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

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| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, National Council of HUD Locals Council 222, AFL-CIO, 451 7th St. SW, Washington D.C. 20410; and | ) | Civil Action No. 1:19-cv-01934<br>Civil Action No. 1:19-cv-01976 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, 80 F Street NW, Washington, DC 20001, | ) | |
| Plaintiffs, | ) | |
| v. | ) | |
| FEDERAL SERVICE IMPASSES PANEL, 1400 K Street NW, Washington, DC. 20424; and | ) | |
| MARK ANTHONY CARTER, In his official capacity as Chairman of the Federal Service Impasses Panel, 1400 K Street NW, Washington, DC 20424; and | ) | |
| FEDERAL LABOR RELATIONS AUTHORITY 1400 K Street NW, Washington, DC 20424, | ) | |
| Defendants. | ) | |

**_AMICUS CURIAE_ BRIEF IN SUPPORT OF PLAINTIFF**
**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES**

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## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Federal Regulations**



**Other Authorities**

## INTEREST OF AMICUS CURIAE

As set forth more fully in the Unopposed Motion for Leave to file this brief, *amicus*, the Association of Administrative Law Judges (AALJ), a national organized labor organization representing approximately 1300 administrative law judges (ALJs) at the Social Security Administration (SSA) has a strong interest in this case because the Court's disposition of the issues presented will profoundly affect the AALJ, as well as many other federal sector labor unions who appear at impasse before the Federal Service Impasses Panel (Panel). On June 28, 2019, Federal Mediation and Conciliation Service Commissioner Randall J. Mayhew certified AALJ's collective bargaining negotiations with SSA at impasse. On October 2, 2019, SSA requested the Panel's assistance with the issues certified at impasse and on October 18, 2019, AALJ filed its jurisdictional opposition to the Panel providing the requested assistance as the panel is not constitutionally or statutorily constituted, and is thus a nullity incapable of legally providing the assistance requested. *Amicus curiae* now seeks to join the Plaintiffs in asserting the Panel is neither constitutionally nor statutorily constituted and wants to ensure these issues central to the Plaintiffs' arguments receive a thorough and comprehensive review by this Court.

## ARGUMENT

### I. Federal Service Impasses Panel Members Not Constitutionally Appointed

The Panel lacks the authority to issue any decision – including determining whether to assert or decline jurisdiction over cases and issuing decisions to resolve parties' impasses - because the Panel members are not constitutionally appointed. The method by which the Panel members are appointed under the statute unconstitutionally confers upon the President plenary

power to appoint principal Officers in violation of Article II, Section 2, Clause 2 of the U.S. Constitution (Appointments Clause). *See* U.S. Const. art. II, § 2, cl. 2.

For purposes of appointments, the Constitution lays out the exclusive methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. *See* Appointments Clause. The first method requires nomination by the President with the advice and consent of the Senate. *Id.* However, the framers in their infinite wisdom realized that offices and officers would be become too numerous for this to be the exclusive method of nominating officers. Therefore, they created a second, lesser class of officers with a more streamlined appointment process in which Congress could vest the appointment of inferior officers in the President alone, courts of law, or heads of departments. *Id.* No other lawful means of appointment of officers exits.

Pursuant to prevailing Supreme Court case law, the Chair and all the members of the Panel are principal Officers, however the statute that governs their appointments, 5 U.S.C. §7119, does not require Senate confirmation. Thus, the statute is unconstitutional. Principal officers must be nominated by the President with the advice and consent of the Senate. *See Lucia v. SEC*, 585 U.S. ___, 138, S. Ct. 2044, 2056 (2018); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 88-82 (1991).

A. Legal Analysis for Officers

The Supreme Court first examined the definition of an officer in *United States v. Hartwell*, 73 U.S. 385(1867). In *Hartwell*, the Court found that an officer is one who holds an office conferred by appointment that embraces the ideas of tenure, duration, emolument and duties. *See Hartwell*, 73 U.S. at 386. A review of the Panel reveals the members satisfy the

criteria set forth in *Hartwell* as a specified number of Panel members are directly appointed by the President, serve a five year term, receive compensation fixed by law, and have statutorily defined duties. *See* 5 U.S.C. § 7119; s*ee Hartwell,* 73 U.S. at 393.

