IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Plaintiff, v. DONALD J. TRUMP, *in his official capacity as President of the United States, et al.*, Defendants.	)	No. 18-cv-1261 (KBJ)

PLAINTIFF AFGE'S MOTION FOR A PRELIMINARY INJUNCTION

The American Federation of Government Employees ("AFGE") hereby moves for a preliminary injunction enjoining the implementation of Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), (4)(a)(iii), and 4(a)(v), of Executive Order 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use.

AFGE satisfies all the prerequisites for preliminary injunctive relief. AFGE has a substantial likelihood of success on the merits because the order violates AFGE's right to expressive association under the First Amendment, and because the order plainly conflicts with the Congressionally-enacted framework that governs labor-management relations for executive agencies, federal employees, and their labor organizations. AFGE will also be irreparably harmed, in that AFGE's constitutional injury will be immediate and will not be remediable after the fact. Federal agencies have also begun implementing Executive Order 13837 to collective bargaining that is presently underway. Implementation of the order will drastically and irreparably impact the course of these negotiations by limiting the union's rights at the

bargaining table, contrary to the statutory labor-management relations scheme set forth in 5 U.S.C. Chapter 71. Even if AFGE were to be successful at the conclusion of this action, without injunctive relief collective bargaining agreements executed under the executive order would persist notwithstanding a subsequent invalidation of the order's terms by this court. The same is true with respect to individual and institutional cases that would immediately be impacted by the order but that would conclude prior to its invalidation.

The balance of the equities and the public interest also support injunctive relief. Maintaining the status quo pending the resolution of this action will not adversely affect defendants. It will merely require defendants to continue to follow the law, and to abide by agreements and practices that are already in place. The public interest could also not be more clearly in AFGE's favor. Congress has explicitly determined that labor organizations, like AFGE, and collective bargaining in the civil service are in the public interest. 5 U.S.C. § 7101(a).

For all these reasons, and the reasons explained in AFGE's memorandum in support of this motion, AFGE respectfully asks that the Court grant this motion.

Respectfully submitted,

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PROPOSED ORDER

For the reasons stated in AFGE's Motion for a Preliminary Injunction and memorandum in support thereof, it is hereby

ORDERED that Defendants are preliminarily enjoined from implementing Sections 2(j), and 3(a), and 4(a)(i), and (4)(a)(ii), and (4)(a)(iii), and 4(a)(v) of Executive Order No. 13837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use.

SO ORDERED.

_____
Date

_____
Hon. KETANJI BROWN JACKSON
United States District Judge
U.S. District Court for the District of Columbia

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

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I. INTRODUCTION

The American Federation of Government Employees, AFL-CIO, ("AFGE") is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government and in the District of Columbia. AFGE's representation of these employees includes collective bargaining and direct representation in unfair labor practice proceedings and grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq*. (hereinafter the "Statute" or "Chapter 71").

AFGE, on its own and through its affiliated councils and locals, represents employees within bargaining units for which AFGE and its councils and locals have been certified as the exclusive representative by, *inter alia*, negotiating collective bargaining agreements, arbitrating grievances brought pursuant to applicable negotiated grievance procedures, representing employees in formal discussions or investigative examinations pursuant to 5 U.S.C. § 7114(a)(2), litigating employees' collective and individual rights before administrative agencies and in court, and generally acting as federal civilian employees' exclusive representative for the purpose of collective bargaining with federal agencies.

AFGE challenges Executive Order No. 13837, 83 Fed. Reg. 25335, entitled "Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use" (hereinafter the "Official Time Order") because it seeks to impermissibly rewrite the Statute. In particular, Sections 2(j), 3(a), 4(a)(ii), 4(a)(iii), and 4(a)(v) are plainly contrary to 5 U.S.C. § 7131, which is the provision of the Statute that governs official time. Section (4)(a)(i) of the Official Time Order is likewise plainly contrary to the Statute, in that it is contrary to 5 U.S.C. § 7102(1) and 5 U.S.C. § 7131, and is also contrary to 5 U.S.C. § 7211. Among other things, the Official Time

Order seeks to prohibit employees from receiving official time to lobby, or to prepare, file, and pursue negotiated grievances on behalf of their labor organization, i.e., union, and prohibits employees who are union representatives from receiving official time for the purpose of representing another individual employee or group of employees in negotiated grievances brought on behalf of such individual employee or group of employees. These restrictions have no basis in law.

Further, withholding injunctive relief would break with Chapter 71 and directly and immediately harm AFGE by forcing AFGE to, among other things, lose rights it presently has and by forcing AFGE to represent bargaining unit employees under a restrictive labor-management relations scheme that has no statutory foundation. Withholding injunctive relief would also not serve the public interest because it would diminish labor organizations and collective bargaining in the civil service. The Court should therefore grant AFGE's motion for a preliminary injunction.

a. The Statute

Congress passed the Civil Service Reform Act of 1978 ("CSRA") to create a comprehensive statutory scheme governing the conditions of federal civilian employment. *See*, e.g., *U.S. v. Fausto*, 484 U.S. 439, 455 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983). Within the CSRA, Congress also enacted Chapter 71 to specifically govern the rights and collective bargaining obligations of federal labor organizations and federal agencies.

