IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION)
1750 H Street, N.W.)
Washington, D.C. 20006)
)
Plaintiff,)
)
v.)
)
DONALD J. TRUMP,)
President of the United States,)
1600 Pennsylvania Avenue, N.W.) No. 1:18-cv-01348-KBJ
Washington, D.C. 20035,)
)
and)
)
JEFF T.H. PON,)
Director of the Office of Personnel Management)
1900 E Street, N.W.)
Washington, D.C. 20415)
Defendants.)
____)

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING
PLAINTIFF NTEU'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff National Treasury Employees Union (NTEU) is a labor organization that represents approximately 150,000 federal government employees. On June 6, 2018, NTEU filed this action to challenge provisions in two executive orders issued by Defendant Donald J. Trump on May 25, 2018, as contrary to federal statute. Specifically, NTEU challenges (1) Sections 4(a)(i), (ii), and (v) of Executive Order No. 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use; and (2) Sections 4(a) and (c) of Executive Order No. 13839, Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles.

The challenged executive order provisions target federal sector labor organizations and the employees whom they represent, and they are plainly unlawful because they conflict with federal statute. These illegal provisions will cause federal agencies to (1) propose contractual provisions during ongoing collective bargaining negotiations with NTEU that, while mandated or urged by the President, are inconsistent with federal statute; and (2) give NTEU notice that they intend to require the renegotiation or, potentially, termination, of existing contractual provisions that have been agreed upon and that are entirely in accord with federal statute.

The illegal provisions of the executive orders that are challenged in this action, if not preliminarily enjoined, will thus cause severe and irreparable injuries to NTEU and the employees that it represents. NTEU's bargaining power will be diminished significantly and in ways that are contrary to the collective bargaining scheme that Congress carefully created. To conform to the executive orders, federal agencies shall force upon NTEU contractual provisions that are inconsistent with federal statute, but required by the illegal executive orders. The executive orders further compel agencies' rejection of NTEU's contractual proposals that are

consistent with federal statute, but not the illegal executive orders. And even provisions in collective bargaining agreements that are currently in force, which are consistent with federal statute but at odds with the overreaching provisions of the executive order, can be expected to be called into question. Because of these constraints, NTEU's will become a less effective advocate for its members, and its status in the workplace in terms of recruiting and retaining members and dealing with agency employers will be harmed. NTEU's members will also feel the sting of NTEU's injuries and diminishment, which will lead to them being deprived of the rights that Congress intended for them to have. NTEU thus asks that this Court grant its motion for a preliminary injunction, as discussed in more detail below.

BACKGROUND

I. The Statutory Framework: The Civil Service Reform Act and The Federal Service Labor-Management Relations Statute.

Prior to 1978, federal employment was governed by an "outdated patchwork of statutes and rules built up over almost a century." United States v. Fausto, 484 U.S. 439, 444 (1988). Congress reacted to this state of disarray by enacting the Civil Service Reform Act of 1978 (the Act), which "comprehensively overhauled the civil service system." Lindahl v. Office of Pers. Mgmt., 470 U.S. 768, 773 (1985). The Act "prescribes in great detail the protections and remedies applicable . . ." to federal employees. Fausto, 484 U.S. at 443.

"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 [prior] regime." Bureau of Alcohol, Tobacco, & Firearms v. Fed. Labor Rel. Auth., 464 U.S. 89, 107 (1983) (BATF). Thus, as a central piece of this extensive federal civil service reform, Congress enacted the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. (the Statute), explicitly

finding "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" to "safeguard[] the public interest." 5 U.S.C. § 7101(a)(1).

Through the Statute, Congress assigned federal sector labor organizations the job of "act[ing] for" and "negotiat[ing] collective bargaining agreements covering" not only their members, but all employees in the bargaining units that they were elected to represent. 5 U.S.C. § 7114(a). Congress did so based upon its conclusion that the work of labor organizations "contributes to the effective conduct of public business" and "facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a)(1). The responsibility that Congress has bestowed on labor organizations, like NTEU, thus requires them to represent all employees in their bargaining units fairly, in good faith, and without discrimination, regardless of whether they have joined the union. In NTEU's case, this means providing representation to approximately 150,000 bargaining unit employees working in 32 different federal departments and agencies.

A. Congress's Deliberate Decision to Expand Official Time.

To allow labor organizations to do what the Statute requires of them, Congress consciously, and dramatically, expanded upon the "official time" concept contained in the executive orders that governed federal sector labor-management relations prior to the Statute's enactment. That concept allows employee union representatives what is known as "official time" for certain work-related functions involving agencies, labor organizations and the agency employees that they represent. Hence, Congress decided that managers and representatives of labor organizations can perform certain work-related functions during the work day, while being paid by the government.

The events leading up to Congress's decision to expand official time show that Congress understood the value of official time. The legislative history of the Act shows that an early bill proposed in Senate would have retained then-existing restrictions on the authorization of official time. See BATF, 464 U.S. at 101-02 (citing S. Rep. No. 95-969, at 112 (1978)). But Congress, instead, adopted 5 U.S.C. § 7131 "in its present form." Id. at 102. Representative Clay, who co-introduced the bill that became the enacted legislation, stated emphatically that union negotiators "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." Id. at 102 (quoting 124 Cong. Rec. 29188 (1978) (remarks of Rep. Clay) and citing H.R. Conf. Rep. No. 95-1717, at 111 (1978)).

Through Section 7131 of Title 5, Congress made several deliberate policy decisions. Congress rejected, completely, the limitations on official time in the executive orders that predated the Statute. It chose, instead, to expressly provide for official time, without limitation, in two circumstances: the negotiating of a collective bargaining agreement and the participation in a proceeding before the Federal Labor Relations Authority. See 5 U.S.C. § 7131(a),(c).