*Hartwell* further required the duties of officers to be continuing and permanent in nature and not occasional or temporary. *Hartwell,* 73 U.S. at 393. In *United States v. Germaine*, 99 U.S. 508 (1878), this requirement was further examined and the duties of civil surgeons appointed by the Commissioner of Pensions were determined to be occasional and intermittent rather than continuing and permanent, and thus they were found not to be officers. *See Germaine*, 99 U.S. at 512. The Court decided the surgeons in *Germaine* were only called upon to act when someone presented himself or herself for examination and that in any given year they could conduct fifty examinations or none at all. *Id.* Given the uncertainty of their duties, the Court likened them more to contractors who were required to maintain no permanent place of business for public use, took no oath and issued no bonds. Additionally, the surgeons in *Germaine* did not receive regular appropriations to pay their compensation. *Id.*

Although here the Panel members are part-time, decide cases only when requested by a party certified at impasse, and the number of such cases decided may vary from year to year, unlike the surgeons in *Germaine*, the Panel members are clearly distinguishable and are officers. *See id*. Here, the Panel has a public place of business with fixed hours accessible to the public.[1] Additionally, they maintain a full-time staff consisting of an Executive Director, two Attorney-Advisors and an Administrative Assistant. Further, they are administered an oath of office upon appointment, and receive an annual budget through the appropriations process that

[1] The public website for the Panel indicates the Office of the Executive Director for the Panel is located at 1400 K Street, N.W, Suite 200, Washington, DC 20424 with posted hours of duty from 8:00 am to 4:00 pm. *See* www.flra.gov/fsip_contact.

covers their salary, travel, and expenses associated with maintaining a public place of business. As such, none of the factors present in *Germaine* that precluded the surgeons from being considered officers are present with the Panel members. Thus, *Germaine* is inapposite to the present case and the Panel members. *See id*.

The Supreme Court again examined the definition of an officer, and further refined the test for distinguishing an officer from a mere employee or other government official in *Freytag v. Commissioner*, 501 U.S. 868 (1991). In *Freytag*, the Court examined whether special trial judges were inferior officers or employees. *Id.* The Court found that any appointee who exercises significant authority pursuant to the laws of the United States is an officer and must be appointed in the manner prescribed in the Appointments Clause. *Id* at 880. The Court found the authority vested in special trial judges was inconsistent with those of mere employees. *Id.* Specifically, it found their positions were established by law with duties, salary, manner of appointment all specified by statute, and they issued final decisions. *Id*. Further, they took testimony, conducted trials, ruled on the admissibility of evidence, and had the power to enforce compliance with discovery. *Id.* at 881.

All of the Court's findings regarding the special trial judges in *Freytag* are mirrored within the Panel. *See id*. The Panel is established by 5 U.S.C. § 7119. The statute sets forth the duties, authorities, salary, and manner of appointment for Panel members. The statute provides that Panel decisions are final and binding on the parties, unless the parties mutually agree otherwise. 5 U.S.C. § 7119(c)(5)(C). Further, panel members, pursuant to the statute, are empowered to hold hearings, administer oaths, take testimony and depositions under oath, issue subpoenas, and take whatever additional action in their discretion they deem necessary to resolve

impasses. 5 U.S.C. § 7119(c)(5)(B). As such, under *Freytag,* the Panel members again would be considered officers.

Most recently, the Supreme Court examined whether administrative law judges at the Securities and Exchange Commission were inferior officers and invalidly appointed under the Appointments Clause. *Lucia v. S.E.C.*, 585 U.S. ___, 138 S.Ct. 2044 (2018). In *Lucia*, the Court examined its precedent for distinguishing between officers and employees in its leading cases as set forth in *Germaine, Buckley,* and *Freytag. See Lucia*, 585 U.S. at ___, 138 S.Ct. at 2050-2054. Relying primarily on its "unadorned significant authority" test in *Freytag*, the Court found the administrative law judges to be inferior officers because they were near carbon copies of the special trial judges in *Freytag*. *Lucia*, 585 U.S. at ___, 138 S.Ct. at 2052-2053, *citing Freytag*, 501 U.S. at 868. Thus, the Panel members in the present case are unquestionably officers. All of the criteria applied by the Court to the administrative law judges in *Lucia* are applicable to the Panel. The authority, duties and responsibilities of the Panel members are similar to those of the administrative law judges in *Lucia* and the special trial judges in *Freytag*, and thus satisfy the requirements of officers as set forth in *Lucia. See id*.