As the Supreme Court has explained, Chapter 71 was the first statutory scheme to govern "labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 91 (1983) ("*ATF*"). Chapter 71 supplanted prior executive orders that had controlled federal-sector labor

relations in the absence of statutory authority. Congress explicitly found that labor organizations and collective bargaining are in the public interest, and the Supreme Court has found that Chapter 71 clearly "strengthened the position of employee unions[.]" *Id.*; 5 U.S.C. § 7101(a).

But Chapter 71 also did so much more. It reached every aspect of federal-sector labor relations. For example, Chapter 71 created the Federal Labor Relations Authority (the "Authority") and charged it with taking the necessary and appropriate actions to effectively administer the provisions of Chapter 71. 5 U.S.C. § 7105(a)(2)(I). Congress gave the Authority the power to prescribe rules and regulations to carry out the provisions of Chapter 71 applicable to the Authority. 5 U.S.C. § 7134; *see also National Federation of Federal Employees, Local 1309 and Department of the Interior*, 526 U.S. 86, 88 (1999) (the Authority implements Chapter 71 "through the exercise of broad adjudicatory, policy making, and rulemaking powers."). Chapter 71 went on to expressly protect the right of employees to form, join, or assist any labor organization freely and without fear of penalty or reprisal, as well as to guarantee the right of employees to act as a representative of a labor organization, to present the labor organization's views to agency officials, the Congress, and other appropriate authorities, and to engage in collective bargaining over conditions of employment through representatives of their choosing. 5 U.S.C. § 7102(1).

Chapter 71 placed upon agencies and labor organizations a mutual duty to bargain in good faith with "sincere resolve" to reach agreement. And it placed a duty of fair representation on labor organizations that it then balanced with the right of a labor organization to represent an employee at a formal discussion between any agency representative and one or more bargaining unit employees or their representative concerning, *inter alia*, any grievance; and any investigative examination of a bargaining unit employee if the employee reasonably believes

discipline may result from the interview and the employee requests representation. 5 U.S.C. § 7114.

In other words, where once the President had the ability to direct labor relations by executive order, Congress intervened and left the President no room to act in ways contrary to the Statute. *See* 5 U.S.C. § 7135(b).

b. Official Time

With 5 U.S.C. § 7131(d) especially, Congress superseded any prior executive orders concerning whether and when union representatives were entitled to use official time. As the Supreme Court observed in *ATF*:

> The Senate version of the bill that became the Civil Service Reform Act would have retained the last Executive Order's restrictions on the authorization of official time. S.Rep. No. 95–969, p. 112 (1978), U.S. Code Cong. & Admin. News 1978, 2723. *Congress instead adopted the section in its present form, concluding, in the words of one congressman, 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."* 124 Cong. Rec. 29,188 (1978) (remarks of Rep. Clay). See H.R. Conf. Rep. No. 95–1717, p. 111 (1978), U.S. Code Cong. & Admin. News 1978, 2723.

ATF, 464 U.S. at 101-02 (emphasis added).

Congress knew full well what it was doing when it passed section 7131 and authorized official time for federal employees. It intended, in 5 U.S.C. § 7131(a), to require that employees representing an exclusive representative be authorized official time to negotiate a collective bargaining agreement. It intended, in 5 U.S.C. § 7131(c), that the Authority determine, except as provided, whether employees are entitled to official time in any phase of proceedings before the Authority. And Congress intended, in 5 U.S.C. § 7131(d), to require that union representatives be granted official time in any amount that the agency and the union mutually agree to be reasonable, necessary, and in the public interest. Likewise, Congress intended for any employee

who is a member of a bargaining unit represented by a union to be granted official time in connection with any other matter covered by Chapter 71, in any amount that the agency and the union mutually agree to be reasonable, necessary, and in the public interest.

Put differently, Congress deliberately left the determination of what constitutes "reasonable, necessary, and in the public interest" to unions and agencies together. Congress did not give the President the power to unilaterally dictate restrictions on official time. This is the precise conclusion that this court's reviewing circuit correctly came to in *American Federation of Government Employees, AFL-CIO, Council of Locals No. 214, v. Federal Labor Relations Authority*, 798 F.2d 1525, 1530 (D.C. Cir. 1986) ("Congress thus committed the determination of the public interest to the union and the agency together, not to the agency alone.") ("*Council 214*").

II. APPLICABLE LAW

a. Standard for Granting a Preliminary Injunction

A court must balance four factors when deciding whether to grant a preliminary injunction, these factors are: "(i) whether the party seeking the injunction is likely to succeed on the merits of the action, (ii) whether the party is likely to suffer irreparable harm without an injunction, (iii) whether the balance of equities tips in the party's favor, and (iv) whether an injunction would serve the public interest." *Doe v. Mattis*, 889 F.3d 745, 751 (D.C. Cir. 2018), citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Further, while a court must balance all four factors, a court may grant an injunction if the moving party makes an especially strong showing on one factor even if the party's showing in other areas is weak. *Sierra Club, et al., v. U.S. Army Corps of Engineers*, 990 F.Supp. 2d 9, 24 (D.D.C. 2013).

b. AFGE's Right to Non-statutory Review of *Ultra Vires* Executive Action

The President's authority is not absolute. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring) (The President's "command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress.").

