executive Order targets will continue not to discuss those reductions-in-force with NTEU or honor the reduction-in-force procedures in their collective-bargaining agreements. A35, A47–48.

NTEU will not get these chances to advocate for and to protect its workers back: "there is a substantial possibility that only a small fraction of its once large union w[ill] remain upon prevailing in this litigation." A48. The same will be true for other federal-sector unions.

This Court's stay will also allow federal agencies exempted through the Executive Order to refuse to process dues payments to federal-sector unions via the payroll deduction process that Congress created in 5 U.S.C. § 7115(a). Those dues payments restarted less than two weeks ago because of the district court's preliminary injunction and after NTEU had lost over $3 million in dues revenue. Doc. #2114615 at 126–27, ¶ 4.[1] The stay will restart those losses, which for NTEU will take away over half of its revenue. A50–51.

As the district court understood, those losses threaten NTEU's very existence. A50. Indeed, the largest federal-sector union, the American Federation of Government Employees, has announced it is laying off half its staff nationwide because of the effect of this Administration's actions on its finances. Doc. #2114615 at 127, ¶ 6.

[1] Citations to court documents use the page numbers generated in the ECF header.

With the two largest federal-sector unions (among others) on the precipice, so too is Congress's statutory regime.

And the final blow for federal-sector unions might be just around the corner. The Executive Order, Section 7, directs agency heads to recommend additional national-security exemptions from the Statute. If the government gets the unchecked executive power that it is asking for here, additional exemptions are sure to come.

2. The majority's ruling is based on a plain factual misunderstanding: that agencies were not implementing the Executive Order before the district court enjoined its implementation. That is untrue. The district court's factual findings and the record, relevant portions of which NTEU submitted to this Court with its opposition, are directly to the contrary. *See* Doc. #2114615 at 33–130.

But the majority ignored that record and the district court's factual findings. It then gave the government a pass on its own burden, allowing it to "glide[] over its obligation to show irreparable injury." A9 (Childs, J., dissenting). The majority found it sufficient for the government, "[i]n one brief paragraph," to simply invoke the words "national security." *Id.* The majority did not stop there. It went on to

raise arguments that the government did not even suggest to the Court: that the preliminary injunction is too broad and that it "doubt[s] that $0 was the 'appropriate bond' in this case." A3, A5 n.4.

"[T]he central purpose of [a stay pending appeal] is to prevent irreparable injury, not to short-circuit the normal course of litigation." *J.G.G. v. Trump*, No. 25-5067, 2025 U.S. App. LEXIS 7131, at *36 (D.C. Cir. Mar. 26, 2025) (Henderson, J., concurring). Yet the majority rushed past the district court's factual findings to upend the status quo in a way that will harm federal-sector unions irreparably. Putting the Executive Order, Section 2, back into effect will accomplish the Order's aims of dismantling Congress's collective-bargaining regime and punishing union dissent. This merits the full Court's intervention.

BACKGROUND

I. Congress's Broad Grant of Collective-Bargaining Rights to Federal Workers

"In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest than it had been under the Executive Order regime." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 107.

As Title VII of the Act, Congress enacted the Statute, 5 U.S.C. § 7101 *et seq*. Congress intended the Statute to replace the existing Executive-Order regime governing collective bargaining with a "statutory Federal labor-management program which cannot be universally altered by any President." 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978) (statement of Rep. Clay).[2]

The Statute rests on Congress's finding that "the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . safeguards the public interest." 5 U.S.C. § 7101(a). The Statute assigns federal-sector unions the job of "act[ing] for" and "negotiat[ing] collective-bargaining agreements covering" all employees in the bargaining units that they are elected to represent. *Id*. § 7114(a).

Congress excluded some agencies from the Statute, like the Federal Bureau of Investigation. *Id*. § 7103(a)(3). The Statute gives the President narrow grounds to exclude additional agencies if he

[2] This Court has relied on statements from "major players in the legislation, such as Representative Clay." *OPM v. FLRA*, 864 F.2d 165, 169 (D.C. Cir. 1988).

determines that an agency or subdivision has a "primary function [of] intelligence, counterintelligence, investigative, or national security work," and the Statute cannot be applied "in a manner consistent with national security requirements and considerations." *Id.* § 7103(b)(1).