B. Legislative History Confirms the Officer Status of the Panel Members

On October 29, 1969, President Richard Nixon issued Executive Order 11491 entitled "Labor Management Relations in the Federal Service." This Executive Order was groundbreaking and established the institutional framework to govern labor-management relations throughout the federal government. The Executive Order created two new entities - the Federal Labor Relations Council, the precursor to the Authority, and the Impasse Panel within it which was granted discretionary powers to assist parties in resolving bargaining impasses when

voluntary arrangements failed. *See* Executive Order 11491. At that time, the Panel was granted only three explicit powers: to promulgate regulations, to resolve impasses through recommendations for resolutions, and to take appropriate action to settle disputes. The grant of authority to "take appropriate action to settle disputes" was not defined nor was the Panel granted any other authorities or powers such as to conduct hearings. *Id.*

Originally, the Panel, consisted of only three members and did not have the same expansive powers that it has today. This would come approximately nine years later with the enactment of Title VII of the Civil Service Reform Act of 1978 (the Act). The Act, along with the Reorganization Plan Number 2 of 1978, formally established the Authority and made significant changes to the Panel. The Act expanded the number of Panel members from three to seven, and formally bestowed upon the Panel the indicia of officers, which did not previously exist. The Act gave the Panel the expressed authority to administer oaths, conduct hearings, issue subpoenas, issue binding decisions upon the parties unless the parties mutually agreed otherwise, and made the Panel's decisions final and non-reviewable or appealable. *See* 5 USC § 7119. The Panel, through appropriations, was also provided a budget in which to staff a full time office.

A review of the legislative history of the Act is also instructive because the congressional hearings and other documents of the time illustrate clear intent on the part of Congress to create the Panel as a governmental office whose appointments would rest solely with the President. In the Reorganization Plan Number 2 of 1978, it referred to the Panel members as "officers" and listed them among the officers who were eligible for interim appointments. *See* Reorganization Plan No. 2 of 1978, (signed by President Jimmy Carter on May 23, 1978 and Committed to the

Committee of the Whole House on the State of the Union on July 26, 1978). It is important to note that all of the other "officers" listed were principal officers, who must be nominated by the President and confirmed by the Senate. The interim officers set forth in the plan included the following: Director and Deputy Director of the Office of Personnel Management, Chairman and members of the Authority, General Counsel of the Authority, and the Chairman and members of the Panel. *See id*. Congress repeatedly referred to the Panel members as appointed to an "office" and thus, officers. *See* Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Committee on Post Office and Civil Service House of Representatives, Ninety-Sixth Congress, November 19, 1979. As such, the legislative history of the statute further confirms that the Panel members are officers.

C. Panel Members are Principal v. Inferior Officers

Since the Panel members are indeed officers, the analysis must now turn to determine whether they are principal or inferior officers under the Appointments Clause. It is well established that the Appointments Clause of the Constitution divides officers into two categories: (1) principal or superior officers whose appointments require nomination by the President and confirmation by the Senate; and (2) inferior officers, whose appointment Congress rests with the President alone, courts of law, or agency heads. U.S. Const. art. II, § 2, cl. 2.

If Panel members were inferior officers their manner of appointment by the President pursuant to the Statute would likely be constitutional because the Constitution grants Congress the express authority to vest the appointment of inferior officers in the President, as well as with courts of law or agency heads. *See id*. However, the evidence suggests that the Panel members

are principal rather than inferior officers and thus, their existing manner of appointment is unconstitutional.