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. art. I, § 1. By the same token, the Constitution vests Executive power in the President but deliberately cabins that power by requiring that the President "shall take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. Congress thus makes the laws and it is for the President to faithfully implement them. The force of the Constitutional system of checks and balances is consequently amplified when, as here, the President seeks to assert his power in the face of preexisting and contrary Congressional action. *Youngstown*, 343 U.S. at 644.

When Congress has spoken but the President nevertheless seeks to exercise power on his own behalf in a manner that is incompatible with either the express or implied will of Congress, his power is, as Justice Jackson presciently put it, at its "lowest ebb." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]"). "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Id*. Put differently, the constitution mandates a functional system of checks and balances to act as a

safeguard against the arbitrary exercise of executive power. *Id*. at 629 (Douglas, J., concurring) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.").

AFGE may therefore seek non-statutory review of *ultra vires* action by the President in this court. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996), citing *Dart v. U.S.*, 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."); *accord Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) ("It is beyond question that the federal judiciary retains the authority to adjudicate constitutional challenges to executive action.").

III. ARGUMENT

An injunction should issue. AFGE meets the prerequisites for preliminary injunctive relief. AFGE has a substantial likelihood of success on the merits because the Official Time Order is unlawful on its face. The order violates AFGE's right to expressive association under the First Amendment. With no basis whatsoever, the order singles labor organizations out for disparate treatment with respect to official time for institutional grievances and for representing other employees in their grievances. This is also an obvious violation of 5 U.S.C. § 7131(d).

Indeed, Section 2(j), 3(a), 4(a)(i), 4(a)(ii), 4(a)(iii), and 4(a)(v) are plainly unlawful because each of these sections conflicts with the Congressionally-enacted framework that governs labor-management relations for executive agencies, federal employees, and their labor organizations. Put differently, it is outside the bounds of reason to believe that the President may infringe on Chapter 71 when Congress chose to act so deliberately and so extensively to create a framework that covers nearly every aspect of federal labor relations, and expressly gives employees and labor organizations an array of statutory rights. Congress simply did not cede discretion to the President to act in contravention of Chapter 71, or to otherwise operate

beyond its confines.

AFGE will, moreover, be irreparably harmed if defendants are not enjoined from implementing the Official Time Order. AFGE's constitutional injury will be immediate and will not be fully remediable after the fact, as employees will be deterred from associating with AFGE. Implementation of the order will also drastically and irreparably impact the course of these collective bargaining negotiations that AFGE is engaged today and will engage in the immediate future by limiting the union's rights at the bargaining table, contrary to the text and purpose the statutory labor-management relations scheme set forth in 5 U.S.C. Chapter 71.

The balance of the equities and the public interest similarly support injunctive relief. Maintaining the status quo pending the resolution of this action will not adversely affect defendants. It will merely require defendants to continue to follow the law, and to abide by agreements and practices that are already in place. The public interest also tilts in AFGE's favor. Congress has explicitly determined that labor organizations and collective bargaining in the civil service are in the public interest. 5 U.S.C. § 7101(a).

a. **AFGE has a Substantial Likelihood of Success on the Merits**

i. <u>The Official Time Order Violates the First Amendment</u>

Section 4(a)(v) of the Official Time Order impermissibly subjects union representatives to disparate treatment by authorizing official time for an employee to prepare or pursue a grievance filed on the employee's behalf while at the same time prohibiting union representatives from receiving official time to prepare or pursue grievances brought on behalf of the union, the bargaining unit, or an individual employee. By singling out unions for disparate treatment, Section 4(a)(v) of the Official Time Order unlawfully restrains and retaliates against

AFGE and its union-member representatives in and for the exercise of their rights to expressive association under the First Amendment.

"[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 933 (1982). "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("*Roberts*"). Government actions may infringe on the right to association for expressive purposes by "seek[ing] to impose penalties or withhold benefits from individuals because of their membership in a disfavored group" or by "try[ing] to interfere with the internal organization or affairs of the group." *Roberts*, 468 U.S. at 622-23.

While the freedom of expressive association may not be absolute, government actions may only infringe on that right when those actions "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts* at 623; *see also Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) ("*Dale*"). To be entitled to First Amendment protections, "an association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Dale* at 655. The Supreme Court has previously recognized the right of workers to act collectively to engage in protected expressive association. *See Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5 (1964) ("It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to

gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them[.]").

Here, Section 4(a)(v) prohibits any employee from using official time "to prepare or pursue grievances" brought against an agency under any collectively bargained grievance procedure unless: (a) such use is "otherwise authorized by law or regulation;" (b) the employee is preparing or pursuing a grievance brought on the employee's own behalf; or (c) the employee is to appear as a witness in a grievance proceeding.[1] Compl. ¶ 71. In other words, employees representing themselves in a grievance are eligible to receive official time, whereas union representatives are categorically prohibited from receiving official time to: (a) prepare or pursue grievances brought on behalf of the union itself or brought to vindicate the union's institutional interests; or (b) represent bargaining unit employees in grievances. Compl. ¶ 72. The order contains no reason for this distinction.