Congress did something else in Section 7131: it purposefully left it to labor organizations and agencies to agree upon the other amounts of official time that are "reasonable, necessary, and in the public interest" (5 U.S.C. § 7131(d)). Congress declared that once the union and agency agree on that amount, such official time "shall be granted." 5 U.S.C. § 7131(d). Congress also provided that the agreed upon amount of official time could be used by any employee representing the union or by any bargaining unit employee "in connection with any other matter covered by [the Statute]." 5 U.S.C. § 7131(d). In other words, official time could be used for any representational work, performed by a labor organization, or any other matter

related to Chapter 71 of Title 5, so long as it did not relate to the union's "internal business," e.g., "solicitation of membership, election of labor organization officials, and collection of dues." 5 U.S.C. § 7131(b).

In short, the policy decisions made by Congress through Section 7131 significantly expanded the categories of union work for which official time might be available beyond the executive orders that previously governed federal labor relations. Section 7131 also plainly marked a conscious shift by Congress to a new official time system that deferred to the will, experience, and expertise of the negotiating parties to a collective bargaining agreement. This new system mandated official time for certain purposes (5 U.S.C. § 7131(a), (c)) and delegated to labor organizations and agencies the right to bargain for other amounts of official time that they deem to be "reasonable, necessary, and in the public interest" (5 U.S.C. § 7131(d)).

B. The Expansive Negotiated Grievance Procedure That Congress Created to Facilitate the Resolution of Labor-Management Disputes.

In the Statute, Congress commanded that each federal sector collective bargaining agreement include a negotiated grievance procedure (5 U.S.C. § 7121(a)) and that the negotiated grievance procedure culminate in binding arbitration (5 U.S.C. § 7121(b)). Congress also resolved that the negotiated grievance procedure must be broad in scope, to include:

> any complaint-- (A) by any employee concerning any matter relating to the employment of the employee; (B) by any labor organization concerning any matter relating to the employment of any employee; or (C) by any employee, labor organization, or agency concerning-- (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.

5 U.S.C. § 7103(a)(9).

Not only did Congress provide for this expansive negotiated grievance procedure, it also took care to prescribe matters—five matters, specifically—that were to be excluded from that

procedure. 5 U.S.C. § 7121(c). Congress took care in excluding only the following matters from the negotiated grievance procedure: "(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities); (2) retirement, life insurance, or health insurance; (3) a suspension or removal under section 7532 of this title; (4) any examination, certification, or appointment; or (5) the classification of any position which does not result in the reduction in grade or pay of an employee." 5 U.S.C. § 7121(c). All other matters fitting within Congress's expansive definition of "grievance" in Section 7103(a)(9) are properly subject to the negotiated grievance procedure, though the negotiating parties may elect to exclude other matters (5 U.S.C. § 7121(a)(2)).

Consistent with the Statute, NTEU negotiates grievance procedures that are broad in scope, through which employees or NTEU itself can file a grievance on matters relating to employment or violations of law. Declaration of Kenneth Moffett, Jr. (Moffett Decl.) at ¶ 20. The negotiated grievance procedures in NTEU's collective bargaining agreements consistently allow for employees or NTEU to grieve, for example, performance ratings and incentive pay, including monetary awards. Id.

Employees having the opportunity to contest flawed performance ratings is critical. The federal regulations governing reductions in force take performance ratings into account in prescribing how agencies would determine which employees are retained and which employees would be released. 5 C.F.R. Part 351. Consistent with that regulatory scheme, NTEU's agreements with, for example, the Internal Revenue Service and Customs and Border Protection factor annual performance ratings into the reduction in force procedures contained in those contracts. Moffett Decl. at ¶ 21. Further underscoring the importance of the negotiated grievance procedure in performance ratings matters, NTEU has successfully raised and resolved

matters through its negotiated grievances procedures with the Securities and Exchange Commission and the Federal Deposit Insurance Corporation concerning illegal discrimination related to performance appraisals. Moffett Decl. at ¶ 22.

NTEU's collective bargaining agreements also generally allow for employees or NTEU to file grievances related to types of incentive pay, including monetary awards. Moffett Decl. at ¶ 23. NTEU's contract with the Internal Revenue Service, for example, provides that "[t]he merits of the Employer's decision to withhold an award are subject to the negotiated grievance procedure." Id. The importance of being able to challenge employer decisions related to these types of pay and awards is important because, as with performance ratings, the employer's decisions might be flawed or discriminatory. Id. A challenge through the negotiated grievance procedure would thus be necessary to avoid financial harm to the affected employee(s). Id.

C. Congress's Decision on Removals for Performance.

The comprehensive federal personnel scheme that Congress created through the Civil Service Reform Act establishes, among other things, processes for evaluating employee performance, including procedures for addressing the performance of an employee that drops below an acceptable level. In Section 4302 of Title 5, Congress directs agencies to develop one or more personnel appraisal systems that "(1) provide for periodic appraisals of job performance of employees; (2) encourage employee participation in establishing performance standards; and (3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees."

Congress further provided in Section 4302 that, "[u]nder regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for . . . reassigning, reducing in grade, or removing employees who continue to have unacceptable

performance but only after an opportunity to demonstrate acceptable performance." 5 U.S.C. 4302(c)(6) (emphasis added). The statutorily mandated "opportunity to demonstrate acceptable performance" (5 U.S.C. 4302(c)(6)) is commonly known as a "performance improvement period" (PIP).

Agencies must bargain with unions over conditions of employment to the extent that proposals are not inconsistent with federal law, government-wide statute, or rights that the Statute reserves for agency management. See 5 U.S.C. §§ 7103(12),(14), 7106(a), 7117(a)(1). Congress chose not to define the precise length of a PIP in Section 4302(c)(6) or its list of reserved management rights in the Statute (see 5 U.S.C. § 7106). Agencies and unions thus bargain over the appropriate length of a PIP or, put differently, how long a bargaining unit employee will have to "demonstrate acceptable performance" (5 U.S.C. § 4302(c)(6)) before being sanctioned for unacceptable performance.