The Act that created the FLRA, divides the Authority into three separate and distinct statutory components each with unique adjudicative or prosecutorial roles. The Authority decides cases; the Office of the General Counsel investigates and prosecutes cases; and the Panel resolves negotiation impasses. All three are equal in autonomy within their defined areas of authority and responsibility. *See* 5 U.S.C §§ 7105, 7118, 7119, 7134. No distinction is made in 5 U.S.C. § 7134 for the Panel, instead they are placed on equal footing with the Authority and the General Counsel. Members of the Authority and the General Counsel are all principal officers who are nominated by the President with the advice and consent of the Senate. 5 U.S.C. § 7104 (b) and (f)(1). This too must be required for the Panel based on the evidence and analysis under existing case law.

In *Edmond*, the Supreme Court recognized that its precedent at that time had not set forth exclusive criteria for distinguishing between principal and inferior officers. *Edmond v. United States*, 520 U.S. 651, 661 (1997). Therefore, the Court in *Edmond* found the distinguishing factor between the two is that the term "inferior officer" connotes a relationship with some higher-ranking officer or officers below the President. *Id* at 662. Whether one is "inferior" depends on whether or not he has a superior. *See id.* It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. *Id.* Rather, the Court found inferior officers are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate. *Id.* In this way the government can preserve political

accountability relative to important government assignments. *Id*. Additionally, the Court held the power to remove an individual at will is a "powerful tool for control" and can be a determining factor for supervision. *Id. at* 664.[2]

Here, the Panel is an entity within the Authority. 5 U.S.C. § 7119 (c) (1). However, despite being within the Authority, it is a distinct organizational entity that is both separate and autonomous. *See* Reorganization Plan No. 2 of 1978, (signed by President Jimmy Carter on May 23, 1978 and Committed to the Committee of the Whole House on the State of the Union on July 26, 1978). Although the Panel resides within Authority, the Authority has no statutorily derived powers, duties or authority over the Panel. *See* 5 U.S.C §7105. Panel members are appointed directly by the President, have no direct or indirect relationship with any higher-ranking officer or officers below the President who direct, review and/or supervise their actions, activities or decisions, and are answerable only to the President through his statutory at will removal power. *See* 5 U.S.C § 7119 (c) (3). Therefore, if anyone is found to supervise the Panel, it would be the President through his statutory at will removal power. No other individual(s) has the statutory authority to remove a Panel member for any purpose except the President. *Id*.

Further, unlike the special trial court judges in *Freytag* and the administrative law judges in *Lucia,* the Panel's decisions are final, binding (unless the parties mutually agree otherwise) and non-reviewable or appealable, absent extraordinary circumstances, by any administrative

[2] On November 12, 2019, the President issued the "Presidential Memorandum on the Delegation of Removal Authority Over the Federal Impasses Panel." This memorandum purports to delegate the President's statutory authority to remove Panel members at will to the Federal Labor Relations Authority. It is our position that such authority cannot be delegated. Congress expressly vested this authority via statute alone in the President. Additionally, the memorandum attempts to vest in the Authority the ability to review decisions of the Panel in order to ascertain whether they are consistent with 5 USC § 7101(b). It is our position that such review is unlawful as it directly conflicts with the statute and established case law that decisions of the Panel are final and non-reviewable. Presidential memorandum are not law and do not have the force and effect of law, as such this memorandum cannot overturn or materially change a statute.

body, including the Authority, or a court of law because Congress expressly precluded direct review of Panel decisions. *See Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1498 (D.C. Cir. 1984). The Panel "serves as a forum of last resort in the speedy resolution of disputes between a federal agency and the exclusive representative of its employees after negotiations have failed." *National Air Traffic Controllers Association, AFL-CIO v. Federal Service Impasses Panel,* 437 F.3d 1256, 1257–58 (D.C. Cir. 2006) (*citing Brewer*, 735 F.2d at 1501). Therefore, the decisions of the Panel are not subject to direct judicial review absent extraordinary circumstances as defined by *Leedom v. Kyne*, 358 U.S. 184 (1958). *Brewer,* 735 F.2d at 1500-01.