AFGE and its members both publicly and privately engage in multiple forms of expression, such as promoting unity of action in matters affecting the mutual interest of federal employees, promoting organized labor, and advocating for workers' rights and for the improvement of government service. Compl. ¶ 27. AFGE is, thus, clearly an expressive association. The inability of AFGE representatives to receive official time to represent the union, the bargaining unit, or individual employees will discourage employees from becoming AFGE representatives or otherwise associating with AFGE. Declaration of David Cann ("Cann Decl."), ¶ 22. In other words, Section 4(a)(v) will have a chilling effect on the expressive association of AFGE, its members, and the employees its represents.

[1] No law other than 5 U.S.C. § 7131 governs the use of official time to prepare or purse grievances brought pursuant to Chapter 71 collective bargaining agreements.

The Official Time Order does not offer any rationale, nor is there any valid basis, for the disparate treatment accorded to employees and union representatives. Thus, the Official Time Order fails to identify any state interest whatsoever that would justify the infringement of AFGE's right to expressive association. Moreover, there can be no compelling state interest in the perpetuation of unlawful agency action. *Cf. League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (2016) (explaining, in the context of a preliminary injunction, "[t]here is generally no public interest in the perpetuation of unlawful agency action.") As discussed below, Section 4(a)(v) is plainly contrary to both 5 U.S.C. § 7131 and the statutory scheme established by Chapter 71. Consequently, there is no compelling state interest that can justify the Official Time Order's infringement of AFGE's right to expressive association.

Section 4(a)(v) of the Official Time Order unlawfully restrains and retaliates against AFGE and its union-member representatives in and for the exercise of their rights to expressive association under the First Amendment. AFGE therefore has a substantial likelihood of success on this count.

ii. The Official Time Order is Contrary to Chapter 71 and Should be Enjoined

1. Section 4(a)(i) of the Official Time Order is plainly *ultra vires*

Section 7102(1) of Chapter 71 guarantees the right of employees to act as a representative of a labor organization and to present the labor organization's views to Congress. Moreover, section 7131(d) requires that official time be granted in amounts that an agency and its counterpart labor organization mutually agree upon. There is nothing in section 7102 or section 7131 that prohibits the parties from agreeing to allow official time to be used for the direct lobbying of Congress.

The Authority has accordingly exercised its Congressionally-granted power to hold that, absent a separate and specific statutory prohibition that would prohibit the expenditure of appropriated funds for direct lobbying, direct representational lobbying is clearly permissible. *See U.S. Department of the Army, Corps of Engineers and NFFE, Local 259*, 52 F.L.R.A. 920, 932 (1997); *SSA and AFGE*, 54 F.L.R.A 600 (1998); *see also* Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives, 29 Op. O.L.C. 179, 181 (2005) (noting the Office of Legal Counsel's prior conclusions that "sections 7102 and 7131(d) together give 'express authorization' under 18 U.S.C. § 1913 for union representatives to lobby Members of Congress on representational issues."). On top of this, Congress explicitly provided in 5 U.S.C. § 7211 that the "right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

Consequently, because not only is the statute exceptionally clear on this point but also because the Authority has ruled on it, the President is without authority to mandate otherwise. *Cf.* 5 U.S.C. § 7135(b). By purporting in Section 4(a)(i) of the order to ban the use of official time for "lobbying activities," however, he has attempted to do just that. Section 4(a)(i) is thus *ultra vires*. AFGE therefore has a substantial likelihood of success on this count.

2. Sections 2(j), 3(a), 4(ii), 4(iii), and 4(v) of the Official Time Order are plainly *ultra vires* and should be enjoined

The Official Time Order's attempt to redefine "official time" and put new restrictions on its use violates Chapter 71. Specifically, Sections 2(j), 3(a), 4(ii), and 4(v) are contrary to 5 U.S.C. § 7131. Section 4(iii) is similarly contrary to 5 U.S.C. §§ 7114(a)(4) and (b), and 5 U.S.C. § 7105(a)(2)(E). These sections are therefore *ultra vires* and void.

More specifically, Section 2(i) of the order seeks to redefine official time granted to an

employee under 5 U.S.C. § 7131 as "taxpayer-funded union time." But Chapter 71 contains no such term. Section 2(j) of the Official Time Order purports to establish a "union time rate" based on the total number of duty hours in the fiscal year that employees in a bargaining unit used for "taxpayer-funded union time," divided by the number of employees in such bargaining unit. But Chapter 71 contains no such term nor does it demand any such calculation.

Section 3(a) seeks to predetermine what constitutes "reasonable, necessary, and in the public interest" by setting forth a presumption that a "union time rate" in excess of 1 hour is not reasonable, necessary, or in the public interest, and requires agencies to commit the time and resources necessary to achieve a negotiated rate of 1 hour or less. But Chapter 71 contains no such presumption. Section 3(a) of the Official Time Order also seek to vest agencies with unilateral authority to determine whether a particular amount of official time is reasonable, necessary, and in the public interest, in that it purports to forbid agencies from agreeing to any amounts of official time that the agency decides on its own are not reasonable, necessary, and in the public interest. But Chapter 71 grants agencies no such unilateral authority.