NTEU negotiates the length of PIPs in its collective bargaining agreements with agencies. PIPs that NTEU bargains are frequently more than 30 days. Moffett Decl. at ¶ 25. NTEU's contract with the Internal Revenue Service, for example, provides that "[p]rior to issuing a notice of proposed action based on unacceptable performance, the Employer will issue a letter to the employee which contains . . . a statement that the employee has a reasonable period of time (specified in days) but never less than sixty (60) days in which to bring performance up to an acceptable level." Id. Similarly, NTEU's contract with Customs and Border Protection provides that, prior to removing an employee for unacceptable performance, "[t]he employee will be provided a reasonable period of time, at least sixty (60) days, to improve his/her performance to the Successful level." Id. Section 4(c) of the order, if given effect, would

jeopardize these contractual provisions by limiting PIPs to 30 days, unless agencies, in their sole and exclusive discretion, elect to extend those periods.

II. President Trump's Executive Orders.

A. Executive Order No. 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use.

Section 4(a) of this executive order requires that "all employees shall adhere to" the "requirements" imposed by that section. Section 4(a) goes on to limit official time quantitatively. It also prohibits official time altogether in certain circumstances.

First, Section 4(a)(i) provides that "[e]mployees may not engage in lobbying activities during paid time, except in their official capacities as an employee." Through Section 7131(d) of Title 5, Congress has allowed official time to be provided for any activity related to union representation or related to any matter covered by the Statute, apart from those activities prohibited by Section 7131(b). Section 7131(b) does not forbid official time for petitioning Congress on employee-related issues.

Second, Section 4(a)(v) of the executive order states that employees "may not" use official time "to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation." Section 7131 of Title 5, however, expressly allows employee union representatives to use official time for such grievances whenever authorized by contract between the employee's exclusive representative and the employing agency.

Third, Section 4(a)(ii) of the executive order provides the type of quantitative cap on official time that Congress consciously omitted in Section 7131 of Title 5. Specifically, Section 4(a)(ii), at subparagraph 1, states that "[e]xcept as provided in subparagraph (2) of this

subsection, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training."

Section 4(a)'s requirements, pursuant to Section 4(c)(i), "shall become effective 45 days from the date of [the May 25, 2018] order." Section 8(b), moreover, provides that "[o]n the earliest date permitted by law . . . any agency that is party to a collective bargaining agreement that has at least one provision that is inconsistent with an part of this order shall give any contractually required notice of its intent to alter the terms of such agreement and either reopen negotiations and negotiate to obtain provisions consistent with this order, or subsequently terminate such provision and implement the requirements of this order, as applicable under law" (emphasis added).

B. Executive Order No. 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles.

Section 4 of this executive order purports to alter (1) the scope of the negotiated grievance procedure that Congress required to be included in collective bargaining agreements and (2) Congress's method for dealing with removals based on performance.

First, Section 4(a) purports to exclude two broad categories of disputes from the negotiated grievance procedures that Congress has mandated every federal sector collective bargaining agreement to contain (5 U.S.C. § 7121(a)). Section 4(a) provides, in relevant part, "to the extent consistent with law, no agency shall: (a) subject to grievance procedures or binding arbitration disputes concerning: (i) the assignment of ratings of record; or (ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments."

Congress, though, has required that negotiated grievance procedures culminate in binding arbitration (5 U.S.C. § 7121(b)), and it has expansively defined "grievance" to include, in

relevant part, "any complaint" by an employee or his or her union "concerning any matter relating to the employment of the employee"; a breach of the collective bargaining agreement; or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Any matter falling within these expansive categories, in Congress's view, could be grieved, unless the matter fell within one of the five narrow categories of matters that Congress expressly excluded from the negotiated grievance procedure. 5 U.S.C. § 7121(c).

Second, Section 4(c) states that "no agency shall . . . generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance." Section 4302(c)(6) of Title 5, however, contains no temporal limitation on PIPs; it instead requires "an opportunity to demonstrate acceptable performance." Implementing regulations issued by the Office of Personnel Management require this opportunity to be a "reasonable" one. 5 C.F.R. § 432.104.

Section 7 of the order provides mandatory instructions to the Director of the Office of Personnel Management (OPM)—a defendant in this lawsuit—and to agency heads regarding implementation of the Section 4 provisions discussed above. It provides that:

> (a) Within 45 days of the date of this order, the OPM Director shall examine whether existing regulations effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order. To the extent necessary or appropriate, the OPM Director shall, as soon as practicable, propose for notice and public comment appropriate regulations to effectuate the principles set forth in section 2 of this order and the requirements of sections 3, 4, 5, and 6 of this order.
>
> (b) The head of each agency shall take steps to conform internal agency discipline and unacceptable performance policies to the principles and requirements of this order. To the extent consistent with law, each agency head shall:

> (i) within 45 days of this order, revise its discipline and unacceptable performance policies to conform to the principles and requirements of this order, in areas where new final Office of Personnel Management (OPM) regulations are not required, and shall further revise such policies as necessary to conform to any new final OPM regulations, within 45 days of the issuance of such regulations; and
>
> (ii) renegotiate, as applicable, any collective bargaining agreement provisions that are inconsistent with any part of this order or any final OPM regulations promulgated pursuant to this order. Each agency shall give any contractually required notice of its intent to alter the terms of such agreement and reopen negotiations. Each agency shall, to the extent consistent with law, subsequently conform such terms to the requirements of this order, and to any final OPM regulations issued pursuant to this order, on the earliest practicable date permitted by law.

ARGUMENT

"A party seeking a preliminary injunction must establish (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest." Sierra Club v. United States Army Corps of Eng'rs, 990 F. Supp. 2d 9, 24 (D.D.C. 2013) (quotation marks and alterations omitted). "In conducting an inquiry into these four factors, a district court must balance the strengths of the requesting party's arguments in each of the four required areas. If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." Id. (quotation marks, alterations, and ellipsis omitted). As discussed below, each of the factors weigh in favor of preliminary relief here.