*Leedom* provides an extremely limited exception that is narrow in scope to the non-reviewability of the Panel's decisions. "[A] Leedom v. Kyne claim is essentially a Hail Mary pass" that "rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). In order to justify the exercise of *Leedom* jurisdiction, a plaintiff must show: (1) that an agency has acted in excess of its delegated powers and contrary to a specific statutory prohibition that is clear and mandatory; and (2) absent judicial review by the district court, the party would be wholly deprived of a meaningful and adequate means of vindicating its statutory rights. *See Leedom,* 358 U.S. at 188.

The *Leedom* exception is extremely narrow and rarely used, and applies only where an agency has exceeded its delegated powers or facially violated a statute. *See, e.g.*, *Lundeen v. Mineta*, 291 F.3d 300, 304-05 (5th Cir. 2002). *Russell v. NMB*, 714 F.2d 1332, 1340 (5th Cir. 1983) (finding the *Leedom* exception is narrow and rarely successfully invoked). The exception is not applicable unless the party asserting jurisdiction can demonstrate "a plain violation of an

unambiguous and mandatory provision of the [Statute]." *Lundeen*, 291 F.3d at 312. Panel decisions, thus enjoy an exceedingly deferential standard of review making Panel members markedly more independent than the judges in both *Freytag* and *Lucia*. *Compare Lucia*, 138 S.Ct. at 2052-2053, *and Freytag*, 501 U.S. at 868. This extraordinary deference is undisputed by the Parties as advanced in both the Defendants' and Plaintiffs' pleadings to date.

Furthermore, no presidentially-appointed officer has independent statutory authority to review a final decision of the Panel before issuance. The Supreme Court deemed it "significant" whether an appointed official has the power to review an officer's decision such that the officer cannot independently "render a final decision on behalf of the United States." *Edmond*, 520 U.S. at 665. Furthermore, the Panel has independent and exclusive authority, without oversight, under the statute to promulgate policies, rules and regulations to carry out the provisions of the statute applicable to the Panel. *See* 5 U.S.C 7134. Unlike the Board in *Arthrex, Inc. v. Smith & Nephew, Inc.*, no other individuals have statutory authority to issue policies or regulations that guide the outcomes of the decisions of the Panel other than the Panel itself. *Arthrex, Inc. v. Smith & Nephew, Inc.*,, ___ F. 3d ___, 2019 U.S. App. LEXIS 32613 (Fed. Cir., No. 18-2140, October 31, 2019) (Slip Op.).

Courts have held that individuals who exercise such significant deference, authority and independence are principal officers who must be appointed in accordance with the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (holding the eight members of the Federal Election Commission were improperly appointed because Congress was precluded under the separation of powers principle from vesting in itself the sole authority to appoint principal officers who require nomination by the President and confirmation by the Senate); *See*

*Association of American Railroads v. U.S. Department of Transportation,* 821 F.3d 19, 39 (D.C. Cir. 2016) (holding that railroad passenger rate arbitrators are principal officers because arbitrators' decisions are non-reviewable); *See Intercollegiate Broad Systems, Inc. v. Copyright Royalty Board.*, 684 F.3d 1332, 1336-40 (D.C. Cir. 2012) (holding Copyright Royalty Board members principle officers because they exercised significant discretion and issued non-reviewable final agency decisions).

The framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. "Our separation of powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." *Freytag,* 501 at 878; citing *Mistretta v. United States,* 488 U. S. 361, 382 (1989). "The Appointments Clause not only guards against this encroachment, but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id*.

The Appointments Clause clearly and precisely sets forth the exclusive manner in which a principal officer may be constitutionally appointed, by nomination of the President with the advice and consent of the Senate. The Framers anticipated that the President would be more vulnerable to interest-group pressure and personal favoritism than would a collective body elected by the people. *Edmond*, 520 U.S. at 659. As such, the requirement of Senate confirmation served to both curb Executive abuses of the appointment power, and to promote judicious choices in filling the offices of the union. *Id.* Therefore, the Appointments Clause confers plenary power to the President to nominate principal officers and plenary power to the

Senate to reject or confirm the President's nominee, through its advice and consent responsibility under the Constitution. This serves to ensure checks, balances and accountability.