Section 4(a)(ii) requires employees to spend seventy-five percent of their paid time in each fiscal year performing "agency business." In other words, this subsection limits the use of official time to twenty-five percent of an employee's duty time. And again, Chapter 71 contains no such limitation. Section 4(a)(v) of the Official Time Order purports to prohibit any employee from using official time "to prepare or pursue grievances" brought against an agency under any collectively bargained grievance procedure unless: (a) such use is "otherwise authorized by law or regulation;" (b) the employee is preparing or pursuing a grievance brought on the employee's own behalf; or (c) the employee is to appear as a witness in a grievance proceeding. Section 4(a)(v) thus purports to categorically prohibit the use of official time to: (a) prepare or pursue

grievances brought on behalf of a labor organization itself or brought to vindicate a labor organization's institutional interests; or (b) to provide a union representative to another employee. Chapter 71 allows none of this.

What Chapter 71 does do is create the Authority and expressly empower it to take necessary and appropriate actions to effectively administer the provisions of Chapter 71. 5 U.S.C. § 7105(a)(2)(I). What Chapter 71 does do is charge the Authority, not the President, with prescribing rules and regulations to carry out the provisions of Chapter 71 applicable to the Authority. 5 U.S.C. § 7134.

Chapter 71 controls. For example, 5 U.S.C. § 7102, as part of Chapter 71, protects the right of employees to form, join, or assist any labor organization freely and without fear of penalty or reprisal. Section 7102(1) further guarantees the right of employees to act as a representative of a labor organization, to present the labor organization's views to agency officials, the Congress, and other appropriate authorities, and to engage in collective bargaining over conditions of employment through representatives of their choosing.

In 5 U.S.C. § 7114(a)(1), Chapter 71 creates a duty of fair representation by requiring exclusive representatives to "represent[] the interests of all employees in the unit it represents without discrimination and without regard for labor organization membership." And 5 U.S.C. § 7114(a)(2) requires that an exclusive representative of an appropriate unit in an agency be given a genuine and reasonable opportunity to be present at (A) a formal discussion between any agency representative and one or more bargaining unit employees or their representative concerning, *inter alia*, any grievance; and (B) any investigative examination of a bargaining unit employee if the employee reasonably believes discipline may result from the interview and the employee requests representation. 5 U.S.C. § 7114(b)(1) likewise provides that agencies have a

duty to bargain in good faith that includes the obligation to approach negotiations with a sincere resolve to reach agreement.

By legislating all of these various rights and duties together against the backdrop of 5 U.S.C. § 7131(d), which in so many words actively mandates that union representatives "shall be granted" official time in any amount that the agency and the union mutually agree to be reasonable, necessary, and in the public interest, it is inconceivable that Congress meant to allow the Executive to rewrite the Statute as it would like. The text, purpose, and structure of the Statute inescapably leads to the conclusion that official time was given to labor organizations for the express purpose of fulfilling their duties and exercising their rights under Chapter 71. The Executive cannot now claim this back. This is what drove the court in *Council 214* to reject any assumption that "Congress' explicit provision for official time was not meant to be a meaningful guarantee." *Council 214*, 798 F.2d at 1530. It must be a meaningful guarantee because that is the only reading that makes sense when all the various components of the Statute are read together as one, integrated whole.

Section 4(a)(iii) of the Official Time Order fares no better. This section purports to categorically prohibit an employee acting on behalf of a federal labor organization from the "free or discounted use" of any governmental property or resource, including computers or computer systems, that are not ordinarily available for free or at a discount to non-federal organizations. But this section ignores the duty to bargain imposed by 5 U.S.C. § 7114(b)(1), and usurps the power of the Authority under 5 U.S.C. § 7105(a)(2)(E). In this vein, the Authority has long held that, for example, the provision of union office space is a substantively negotiable condition of employment. *U.S. Department of Veterans Affairs and AFGE, Local 31*, 60 F.L.R.A. 479, 482 (2004).

Chapter 71's creation of the duty to bargain in conjunction with the Authority's determination that union office space falls within that duty to bargain disallows the Executive from trying to single-handedly un-create what the Statute has wrought and the Authority has held. This is especially so because it cannot be gainsaid that Chapter 71 grants labor organizations rights that are distinct and above whatever rights non-federal organizations may have. *See*, *e.g.*, 5 U.S.C. § 7114(a). Section 4(a)(iii) is therefore *ultra vires* and should be enjoined.

b. AFGE will Suffer Irreparable Harm in the Absence of Injunctive Relief.

AFGE and its members will suffer irreparable harm if Sections 3 and 4 of the Official Time Order are not immediately enjoined. Section 4(a)(v)'s singling out of union representatives for disparate treatment vis-à-vis official time for grievances will discourage employees from becoming union representatives or otherwise associating with AFGE. Cann Decl. ¶ 22. This constitutional injury to AFGE's, and its members', right of expressive association is irreparable. *See Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) ("Although a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes.").