II. The President's Sweeping Executive Order Cancelling Statutory Collective-Bargaining Rights

Before the Executive Order at issue, no President had used Section 7103(b)(1)'s narrow national-security exemption to exclude an entire Cabinet-level agency from the Statute—let alone multiple Cabinet-level agencies. A7. This Executive Order, though, strips collective-bargaining rights from about two-thirds of federal workers, including 65.9% of the workers that NTEU represents. A14, A46.

The Office of Personnel Management (OPM) issued guidance explaining that excluded agencies "are no longer subject to the collective-bargaining requirements of [chapter 71]" and that the unions representing bargaining-unit employees at those agencies have "los[t] their status" as the exclusive representative for those employees. A19.

NTEU represents nearly a dozen federal agencies that the Executive Order excludes from the Statute's coverage. *See* Doc. #2114615 at 37, ¶ 6. NTEU has represented several of the

bargaining units that the Executive Order excludes from the Statute's coverage for decades and some since the Statute's inception in 1978. *See* Doc. #2114615 at 48–50, ¶¶ 46–57.

III. The Administration's Admitted Motivations Behind the Executive Order

The Administration issued a Fact Sheet and OPM Guidance on the same night as the Executive Order. Each discusses the Executive Order's impetus: facilitating mass firings of federal employees and exacting political vengeance.

A. The OPM Guidance acknowledges the larger context: the President's direction to agencies "to prepare large-scale reductions in force." A35. Now, with the Executive Order's issuance, OPM advises that "agencies can proceed to '[d]isregard contractual [reduction-in-force] articles' and 'prepare large-scale reductions in force' as the 'President has directed.'" *Id*. According to OPM, "Agency [collective-bargaining agreements] often create procedural impediments' to removing [underperforming] employees." *Id*.

B. The White House Fact Sheet reveals an additional motivation for the Executive Order: political retribution against "hostile

Federal unions." A18. The Fact Sheet states that "[c]ertain Federal unions have declared war on President Trump's agenda." A19. NTEU is one of the "Federal unions" that has fought back against President Trump's agenda. NTEU has initiated litigation against several Administration initiatives that it believes are unlawful. A33.

The Executive Order targets a dozen different collective-bargaining relationships that NTEU has with federal agencies and departments. A17–18. That includes NTEU's largest bargaining unit: the IRS. Doc. #2114615 at 39, 43, and 48, ¶¶ 19, 37, and 46.

IV. Procedural History

On March 31, NTEU filed a lawsuit alleging that the Executive Order's exemptions of its bargaining units from the Statute, individually and collectively, were ultra vires because they exceeded the President's authority under the Statute; and that the exemptions reflected First Amendment retaliation for NTEU's litigation against the Administration. A20. NTEU then moved for a preliminary injunction against the Executive Order, Section 2, and OPM's implementing guidance against the defendants. *Id.*

In a decision issued on April 28, the district court held that the White House's own words and actions defeated the presumption of regularity and allowed for judicial review of NTEU's ultra vires claims. A29–36. The district court found "clear evidence" that the President's sweeping use of that narrow exemption was "retaliatory" and aimed to "punish unions for the 'war' they have 'declared [] on President Trump's agenda"; served to facilitate "unrelated policy objectives" like "mak[ing] federal employees easier to fire"; and "bear no relation to the [statutory] criteria" for the national-security exemption. A33–36, A38. The evidence likewise showed that the President's exemptions were based on "disagreement with Congress's decision to extend collective bargaining rights to the federal workforce broadly, rather than a determination that such rights cannot be applied in a 'manner consistent with national security requirements and considerations.'" A32 (quoting 5 U.S.C. § 7103(b)(1)(B)).

The district court concluded that NTEU would likely succeed in proving its ultra vires claims (A36–45 (abstaining from evaluating First Amendment claim)); that it had shown irreparable harm given the damage to its bargaining power and the financial losses that threatened

its very existence (A45–52); and that the equities favored preliminary relief (A52–53). The district court thus preliminarily enjoined Section 2 of the Executive Order as it applies to eleven NTEU-represented agencies that the Order exempts from the Statute entirely and another NTEU-represented agency that the Order exempts in part. A17–18.