The Panel members were not appointed in this manner. As the Supreme Court instructs, when confronting a constitutional flaw in a statute, the proper solution to the problem is to sever any problematic portions while leaving the remainder intact. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)). Therefore that portion of the statute that vests plenary power in the President to appoint Panel members should be stricken and Panel members must be appointed in a manner consistent with the Appointments Clause. In the absence of proper appointment consistent with the Appointments Clause, the Panel lacks the authority to discharge its duties as principal officers within the doctrine of separation of powers. Therefore, the Panel as currently constituted is a nullity.

## II. FSIP Panel Members Not Statutorily Constituted

The Panel is not constitutionally constituted because the statute unconstitutionally confers upon the President plenary power to appoint rather than merely nominate principal officers. However, the Panel has nonetheless operated under the assumption that the appointment process under the statute was legal and proper. Despite this assumption, the Panel is not even statutorily constituted.

Title 5 Section 7119 of the United States Code (statute) establishes the Federal Service Impasses Panel (Panel) within the Federal Labor Relations Authority (Authority). The Panel is empowered to resolve negotiation impasses that arise between an agency and a federal sector

labor organization engaged in collective bargaining. The statute prevents the Panel from taking action that is inconsistent with the statute. 5 USC § 7119 (c)(5)(B)(iii). The statute further lays out the authorities and method of appointment for each Panel member. It provides that "the Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved…" 5 USC § 7119 (c)(2). At all relevant times when the Panel asserted its jurisdiction over the case at issue, the Panel was composed of a Chairman and five members, and thus lacked the statutorily required minimum number of members to perform the duties and functions of the Panel as required clearly and plainly by the statute.

On or about May 18, 2017, the President discharged all members of the Panel, which left all positions on the Panel vacant. Following the discharge of the entire Panel, on or about July 26, 2017, the President appointed Mark Carter to be Chairman of the Panel and appointed the following individuals to be members: Andrea Fisher Newman; David R. Osborne; Karen M. Czarnecki; Donald Todd; Jonathan Riches; and F. Vincent Vernuccio. On January 10, 2019, the appointments of Donald Todd, Jonathan Riches and F. Vincent Vernuccio expired, leaving the Panel with a chairman and three members. On May 3, 2019, Jonathan Riches and F. Vincent Vernuccio were reappointed for the remainders of five-year terms expiring on January 10, 2024, leaving the Panel with a chairman and five other members. Donald Todd was not reappointed. On September 19, 2019, the President announced his intent to appoint Robert J. Gilson, Maxford Nelson, and Michael Lucci to be members of the Panel for a term of five years. Additionally, on October 29, 2019, the President announced his intent to appoint Patrick James Wright to be a member of the Panel for the remainder of a five-year term. However, of the five individuals the

President announced his intent to appoint in September and October (Gilson, Maxford, Nelson, Lucci and Wright) only two appear to have been added as Panel members on the Panel's website (Gislon and Nelson). However, from July 26, 2017 to September 19, 2019, it is clear the Panel lacked the statutorily required minimum number of members to perform the duties and functions of the Panel as required clearly and plainly by the statute. This defect as to the present case was not cured by later appointments.

When a statute is plain and unambiguous on its face, it must be given its plain meaning and applied according to its terms. *See Sebelius v. Cloer*, 569 U.S. 369 (2013). Here, the statute clearly and plainly requires the Panel to be composed of a total of seven members (Chairman and six panel members) in order to perform its duties and functions. The statute uses the word "shall" in order to convey clearly and plainly that the number needed for the Panel to conduct business is mandatory and not permissive. Although the Supreme Court held "shall" generally means "must," it also found it can mean "should, will, or even may." *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 (1995). The ultimate meaning depends upon the context and the legislative intent of the statute. *Id.* Here, Congress coupled the use of the word "shall" with the phrase "at least six panel members" to convey its intent to create a statutory minimum for the Panel. 5 USC § 7119 (c)(2).