Further, AFGE has a statutory duty of fair representation to its bargaining unit employees in the negotiated grievance and collective bargaining process. *See* 5 U.S.C. § 7114(a)(1). AFGE, by and through its councils and locals, uses § 7131 official time to meet this duty of fair representation. Compl. ¶ 32. AFGE will be irreparably harmed because Sections 3 and 4 of the Official Time Order severely limit the amount of official time available to union officials to

represent AFGE members and represented bargaining unit employees. Sections 3 and 4 "perceptibly impair[]" AFGE's programs by making it markedly more difficult for AFGE to carry out its mission—representing federal employees. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 8 (2016) (explaining that an organization is harmed when the defendant's actions have "perceptibly impaired" the organization's programs and those actions directly conflict with the organization's mission).

Specifically, Section 3 of the Official Time Order will substantially impair AFGE's ability to represent bargaining unit employees in grievances, formal discussions, and investigations and while negotiating collective bargaining agreements because it places an arbitrary cap on the amount official time available to union officials in a fiscal year. In a similar fashion, Section 4 will substantially impair AFGE's ability to represent bargaining unit employees because it limits union officials to no more than twenty-five percent of official time in a fiscal year and prohibits union officials from receiving official time to represent employees in grievances or to represent the union in institutional grievances. Cann Decl. ¶¶ 20-22.

Sections 3 and 4 of the Official Time Order will harm AFGE and its members by diminishing the overall number of AFGE representatives available to assist employees with, for example, grievances, formal discussions, investigative interviews. Compl. 34. In addition, the Official Time Order will reduce the number of AFGE representatives available to assist with collective bargaining and contract enforcement. Cann Decl. ¶ 21. Further, the Official Time Order will discourage employees from becoming union representatives or otherwise associating with AFGE by eliminating the ability of AFGE representatives to use official time to purse institutional grievances or represent other employees in grievances. Cann Decl. ¶ 22.

Approximately 15 of AFGE's national-level collective bargaining agreements are currently open for bargaining. Cann Decl. ¶ 11. In the next 18 months approximately 15 more

agreements will become eligible for renegotiation. *Id.* The Social Security Administration ("SSA") has already informed AFGE of its intention to open multiple articles of the collective bargaining agreement between AFGE and SSA, including the articles concerning Official Travel, Official Time, Union use of Official Facilities and Communications, and Grievance and Arbitration Procedures, and to implement the Official Time Order on July 9, 2018, regardless of the status of any collective bargaining. Cann Decl. ¶¶ 13-15; Exhibit 1.1, SSA Bargaining Notice dated June 5, 2018.

If implemented, Sections 3 and 4 of the Official Time Order will irreparably harm AFGE and its members because those sections drastically diminish AFGE's bargaining power concerning official time and the use of government facilities. The harm caused by the Official Time Order cannot be remediated once the collective bargaining agreements are finalized.

c. The Balance of the Equities Favors AFGE

The balance of the harms weighs strongly in favor of granting a preliminary injunction. In contrast to the irreparable injury facing AFGE and its members, the government will not be injured by an injunction maintaining the status quo pending the resolution of this action. It will merely require defendants to continue to follow the law, and to abide by agreements and practices that are already in place. The parties have operated under the same statutory framework since the passage of the Statute in 1978. A preliminary injunction ordering the government to continue to comply with Chapter 71 and Authority regulations and decisions will cause the government no injury. But as shown above, withholding an injunction will cause AFGE irreparable harm. The balance of the equities therefore weigh heavily in favor of AFGE.

d. Public Policy Favors Injunctive Relief

The Public Interest heavily supports a preliminary injunction. Congress has plainly and clearly stated that collective bargaining is in the public interest:

> [E]xperience in both private and public employment indicates 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—
>
> > (A) safeguards the public interest,
> > (B) contributes to the effective conduct of public business, and
> > (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment
>
> …
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

5 U.S.C. § 7101 (a). Further, this statute implements the principle that "the right of federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business." *See AFGE v. Federal Labor Relations Authority*, 702 F.2d 1183, 1184 (D.C. Cir. 1983). Therefore, the "labor organizations and collective bargaining in the civil service are in the public interest." *Id.* at 1185, citing 5 U.S.C. § 7101(a).

Further, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is substantial public interest 'in having government agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). As discussed above, Sections 3 and 4 of the Official Time Order are contrary to plain language in Chapter 71 and the comprehensive statutory scheme established by the CSRA.

Moreover, the Official Time Order disregards collective bargaining and instead, adversely affects the public interest by depriving the public of an efficient and fair method for resolving labor-management disputes. Without this forum, labor organizations and their members are forced to seek redress instead in the courts, the media, and Congress, all to the

detriment of the public interest. *See* Patrick Hardin, 1 *Developing Labor Law* 764 (4th ed. 2001) (collective bargaining arose as a part of an effort to stem increasing congressional involvement in labor disputes).

Finally, there is no urgent need to implement the Official Time Order. Chapter 71 authorizes the government to make decisions and institute changes on many issues. *See* 5 U.S.C. § 7106(a). This has not changed. And this authority includes the power "to take whatever actions may be necessary to carry out the agency mission during emergencies." 5 U.S.C. § 7106(a)(2)(D). Therefore, a preliminary injunction will not thwart the government from operating in an effective and efficient manner.