I. NTEU's Claims Will Likely Succeed Because Each of the Challenged Executive Order Provisions Plainly Conflicts with Federal Statute.

To establish a likelihood of success on the merits, NTEU must show that a "serious legal question" is at issue. WMATA v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Circ. 1977). "The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, the court may grant an injunction even though its own approach may be

contrary to movants' view of the merits." New Mexico v. Richardson, 39 F. Supp. 2d 48, 50 (D.D.C. 1999) (alterations omitted).

"The Founders of this Nation entrusted the lawmaking power to the Congress alone . . . ." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952). "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Id. at 637 (Jackson, J., concurring). "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." Id. at 637-38 (Jackson, J., concurring).

President Trump has issued executive orders with provisions that flatly conflict with Congress's comprehensive scheme governing the federal civil service and federal labor-management relations. Because these executive order provisions would impermissibly override Congress's legislation, their illegality is evident and they must be nullified. Chamber of Commerce v. Reich, 74 F.3d 1322, 1324, 1332 (D.C. Cir. 1996) (asserting nonstatutory authority to review executive order conflicting with National Labor Relations Act). See Dart v. United States, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority. Rarely, if ever, has Congress withdrawn courts' jurisdiction to correct such lawless behavior . . . .").

A. Sections 4(a)(i), (ii), and (v) of Executive Order No. 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use Conflicts with 5 U.S.C. § 7131 and the Statute's Collective Bargaining Scheme.

Through Section 7131 of Title 5, Congress made several deliberate policy decisions. Congress rejected the limitations on official time in the executive orders that predated the Statute. It chose, instead, to expressly provide for official time, without limitation, for collective

bargaining and participation in Federal Labor Relations Authority proceedings. See 5 U.S.C. § 7131(a),(c). And Congress purposefully left it to labor organizations and agencies to agree upon any other amounts of official time that they concluded were "reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d). Once agreed upon, Congress declared that these additional amounts of official time "shall be granted." 5 U.S.C. § 7131(d). Congress further provided that the agreed upon amount of official time could be used by any employee representing the union or by any bargaining unit employee "in connection with any other matter covered by [the Statute]" (5 U.S.C. § 7131(d)), so long as it did not relate to the union's "internal business," e.g., "solicitation of membership, election of labor organization officials, and collection of dues" (5 U.S.C. § 7131(b)).

Section 4(a) of Executive Order No. 13837 contravenes Congress's statutory plan. Section 4(a) requires that "all employees shall adhere to" the official time "requirements" imposed by that section. Section 4(a) goes on to limit official time quantitatively, in conflict with 5 U.S.C. § 7131. It also prohibits official time altogether in certain circumstances, again in conflict with 5 U.S.C. § 7131. In all, Sections 4(a)(i), (ii), and (v) conflict with Section 7131, as discussed in more detail below. Because of the patent conflict between these executive order provisions and federal statute, there is a strong likelihood that NTEU's legal claims seeking their enjoinment would succeed.

First, Section 4(a)(i) provides that "[e]mployees may not engage in lobbying activities during paid time, except in their official capacities as an employee." Through Section 7131(d) of Title 5, Congress has allowed official time to be provided for any activity related to union representation or related to any matter covered by the Statute, apart from those activities

prohibited by Section 7131(b). Official time for petitioning Congress on issues related to federal employees or federal employment is thus allowable under the Statute.

NTEU's collective bargaining agreement with Customs and Border Protection, for example, explicitly allows for official time to petition Congress regarding certain "activities (e.g., visiting, phoning and writing to elected representatives) on matters concerning Union employees' conditions of employment." Moffett Decl. at ¶ 14. Section 4(a)(i), if given effect, would upend provisions like this one or allow their termination.

Second, Section 4(a)(v) of the executive order states that employees "may not" use official time "to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation." This provision flatly conflicts with Section 7131 of Title 5, which expressly allows employee union representatives to use official time for such grievances whenever authorized by contract between the employee's exclusive representative and the employing agency. NTEU's representatives routinely assist bargaining unit employees in grievance and arbitration proceedings and receive official time for doing so. Moffett Decl. at ¶ 15. Section 4(a)(v) would lead to agencies renegotiating or terminating contractual provisions that allow official time for such critical representational work.

Oddly, if Section 4(v) were given effect and an agency were to commit an unfair labor practice, as defined by Congress in Section 7116 of Title 5, union representatives would be denied official time to challenge that unfair labor practice through the grievance procedure that Congress has required them to negotiate to deal with disputes with the agency (5 U.S.C. § 7121(a)(1)). The plain text of the Statute tells us that this was not what Congress intended.

Congress aimed to aid labor organizations in performing their statutory representational roles, not make it harder for them to do what is required of them.

Third, Section 4(a)(ii) of the executive order provides the type of quantitative cap on official time that Congress consciously omitted in Section 7131 of Title 5. Specifically, Section 4(a)(ii), at subparagraph 1, states that "[e]xcept as provided in subparagraph (2) of this subsection, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training." This fiscal year cap on official time plainly contradicts Congress's scheme in Section 7131 of Title 5, which, unlike the superseded executive orders that the Statute supplanted, contains no quantitative limits on the use of official time. Consistent with the Statute, NTEU's collective bargaining agreements generally allow for an individual union representative to spent more than 25% of his or her paid time in a fiscal year on official time, if necessary. Moffett Decl. at ¶ 15. Section 4(a)(ii), if valid, would allow agencies to renegotiate or to terminate these provisions, even though they are authorized by, and entirely consistent with, the Statute.

Subparagraph 2 of Section 4(a)(ii) does not mitigate the conflict with the Statute. That subparagraph provides that "[e]mployees who have spent one-quarter of their paid time in any fiscal year on non-agency business" may continue to use official time for the purposes outlined in 5 U.S.C. § 7131(a) and (c)—i.e., negotiating a collective bargaining agreement or participating in a proceeding before the Federal Labor Relations Authority. But, under subparagraph 3 of the subsection, any official time spent in excess of 25% of one's paid time in any fiscal year—including time spent negotiating a collective bargaining agreement or participating in a Federal Labor Relations Authority proceeding—"shall count toward the limitation set forth in subparagraph (1) of this subsection in subsequent fiscal years."