On April 30, the government appealed the district court's ruling. It then asked this Court for an immediate administrative stay of the ruling and a motion for stay pending appeal. Doc. #2113741. This Court did not grant an administrative stay, but on May 16 granted a stay pending appeal in a divided decision that was based solely on the equitable factors. A2 n.1.

ARGUMENT

The Majority's Ruling Is Wrong and Will Cause Irreparable Harm to Federal-Sector Collective Bargaining.

A. The Majority's Entire Analysis Is Based on a Factual Misunderstanding.

At the heart of the majority's equities analysis is an incorrect fact: that agencies were complying with their collective-bargaining agreements before the district court's injunction. A2–4 (stating that "the Government directed agencies to *refrain* from terminating collective-bargaining agreements . . . until after the litigation concludes"). This

belief is based exclusively on a Frequently Asked Questions document that OPM issued on April 8—after NTEU filed suit and moved for preliminary relief—which contains the following suggestion: that "'[a]gencies should not terminate any collective bargaining agreements . . . until the conclusion of litigation or further guidance from OPM directing such termination.'" A10, A48 (quoting FAQ document).

Based on the mistaken premise that agencies complied with this suggestion, the majority concluded that neither NTEU nor anyone else is harmed from a stay of the preliminary injunction. A2, A4. Indeed, in the majority's view, the preliminary injunction was not needed at all, given agencies' alleged compliance with their collective-bargaining agreements. A2. Thus, the majority concludes, the government will likely prevail on appeal. A1-2.

The panel majority's foundational understanding of the state of affairs before the preliminary injunction issued is incorrect. The government briefly argued to the district court that an April 8 issuance from OPM—the document on which the majority relies—showed that collective-bargaining agreements remained in force. Dist. Ct. Doc. # 26 at 15. But the government did not raise that argument again after

NTEU dispatched it in its reply. Dist. Ct. Doc. # 29 at 25–26 ("Despite the magic words of the FAQs, agencies have, in fact, utterly rejected their collective bargaining obligations with NTEU. Before and after April 8, agencies have refused to meet with NTEU, to bargain with NTEU, or to honor contractual obligations"), *id.* # 29-1 (attaching exhibits showing defendants' non-compliance with agreements).

Indeed, at oral argument on NTEU's motion for a preliminary injunction, the government refused to defend the argument made in its opposition after NTEU raised it. As NTEU stated:

> [T]his didn't come up in the government's initial presentation, but . . . there shouldn't be any factual question here that agencies are disregarding our CBAs. In the government's brief it argued that agencies are not terminating CBAs, and it offered an FAQ document from the Office of Personnel Management advising agencies that they . . . "shouldn't terminate CBAs."
>
> Your Honor read from the March 27th OPM guidance that's still in force . . . [It] details actions that agencies should take . . . "after terminating CBAs." And those actions include disregarding reduction in force articles [in] CBAs. We know, and it's established in the record, that's already happening here with NTEU's agencies.
>
> It also says, "After termination, stop processing dues payment[s] via payroll deduction." We already know, and it's in the record, that's already happening. So if it happens to be the case that some of the agency defendants here haven't used the magic word "termination," those contracts have been

> terminated and agencies are acting consistent with the March 27th guidance and they are not honoring our CBAs.

Dist. Ct. Doc. # 33 at 46–47. The government chose not to respond and defend its earlier position. *Id.* at 48–53, 55.

Consistent with the undisputed record evidence, the district court found that:

> [C]ertain agencies have already failed to honor provisions of the respective collective bargaining agreements by failing to withhold dues payment from employees' paychecks, "disavow[ing] any obligation to bargain," and beginning to implement reductions in force.[]
>
> In other words, notwithstanding the lack of the formal cancellation of the collective bargaining agreements, the agencies and subdivisions have been instructed that the protections in the [Statute] are no longer operative . . . [and] have already begun disregarding provisions of the collective bargaining agreements in line with the OPM Guidance.