IV. CONCLUSION

For the foregoing reasons, Section 4(a)(v) of the Official Time Order is contrary to the First Amendment and Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), 4(a)(iii), and 4(a)(v) are contrary to Chapter 71 of Title 5 of the United States Code. AFGE respectfully requests that this Court enter a preliminary injunction of the implementation and enforcement of Sections 2(j), 3(a), 4(a)(i), 4(a)(ii), 4(a)(iii), and 4(a)(v) of the Official Time Order.

Respectfully Submitted,

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Attorneys for AFGE

DECLARATION OF DAVID I. CANN

I, David I. Cann, hereby declare as follows:

1. I am the Director of the Field Services and Education Department (FSED) for the American Federation of Government Employees, AFL-CIO, (AFGE). I have worked for AFGE in this capacity since May 1, 2013. Prior to my work with AFGE, I was a labor lawyer and union negotiator in private practice.
2. I received my J.D. degree from the American University Washington College of Law, and am a member of the New York, New Jersey and Washington, D.C. bars.
3. As the Director of FSED, I am responsible for overseeing national-level collective bargaining on behalf of AFGE, including affiliated bargaining councils. This responsibility includes but is not limited to: managing national-level negotiations, managing staff assigned to negotiations and interacting with and coordinating with AFGE representatives who are members of union bargaining teams, developing bargaining strategy with respect to specific negotiations, developing general bargaining guidance, training AFGE representatives with respect to collective bargaining, and coordinating and managing related matters before the U.S. Federal Labor Relations Authority and the Federal Impasses Panel.
4. I, and my staff of roughly 9 labor relations specialists, assist approximately 40 nationwide AFGE bargaining units with term and midterm bargaining. This assistance includes serving as part of the union negotiating team alongside other non-staff AFGE representatives. This assistance also includes handling questions relating to contract and

statutory enforcement under the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71 ("Chapter 71").

5. I and my staff routinely work hand-in-hand with AFGE representatives who use official time under 5 U.S.C. § 7131, including under 5 U.S.C. § 7131(d), to bargain collectively with federal agencies and to provide representation to AFGE's bargaining unit members.
6. As such, I am familiar with AFGE national collective bargaining agreements, including those between AFGE and the U.S. Department of Veterans Affairs (DVA), AFGE and the U.S. Social Security Administration (SSA), AFGE and the U.S. Bureau of Prisons (BOP), AFGE and the U.S. Border Patrol (BP), AFGE and the U.S. Environmental Protection Agency (EPA), AFGE and U.S. Immigrations and Customs Enforcement (ICE), and AFGE and U.S. Citizenship and Immigration Services (CIS).
7. Each of the agreements referenced in paragraph 6 above provides for AFGE representatives to use official time, including official time under Section 7131(d), for: (a) the adjustment of grievances; and (b) collective bargaining; and (c) arbitration representation; and (d) pursuant to 5 U.S.C. § 7114(a)(2), the representation of bargaining unit employees at formal discussions or investigative interviews held by an agency; and for (e) the use of agency property or resources, at no added cost, to accomplish the union's representational work.
8. The agreement between AFGE and the U.S. Department of Veterans Affairs is available at:https://www.va.gov/LMR/docs/Agreements/AFGE/Master_Agreement_between_DVA_and_AFGE-fin_March_2011.pdf. (Last visited June 13, 2018). Articles 48 and 51 of this agreement govern official time, including allowing for lobbying when permitted by 5 U.S.C. § 7131, and the use of agency facilities respectively.

9. The agreement between AFGE and the U.S. Bureau of Prisons is available at: https://www.afgelocal1034.org/ewExternalFiles/2014%20New%20Master%20Agreement.pdf. (last visited June 13, 2018). Articles 11 and 12 of this agreement govern official time, including allowing official time for AFGE representatives to present the views of the union to Congress, and the use of agency facilities respectively.
10. I have read and understood sections 8(a) and 8(b) of Executive Order 13837 as directing executive agencies to renegotiate provisions of collective bargaining agreements that are inconsistent with the executive order and seek to bring them into compliance.
11. There are roughly 15 national-level collective bargaining agreements that are currently open, including DVA, SSA, BP, EPA and ICE. In the next 18 months, roughly another 15 agreements will become eligible for renegotiation.
12. Each of the national agreements to which AFGE is a party is likely to have provisions that the agency employer will declare inconsistent with Executive Order 13837.
13. On June 5, 2018, for example, SSA served notice upon AFGE that it wished to open up 21 of 41 articles of the collective bargaining agreement to bring them into conformance with the executive orders. SSA served notice to open the following articles for renegotiation:

Article 3	Employee Rights
Article 4	Negotiations During the Term of the Agreement on Management Initiated Changes
Article 5	Union Initiated Mid-Term Bargaining
Article 8	Official Travel
Article 9	Health and Safety

Article 10	Hours of Work, Flextime, Alternate Work Arrangements and Credit Hours
Article 11	Union Use of Official Facilities and Communications
Article 16	Training and Career Development
Article 17	Monetary Awards
Article 18	Equal Employment Opportunity
Article 20	Child Care and Elder Care
Article 21	Performance
Article 23	Disciplinary and Adverse Actions
Article 24	Grievance Procedures
Article 25	Arbitration Procedures
Article 26	Merit Promotion
Article 29	Union-Management Meetings
Article 30	Official Time
Article 31	Time and Leave
Article 40	Alternative Dispute Resolution
Article 41	Telework