In practical terms, this will mean that a union representative would reach his or her official time cap even sooner in that next fiscal year. This, in turn, would preclude the union representative from using official time for otherwise permissible union functions that do not relate to collective bargaining or Federal Labor Relations Authority proceedings (i.e., official time that can currently be negotiated under Section 7131(d) of Title 5). This would be directly contrary to Congress's intent: Section 7131(d) declares that official time amounts negotiated by unions and agencies "shall be granted."

In sum, the President, through his Section 4(a) (i), (ii), and (v) mandates, has exceeded the scope of his authority by intruding into the area of official time and disrupting the scheme that Congress has put into place through Section 7131 of Title 5. Giving the challenged subprovisions of Section 4(a) effect would allow the President to usurp Congress's role. It would also undermine the collective bargaining regime that the Statute establishes by substituting the judgment of the President for that of those to whom Congress has given the responsibility of bargaining over official time pursuant to Section 7131(d) of Title 5. And it would bestow upon the President power that Congress intended the Federal Labor Relations Authority to exercise: the power to determine which activities are the proper subject of official time negotiations under Section 7131(d) of Title 5. See NTEU v. Chertoff, 452 F.3d 839, 863-64, 866 (D.C. Cir. 2006) (underscoring that "Chapter 71 envisions a significant role for [the] FLRA" and that its "statutory function involves the exercise of judgment and significant authority" on issues related to labor negotiations).

B. Section 4(a) of Executive Order No. 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles Conflicts with Chapter 71 of Title 5.

Section 4(a) of Executive Order No. 13839 is flatly inconsistent with the expansive negotiated grievance procedure that Congress created in Chapter 71 of Title 5. It purports to exclude certain matters from the negotiated grievance procedure that are plainly grievable under Chapter 71 because (1) they fall within 5 U.S.C. § 7103(a)(9)'s definition of "grievance"; and (2) they are not among the five matters that Congress has expressly excluded from the negotiated grievance procedure in 5 U.S.C. § 7121(c).

Section 4(a) would exclude two broad categories of disputes from the negotiated grievance procedures that Congress has mandated every federal sector collective bargaining agreement to contain (5 U.S.C. § 7121(a)). Section 4(a) provides, in relevant part, "to the extent consistent with law, no agency shall: (a) subject to grievance procedures or binding arbitration disputes concerning: (i) the assignment of ratings of record; or (ii) the award of any form of incentive pay, including cash awards; quality step increases; or recruitment, retention, or relocation payments."

But Congress has required that negotiated grievance procedures culminate in binding arbitration (5 U.S.C. § 7121(b)), and it has expansively defined "grievance" to include, in relevant part, "any complaint" by an employee or his or her union "concerning any matter relating to the employment of the employee"; a breach of the collective bargaining agreement; or "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Any matter falling within these expansive categories, in Congress's view, can be grieved, unless the matter falls within one of the five narrow categories of matters that Congress expressly excluded from the negotiated

grievance procedure. 5 U.S.C. § 7121(c). All other matters fitting within Congress's definition of "grievance" in Section 7103(a)(9) are properly subject to the negotiated grievance procedure, though the negotiating parties may elect to exclude other matters (5 U.S.C. § 7121(a)(2)).

Section 4(a)'s purported proscriptions of performance ratings and incentive pay, including monetary awards, from the negotiated grievance procedure thus runs afoul of Section 7103(a)(9)'s broad definition of "grievance." It also impermissibly seeks to expand Congress's finite list of matters that cannot be subjected to the negotiated grievance procedure. 5 U.S.C. § 7121(c). Congress has made the policy decision of what should be excluded from this procedure; the President cannot, through executive order, override that policy decision and purport to expand Congress's determination of what matters may not, as a matter of law, be grieved.

In sum, Section 4(a) plainly conflicts with the plain text of Chapter 71 of Title 5, through which Congress has declared, and has otherwise left to negotiating parties to determine, the categories of matters that will not be subject to the negotiated grievance procedure contained in a collective bargaining agreement.

C. Section 4(c) of Executive Order No. 13839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles Conflicts with 5 U.S.C. § 4302(c)(6).

Section 4(c) of Executive Order No. 13839 that "no agency shall . . . generally afford an employee more than a 30-day period to demonstrate acceptable performance under section 4302(c)(6) of title 5, United States Code, except when the agency determines in its sole and exclusive discretion that a longer period is necessary to provide sufficient time to evaluate an employee's performance." This provision plainly conflicts with Section 4302(c)(6) of Title 5, which contains no temporal limitation on PIPs. Section 4302(c)(6) requires that an employee

receive "an opportunity to demonstrate acceptable performance" prior to an agency action based upon unsuccessful performance. Implementing regulations issued by the Office of Personnel Management require this opportunity to be a "reasonable" one. 5 C.F.R. § 432.104. Because Section 4(c) conflicts with Section 4302(c)(6) of Title 5, giving it effect would serve to override Congress and to allow the President to usurp Congress's lawmaking authority.

Further, Section 4(c)'s declaration that extensions of PIPs beyond 30 days shall be left to the "sole and exclusive discretion" of the agency employer conflicts with Section 7106 of Title 5. Congress deliberately chose not to include the appropriate length of a PIP in its list of non-negotiable, reserved management rights in Section 7106. Section 4(c) would thus bestow upon the President power that Congress intended the Federal Labor Relations Authority to exercise: the power to determine what aspects of PIPs are the proper subject of bargaining. See NTEU, 452 F.3d at 865 (concluding regulation flawed "insofar as it allows DHS to encroach on FLRA's operations without the statutory authority to do so").