A47, 49 (internal citations omitted). Those factual findings must be accepted unless clearly erroneous. *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012). And, here, these findings are undisputed.

The majority nonetheless accepted the government's conclusory attempt to resurrect its debunked argument. Doc. #2113741 at 32. And it completely ignored both the district court's findings to the contrary and the supporting evidence that NTEU appended to its submission to

the panel. Doc. #2114615 at 33–130. That error renders its entire analysis plainly wrong.

B. NTEU Demonstrated Irreparable Harm and Is Thus Likely to Prevail on Appeal

The majority's sole basis for its determination that NTEU is unlikely to succeed on the merits is its conclusion that NTEU failed to show irreparable harm. A2–3. That conclusion, as explained above, is based entirely on the mistaken premise that agencies were honoring their collective-bargaining agreements before the district court's order. An accurate factual understanding leaves no doubt that NTEU showed irreparable harm.

1. The Executive Order drastically diminishes NTEU's bargaining power, which is an additional irreparable injury. The Executive Order took away about two-thirds of the workers that NTEU represents, and it led to agencies disregarding a dozen of its collective-bargaining agreements. A46, A49. Agencies covered by the Executive Order stopped bargaining with NTEU on changes to conditions of employment—including the impending reductions-in-force—and stopped participating in the grievance-arbitration process. Doc. #2114615 at 56–58, ¶¶ 15–24. NTEU members in these agencies

cancelled their membership explicitly because of the Order. *Id.* at 128 ("President Trump demolished the union several weeks ago . . . Please see the attached form, SF-1188 to end my participation in NTEU.").

Courts have held that government action that "fundamentally diminishe[s]" union bargaining power is an Article III injury (*NTEU v. Chertoff*, 452 F.3d 839, 853 (D.C. Cir. 2006)) and that an employer's refusal to bargain with a union is likely to cause irreparable harm (*Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011)). Absent the district court's emergency relief, there is a "very real danger" that NTEU's membership will continue to "erode" and that any final remedy "would be ineffective." *See Asseo v. Centro Medico Del Turabo, Inc.*, 900 F.2d 445, 454 (1st Cir. 1990).

2. NTEU lost over $2 million before the district court's preliminary injunction because the agency defendants stopped processing dues payments to NTEU through payroll deductions, as 5 U.S.C. § 7115 and their collective-bargaining agreements require. A50–51. And by the time defendants complied with the preliminary injunction, losses exceeded $3 million. Doc. #2114615 at 126–27, ¶ 4.

Staying the preliminary injunction will cause NTEU to lose over half of its annual revenue. *See* A50–51.

Financial losses of this magnitude threaten NTEU's very existence (A50) and thus constitute irreparable harm. *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Wilmer Cutler Pickering Hale & Dorr LLP v. Exec. Off. of the President*, No. 25-cv-917, 2025 U.S. Dist. LEXIS 61536, at *4–5 (D.D.C. Mar. 28, 2025) (finding irreparable harm where an Executive Order threatened almost one-third of the plaintiff's revenue, which would be a "devastating blow to plaintiff—threatening plaintiff's very existence").

The majority suggested NTEU can make up for dues that are lost through agencies stopping payroll deductions by asking members to make voluntary contributions. A3. But the Executive Order takes away the apparatus that Congress created in 5 U.S.C. § 7115 and on which NTEU relies for virtually all its dues payments. A50–51. And the Executive Order also takes away the basic reason that NTEU members pay dues at all: to support their exclusive representative, which is entitled to collectively bargain on their behalf and with which their employers must engage. A51; *cf. Perkins Coie LLP v. U.S. Dep't of*

Justice, No. 25-716, 2025 U.S. Dist. LEXIS 84475, at *38 n.20 (D.D.C. May 2, 2025) (noting that executive order took away the reason clients hired firm: i.e., it "hamper[ed] the effectiveness of [firm's] representation of clients").

C. Maintaining Collective Bargaining Would Not Irreparably Harm the Government.

1. Preserving Congress's collective-bargaining regime while the government's appeal is pending will not cause it irreparable harm. The basis for the government's claim of harm is "a generalized statement that interference with 'the government's investigation, intelligence, and national security functions—or . . . the government's ability to supervise the employees engaged in such work—would appreciably injure the Nation's interests.'" A9 (Childs, J., dissenting).