14. A true and accurate copy of SSA's June 5, 2018 notice accompanies this declaration as Exhibit 1.1. I received this notice from AFGE's SSA council president Witold Skwierczynski, who received it directly from the agency.
15. SSA has indicated that it intends to implement Executive Order 13837 on July 9, 2018, regardless of the status of any collective bargaining.
16. Because of the high number of active agreements, including non-national agreements entered into at the local level by AFGE's approximately 1100 local union affiliates, and

because of the large number of provisions that the executive order seeks to have renegotiated, negotiations will demand enormous amounts of time, effort and resources from AFGE.

17. Chapter 71 provides that time spent engaging in collective bargaining "safeguards the public interest" and "contributes to the effective conduct of public business." 5 U.S.C. § 7101(a)(1).

18. Chapter 71 also requires unions and agencies to mutually agree on the amounts of official time that are "reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d).

19. In every collective bargaining agreement entered into by AFGE and an agency, the union and the agency have jointly negotiated amounts of official time that the parties agree are reasonable, necessary, and in the public interest; and for the purpose of AFGE representatives providing representation to all members of AFGE's bargaining units, not just union members.

20. Sections 4(a) of Executive Order 13837 introduces a hard cap on the amount of official available to union representatives, limiting them to no more than 25% per fiscal year. This cap is inconsistent with Chapter 71, and will severely limit the amount of official time available to AFGE representatives. This will, in turn, deprive bargaining unit employees of the union representation they are entitled to under Chapter 71, and deprive agencies of an experienced labor-management counterpart.

21. Executive Order 13837 will damage AFGE's ability to represent bargaining unit employees and to work jointly with management. For example, on its face, the order will reduce the number of AFGE representatives available to assist with collective bargaining

and contract enforcement while on official time, and thereby diminish the union bargaining teams that FSED works with on a regular basis.

22. Section 4(a)(v) of Executive Order 13837 will especially prevent AFGE from effectively using official time to prepare or pursue institutional grievances or represent other employees in the grievance process, which in turn will discourage employees from becoming union representatives and otherwise associating with the union.

23. The executive order also seeks to muzzle union representatives by clawing back lawfully negotiated and permissible official time for employees and AFGE representatives to make their views known to Congress on important matters affecting employees' conditions of employees.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2018.

David I. Cann
Director of Field Services
AFGE

Exhibit 1.1

SOCIAL SECURITY

June 5, 2018

NUC/AFGE-2018-784

Mr. Witold Skwierczynski, Spokesperson
SSA/AFGE General Committee
P.O. Box 47638
Baltimore, MD 21244-7638

Mr. Skwierczynski:

On May 25, 2018, President Trump issued three Executive Orders (enclosed) addressing matters of significance to the federal labor relations community. In accordance with the Federal Service Labor-Management Relations Statute, Article 4 of the expired 2012 SSA-AFGE National Agreement, and the three Executive Orders, this is notice of the Agency's decision to implement all three Orders effective July 9, 2018.

The Agency recognizes that there are various issues addressed in these Orders that are also contained in the expired 2012 SSA-AFGE National Agreement. However, as explicitly stated in the Agency's December 2017 Notice to Terminate the National Agreement, the Agency retained the right to propose changes, independent of term negotiations, to any of the negotiable articles in the National Agreement, as well as MOUs (including the parties' 2018 Ground Rules MOU), Supplemental Agreements, or any other written agreement.

Therefore, effective July 9, 2018, the Agency proposes to revise the following Articles, as well as any other Articles implicated by the Executive Orders, in the expired 2012 SSA-AFGE National Agreement and the parties' 2018 Ground Rules MOU to adhere to the Executive Orders.

Article 3	Employee Rights
Article 4	Negotiations During the Term of the Agreement on Management Initiated Changes
Article 5	Union Initiated Mid-Term Bargaining
Article 8	Official Travel
Article 9	Health and Safety
Article 10	Hours of Work, Flextime, Alternate Work Arrangements and Credit Hours
Article 11	Union Use of Official Facilities and Communications
Article 16	Training and Career Development
Article 17	Monetary Awards
Article 18	Equal Employment Opportunity
Article 20	Child Care and Elder Care
Article 21	Performance
Article 23	Disciplinary and Adverse Actions
Article 24	Grievance Procedures
Article 25	Arbitration Procedures

Article 26	Merit Promotion
Article 29	Union-Management Meetings
Article 30	Official Time
Article 31	Time and Leave
Article 40	Alternative Dispute Resolution
Article 41	Telework

The Agency intends to provide additional information regarding the specific changes to the expired 2012 National Agreement prior to the July 9, 2018 implementation date. In addition, the Agency will adhere to the 2018 Ground Rules MOU until it is modified through the statutory bargaining process.

In the interim, please contact Jack Leiby, OLMER Senior Advisor, at 312-575-4432 with any questions.

Sincerely,

/s/
Ralph Patinella
Associate Commissioner
Office of Labor-Management
and Employee Relations

Enclosures