In sum, The President, through his mandates in Section 4(c) of this executive order, has exceeded the scope of his authority and would disrupt policy decisions that Congress has made in Section 4302(c)(6) of Title 5. Giving Section 4(c) effect would allow the President to usurp Congress's role in designing the Act.

II. NTEU and Its Members Will Suffer Irreparable Harm if the Challenged Executive Order Provisions Are Not Preliminarily Enjoined.

"[I]t is well established that 'perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.'" Sierra Club, 990 F. Supp. 2d at 38 (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 2013)). That prerequisite is satisfied here.

If Sections 4(a)(i), (ii), and (v) of Executive Order No. 13837 are implemented and official time is constricted in a way that Congress did not intend, NTEU's ability to perform its representational functions will be impaired significantly, resulting in irreparable harm to the Union. If Sections 4(a) and (c) of Executive Order No. 13839 are implemented, NTEU will be irreparably harmed by (1) not being able to challenge wrongful performance ratings or incentive pay decisions through the negotiated grievance procedure; and (2) being prevented from contesting the imposition of arbitrary and unreasonable PIP periods.

A preliminary injunction is thus appropriate to enjoin implementation of the illegal executive order provisions challenged in this litigation, which will cause irreparable harm to NTEU's status in the workplace and reduce NTEU's membership. See, e.g., Am. Fed'n of Labor v. Watson, 327 U.S. 582, 594 (1946) ("The loss in bargaining position by the unions, the disruption of harmonious relationships between the union and the employers, the almost certain decrease in union membership -- these are matters involving intangible values."); See, e.g., Int'l Union of Elec. Workers v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining."), cert. denied, 400 U.S. 950 (1970); Reuben v. FDIC, 760 F. Supp. 934, 943-44 (D.D.C. 1991) (granting injunction because "if interim relief is not ordered there will be an additional perhaps lengthy delay before the employees begin to see any results of representation, during which further erosion [of union support] may occur."), aff'd, 1991 U.S. App. LEXIS 28964 (D.C. Cir. Oct. 9, 1991).

A. NTEU and Its Members Will Be Irreparably Harmed If Sections 4(a)(i), (ii), and (v) of Executive Order No. 13837 Are Not Preliminarily Enjoined.

1. Section 4(a)(i).

This section of Executive Order No. 13837, if given effect, would immediately threaten collective bargaining agreements providing official time for petitioning Congress. Congress enacts legislation over topics of great interest to federal employees, such as salary, sick and annual leave, health insurance, retirement, and adverse action rights. As described in the attached Declaration of Kenneth Moffett, Jr., NTEU has, in keeping with 5 U.S.C. § 7131(d), bargained for reasonable official time for employees to make their views concerning these important matters known to Congress. See Moffett Decl. at ¶ 14. The significance of interacting with Congress is underscored by the appointment of dozens of local "Legislative Coordinators," who are responsible for assisting NTEU officials in the pursuit of the union's legislative initiatives. Id.

Section 4(a)(i) would require employers to press for elimination of these negotiated official time provisions, one of which has been in effect for nearly 20 years. Id. It would also preclude bargaining over such provisions in the future. As is true for other official time provisions in Executive Order 13837, the requirements of Section 4(a)(i) "shall become effective 45 days from the date of this order." Section 4(c)(i). Section 8(b) commands agencies, "[o]n the earliest date permitted by law," to target contracts containing provisions inconsistent with the order. Agencies must then, through negotiations with unions, attempt to terminate such provisions. Id.

The obvious objective of Section 4(a)(i) is to make it harder for unions to have a voice in legislative decisions affecting the employees they represent. Agencies successful in stripping these provisions out of contracts would relegate union representatives to performing their crucial

legislative work after hours, while on annual leave, or in a leave without pay (LWOP) status. The resulting diminution of NTEU's effectiveness in the legislative arena cannot reasonably be disputed. A timely opportunity lost to influence legislation can never be recovered. Lessening NTEU's ability to influence the legislative process will result in less favorable terms of employment. The harm done by the enactment of disadvantageous statutes cannot be undone.

2. Sections 4(a)(ii) and 4(a)(v).

Section 4(a)(ii) purports to restrict the use of official time that union representatives can use by arbitrarily capping that amount at 25% of their paid time. In its role as the exclusive representative for the bargaining unit employees that it represents, NTEU must fulfill many responsibilities. See Moffett Decl. at ¶¶ 12, 13. Among NTEU's responsibilities is the preparation and pursuit of grievances filed under the Statute's broad scope grievance procedure. Id. ¶ 15. Section 4(a)(v) purports to bar NTEU representatives from using official time to perform essential work under the negotiated grievance procedures that Congress mandated in 5 U.S.C. § 7121.

To meet its representational obligations, NTEU has negotiated for reasonable amounts of official time pursuant to 5 U.S.C. § 7131. Moffett Decl. at ¶ 13. Sections 4(a)(ii) and (v), if implemented, would upend those agreements by directing agencies to attempt to impose artificial and unreasonable limitations on the ability of NTEU representatives to represent employees.

The assault on NTEU's official time agreements has already begun. On June 5, 2018, the Social Security Administration (SSA) notified NTEU that it intends to implement the executive orders, effective July 9, 2018. Moffett Decl., Ex. 1 at 1. In so doing, SSA intends to revise 19 articles of its contract with NTEU. Id. at 1-2. Because many of those articles implicate official

time, there can be no question that SSA wishes to impose the restrictive requirements of Sections 4(a)(ii) and 4(a)(v). Moffett Decl. at ¶ 8.

3. The Immediate Consequences of Sections 4(a)(i), (ii), and (v).

The objective of Sections 4(a)(i), (ii), and (v) is unmistakable. These provisions are intended to make it more difficult for union officials to influence Congress and to fulfill their basic obligations as employee representatives. As NTEU's effectiveness in the legislative and representational arena decreases, so too will its attractiveness to dues paying members.[1] NTEU's ability to recruit and retain members, which provides dues revenue needed operate effectively, will be impaired as soon as agencies implement the change they have been ordered to make. That revenue, once lost, can never be recovered. See Moffett Decl. at ¶ 26.