But, as Judge Childs explains, "the district court's injunction maintains the state of affairs that has existed for nearly half a century: NTEU has bargained on behalf of federal workers since the 1970s. The Government does not explain why irreparable injury will result from continuing this decades-long practice for a short period of time while we adjudicate the merits of this appeal." *Id.* (internal citations omitted) That should end the analysis.

And while "the Government claims that a stay would protect the President's ability 'to guarantee the effective operation of agencies relevant to national security without the constraints of collective bargaining'" (*id.*), that is merely a policy objection to collective bargaining, which the Executive Branch may take up with Congress. It is not a showing of irreparable harm.

This Court, moreover, has underscored that "the scope of bargaining under [the Statute] is extraordinarily narrow." *Chertoff*, 452 F.3d at 860. "[T]he restricted scope of bargaining under [the Statute] gives federal agencies great 'flexibility' in collective bargaining." *Id.* at 861. And the Statute grants agencies wide latitude to act promptly in exigent situations and often allows bargaining to occur *after* an agency implements a change to working conditions.[3]

2. Critically important here is that the district court found "clear evidence" that the Executive Order's national-security exemptions were *not* motivated by national-security concerns. *See* A29–

[3] *See* 5 U.S.C. § 7106 (granting agencies the right "to take whatever actions may be necessary to carry out the agency mission during emergencies"); *DHS, ICE*, 70 F.L.R.A. 628, 630 (2018) (agency may bargain after implementing changes to condition of employment if made pursuant to a law or government-wide regulation).

36. Instead, the evidence—the Administration's own words—showed that the exemptions were motivated by a desire "to punish unions for the 'war' they have 'declared [] on President Trump's agenda;" and "to remove the barriers created by the [Statute] to his unrelated policy objectives," *i.e.*, "mak[ing] federal employees easier to fire." A34–36.

These factual findings, which must be accepted unless clearly erroneous, likewise defeat the government's claim of irreparable harm absent a stay.

* * *

"When confronting a statutory question touching on . . . national security . . . a court does not adequately discharge its duty by pointing to the broad authority of the President and Congress and vacating the field without considered analysis." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 827 (9th Cir. 2017). The government should not get emergency relief by simply using the words "national security." *Cf.* A4.

D. A Stay Pending Appeal Would Harm Other Parties and the Public.

The majority based its conclusion that a stay pending appeal will not hurt other parties on the same mistaken fact that permeates the

rest of its analysis: the majority's belief that the government is honoring collective-bargaining agreements. *See* A4 (relying on "the Government's self-imposed restrictions."). But those agreements are being disregarded. So, the majority's stay of the district court's emergency relief will hurt the "over one-hundred thousand NTEU-represented federal workers" who will lose their collective-bargaining rights. *See id.*

And while the government and the public's interests generally merge, they should not here. Congress concluded that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a). If Congress's words have meaning, a stay that allows the President to eviscerate federal-sector collective bargaining through "retaliatory" national-security exemptions is not in the public interest. A34.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

/s/ Julie M. Wilson
JULIE M. WILSON
General Counsel

/s/ Paras N. Shah
PARAS N. SHAH
Deputy General Counsel

/s/ Allison C. Giles
ALLISON C. GILES
Assistant Counsel

/s/ Jessica Horne
JESSICA HORNE
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
800 K Street N.W., Suite 1000
Washington, D.C. 20001
(202) 572-5500
julie.wilson@nteu.org
paras.shah@nteu.org
allie.giles@nteu.org
jessica.horne@nteu.org

May 23, 2025

Counsel for Appellee NTEU

CERTIFICATE OF COMPLIANCE

I hereby certify this response complies with the requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, and that it complies with the typeface and type-volume limitation of Federal Rule of Appellate Procedure 40(d)(3) because it contains 3,895 words, excluding those words that Federal Rule of Appellate Procedure 32(f) exempts.

/s/ Jessica Horne
JESSICA HORNE
Assistant Counsel