The challenged executive order provisions have already irreparably harmed NTEU by diminishing its bargaining power. When NTEU confronts inevitable demands to terminate existing contract provisions, like the demands that NTEU has received from SSA (see Moffett Decl., Ex. 1), NTEU will face agency representatives with no authority to reach agreement over official time for petitioning Congress. They will be across the bargaining table from agency officials with no discretion to deviate from their orders to cap official time at 25% and to bar union representatives from preparing or pursuing grievances. The scope of bargaining will necessarily be constrained. In other words, "[i]t is the change wrought on the bargaining process itself . . . that causes immediate injury" to NTEU. NTEU v. Chertoff, 452 F.3d 839, 853-54 (D.C. Cir. 2006) (embracing NTEU's position on the "immediate practical impact" of regulation constricting bargaining and affirming grant of injunction).

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[1] Federal employees are not required to become members of the unions that represent them. Unions earn and retain the support of dues paying members by performing services perceived by the members to warrant their financial support through the payment of dues.

To achieve contracts that are consistent with Section 4's mandates, NTEU will be left with only two choices: accede to the elimination of its existing official time rights or resist agency efforts through the impasse resolution process established in the Statute. There can be no give and take at the bargaining table over the amount of official time available for making congressional contacts or the designation of NTEU representatives allowed to use it. No meaningful negotiations will take place—indeed no negotiations at all—over reasonable amounts of official time needed for NTEU representatives to perform their representational duties, including preparing and pursuing grievances. "These harms are far from conjectural and they will be remedied if [NTEU] prevail[s] on [its] claim[] here." NTEU, 452 F.3d at 853.

Although Section 8(b) of Executive Order 13837 requires agencies to negotiate over changes mandated by Section 4, the marching orders issued by Section 4 preclude agencies from engaging in the good faith bargaining required by the Statute. Imposition of these arbitrary and illegal restrictions on the scope of bargaining is the same as no bargaining at all. As we have explained, that result is contrary to the Statute. It also irreparably harms NTEU by degrading its ability to bargain effectively. Agency officials will be unyielding in their adherence to Section 4's illegal dictates. Neither can there be any consideration of packaging reasonable proposals about official time with proposals concerning other matters. Such package offers are common in bargaining and can result in agreement over an entire contract. Moffett Decl. at ¶ 17. SSA has already begun its assault on official time. Id. at ¶ 8. Other agencies, particularly those with open agreements (those that can currently be re-negotiated or re-opened), are certain to follow suit. Id. at ¶¶ 6, 8.

NTEU will also be irreparably harmed by having to dedicate significant resources to defend itself against the challenged executive order provisions. NTEU will be forced to confront

agencies, like SSA, that demand to renegotiate agreements. It will have to devise bargaining strategies appropriate to the demands imposed by these provisions. If these provisions are not preliminarily enjoined and thus implemented—only to be invalidated at a later date—NTEU will be unable to recover the resources expended in reacting to them.

B. NTEU and Its Members Will Be Irreparably Harmed If Sections 4(a) and 4(c) of Executive Order No. 13839 Are Not Preliminarily Enjoined.

1. Section 4(a).

If allowed to take effect, Section 4(a) would exclude two important topics from the scope of the negotiated grievance procedure. Section 4(a)(i) would preclude grievances over the assignment of ratings of record. Section 4(a)(ii) would bar grievances over incentive pay. For the following reasons, NTEU would be irreparably harmed unless these provisions are enjoined.

The rating an employee receives is very important. Those receiving an unacceptable rating are subject to adverse personnel actions up to and including removal. See Moffett Decl. at ¶ 21. Ratings of record determine employee entitlement to awards and other recognition. Id. They also play a role in determining an employee's status in the event of a reduction in force. Id. Employees, then, have a keen interest in receiving ratings of record that are fair, accurate, and untainted by favoritism, discrimination, or other improper factors.

Because of their importance, ratings of record are frequently the subject of grievances. Id. at ¶ 21. Employees file grievances over their individual ratings. NTEU, in its capacity as exclusive representative, also files grievances over agency rating systems. These grievances have, for example, resulted in the resolution of important challenges brought by NTEU to the ratings systems at the Securities Exchange Commission and Federal Deposit Insurance Corporations. Id. at ¶ 22. Those systems appeared to assign ratings of record in violation of laws prohibiting discrimination. Id.

Section 4(a)(ii) would exclude grievances over incentive pay from the negotiated grievance procedure. As is true for ratings, employees and NTEU have a strong interest in making sure that these payments are issued in a manner that is consistent with applicable law and collective bargaining agreements.

Losing the right to file grievances over ratings of record and incentive payments will make the negotiated grievance procedure and, by implication, NTEU, less meaningful to employees. Employees will be less inclined to support NTEU's efforts on their behalf by becoming dues paying members. Current members who value these grievance rights will be less inclined to maintain their membership. As SSA's June 5, 2018, letter makes clear, contractual provisions implicated by these sections have already been targeted for prompt elimination. See Moffett Decl., Ex. 1 at 1-2. Lost dues revenue cannot be recovered. These injuries will be irreparable. See, e.g., Watson, 327 U.S. at 594 (affirming injunction in part due to "the almost certain decrease in union membership," to which it attributed an "intangible" value); Int'l Union of Elec. Workers, 426 F.2d at 1249 ("Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining."), Reuben, 760 F. Supp. at 943-44 (granting injunction because "if interim relief is not ordered . . . further erosion [of union support] may occur.").

Section 7(b)(ii) of Executive Order 13839 requires agencies to negotiate with unions to bring inconsistent contracts into conformance with the order's terms. But, as is true for Executive Order 13837, there can be no real negotiations. Agency representatives will adhere to the orders given to them in Sections 4(a)(i) and (ii), with no ability to compromise. The harm to NTEU's ability to bargain good agreements will be irreparable. See NTEU, 452 F.3d at 853-54.

2. Section 4(c).

In plain conflict with 5 U.S.C. § 4302(c)(6), Section 4(c) would generally impose an unreasonable limitation of 30 days on the length of PIPs and make longer periods available only at the "sole and exclusive" discretion of agencies. Due to the nature of their positions, many employees require periods greater than 30 days to show an improvement in their performance. See Moffett Decl. at ¶ 25.

Imposition of Section 4(c)'s restrictions would irreparably harm NTEU by disrupting contracts requiring employees to receive longer periods to demonstrate successful performance. Id. Agencies will follow SSA in attacking existing agreements with the goal of conforming them with Section 4(c)'s illegal dictates. Moffett Decl. at ¶ 25; Moffett Decl., Ex. 1 at 1-2. Again, although Section 7(b)(ii) requires negotiations, agency representatives will be unwilling to veer from Section 4(c)'s command. NTEU will be harmed by constraints to the bargaining process that will prevent agency officials from agreeing to reasonable PIP lengths. See NTEU, 452 F.3d at 853-54.

Moreover, if given effect, Section 4(c) will put employees who need PIPs in the length negotiated in NTEU's agreement at risk. Those who reasonably need more than 30 days to demonstrate acceptable performance will face adverse consequences, up to removal, if they cannot show needed improvement in the truncated 30-day period. The obvious unfairness of that situation will cause employees to devalue NTEU's ability to protect them. The lost dues revenue caused by those who do not join NTEU or terminate their membership cannot be recovered.

Finally, NTEU is not seeking monetary relief which courts have frequently deemed not irreparable. It is seeking only injunctive and declaratory relief. Cf. Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1295 (D.C. Cir. 2009) (economic losses are typically not

irreparable); R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (preliminary injunction warranted, in part because plaintiffs suffered harm from an improper government policy and were seeking injunctive, rather than monetary, relief).

III. The Balance of Equities Tips in NTEU's Favor.

"When balancing the competing claims of injury, the Court must consider the effect on each party of the granting or withholding of the requested relief." Sierra Club, 990 F. Supp. 2d at 41 (internal citation, quotation marks, and alterations omitted). As explained above, NTEU and its members will suffer several different types of irreparable harm, if a preliminary injunction does not issue.

The United States, in contrast, will not suffer at all from having to continue to abide by Congress's comprehensive statutory scheme governing the federal civil service and federal labor-management relations. Since 1978, the United States has had to comply with Congress's direction concerning the parameters of official time, the permissible scope of the negotiated grievance procedure, and removals for performance reasons. It would not be prejudiced by continued compliance with this statutory regime.

Agreements in conflict with the illegal mandates of these orders have been in place for many years. See Moffett Decl. at ¶ 14. NTEU is not seeking to impose some new or costly burden on the government, but rather is seeking merely to keep the existing system in place until this case can be resolved on the merits. This squarely fits with the purpose of a preliminary injunction. As the D.C. Circuit has stated, the primary "purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition—to preserve the status quo." Aamer v. Obama, 742 F.3d 1023, 1043 (D.C. Cir. 2014).

In similar circumstances, this court has granted a union an injunction against a rule change where the government would not be injured by a delay in implementation, "especially in light of the fact that the existing reporting requirements which have been in effect, largely unchanged for more than 40 years, will remain in effect." AFL-CIO v. Chao, 297 F. Supp. 2d 155, 162 (D.D.C. 2003) (enjoining the Labor Department from enforcing new, burdensome rules on labor unions to report all receipts and disbursements). The continuation of existing long-standing requirements that may be at odds with the orders, will do no harm to the defendants.

In sum, maintaining the status quo is vital here. NTEU and its members would be injured substantially and permanently if the challenged provisions are not enjoined. The government, in contrast, would need only to comply with the laws of Congress, if a preliminary injunction issues, and be deprived only of the opportunity to defy those laws prior to this Court's decision on the merits. The government cannot be harmed by an injunction delaying implementation of illegal executive orders. R.I.L-R, 80 F. Supp. 3d at 191. See Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013).

IV. A Preliminary Injunction Would Serve The Public Interest.

The public interest weighs heavily in favor of maintaining the status quo and enjoining executive order provisions that conflict with federal statute and would upend Congress's comprehensive statutory scheme governing the federal employment and labor-management relations.

First, the public interest is served by the branches of government acting within, and not exceeding, their respective grants of power. As shown above, the President has far exceeded his authority through the challenged executive order provisions. The public would benefit from this Court enjoining those provisions and reigning in this improper executive action.

Second, the public would benefit from preliminary relief because, without it, NTEU and its members' collective bargaining rights would suffer in a way that could not be undone, as explained above. In creating the federal labor-management regime that the executive orders defy, Congress explicitly concluded that collective bargaining "safeguards the public interest"; "contributes to the effective conduct of public business"' and "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a). By the same token, undercutting federal sector labor unions and the important functions that they perform, including collective bargaining—as the challenged provisions of the executive orders do—cannot be deemed to be in the public's interest. Thus, enjoining the executive order provisions <u>before</u> they undercut and harm union functions that Congress has concluded are in the public interest must, itself, be in the public interest.

Third, the public interest is indisputably served by stability in labor-management relations. If the challenged executive order provisions are implemented, and then held to be unlawful by this Court, it would be disruptive to the parties and to the public. Contract negotiations, and provisions in existing contracts, would be disrupted by the implementation of the illegal executive order provisions, which seek to radically alter the collective bargaining scheme that Congress has created. And collective bargaining negotiations would likewise be disrupted, again, by this Court's final adjudication deeming the provisions to be unlawful. The public would be far better served by maintaining the status quo until the legality of these suspect provisions is adjudicated.

CONCLUSION

For the foregoing reasons, Plaintiff NTEU respectfully requests that this Court grant its motion for a preliminary injunction and order the relief described in its proposed order.

Respectfully submitted,

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