The statute is clear and unambiguous and includes no additional words or phrases to convey an alternative interpretation. When words of a statute are clear and unambiguous, courts need not inquire any further into the meaning of the statute. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). The Supreme Court held "Congress [must] be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."

*Finley v. United States*, 490 U.S. 545, 556 (1989). Here, Congress clearly intended the Panel to be a body of seven members in order to carry out its functions and duties.

A review of the legislative history of the statute reveals no discussions, proposed language or other indications that Congress intended the Panel to operate with fewer than seven individuals. In fact, it suggests otherwise as prior versions of the statute also used the language *at least* to indicate clearly the intent was for the Panel to be composed of a Chair and "at least six panel members." *See* Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Committee on Post Office and Civil Service House of Representatives, Ninety-Sixth Congress, November 19, 1979. ("There is established within the Authority a Federal Service Impasses Panel. The Panel shall be composed of a Chairman and at least 6 other members"...). Additionally, at the time when the statute was enacted, Congress also enacted legislation that created the Authority. *Id.* The legislation for both entities was modeled after earlier legislation enacted by Congress in which it created the National Labor Relations Board (NLRB). *See* 29 U.S.C §153. In both the legislation creating the Authority and the NLRB, Congress included in its enactment legislation language authorizing those entities to operate with a quorum made up of a majority of its members. 29 U.S.C §153(b); 5 USC §7104 (d). Yet, it chose not to do so for the Panel. No such quorum language or other language authorizing the Panel to operate with a vacancy is included in the statute. This was not a simple omission. It was intentional.

Furthermore, the statute in its definitions section specifically defines the term "Panel" to mean "the Federal Service Impasses Panel as described in section 7119(c) of this title." Since 5 USC § 7119 (c)(2) requires the "Panel" to be comprised of a Chair and six panel members, not

only do we not have the requisite number of members, but we do not have a "Panel" within the meaning of the statute. Therefore, the Panel is a nullity.

On January 17, 1980, the Panel through its rulemaking authority, granted in the statute, promulgated regulations changing the definition of the word "Panel" as defined in the statute. *See* 45 Federal Register 3520, January 17, 1980, as amended at 48 Federal Register 19693, May 2, 1983, August 31, 1988. The term "Panel" was changed to mean "the Federal Service Impasses Panel described in 5 U.S.C. 7119(c) *or a quorum thereof."* 5 CFR §2470.1(f). Further, the term "quorum" was added and defined "as a majority of the members of the Panel." 5 CFR §2470.1(h). Federal agencies may promulgate rules when such authority is delegated by statute. Additionally, agencies must promulgate rules in a manner consistent with the procedures set forth in the Administrative Procedures Act. *See* 5 U.S.C §§ 553, 554. However, agencies can not promulgate rules that are in direct conflict with the parent statute, negate the plain language of the statute or Congress' legislative intent. Here, Congress chose not to include language in the statute allowing the Panel to operate with a quorum, in fact, it specifically precluded it by requiring the Panel to operate only with a Chairman and at least six panel members. 5 USC § 7119 (c)(2). The Panel's attempt to create a rule for it to be able to operate with a quorum, where none previously existed statutorily, was arbitrary and capricious, exceeded its legal authority delegated by Congress, and resulted in an abuse of discretion. *See* 5 U.S.C §§ 706 (2)(A)and(2)(c). Additionally, the Panel is not entitled to *Chevron* deference because the statute specifically and unambiguously addresses the number of Panel members required for the Panel to operate and perform its duties and functions. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Furthermore, on July 19, 2019, AALJ, by and through its President, Judge Melissa McIntosh pursuant to the Freedom of Information Act formally requested **all** documents demonstrating the proper appointments of the current chair of the Panel and each current Panel member. This request included any and all documents demonstrating President Trump actually appointed the current chair and current Panel members, as well as any delegation of authority President Trump made to another individual who may have made these appointments.

On August 28, 2019, in response to this request, Judge McIntosh received a response from Rebecca J. Osborne, Deputy Solicitor of the Federal Labor Relations Authority. The response included press releases announcing the President's intent to appoint Panel members and Standard Form 50, Notification of Personnel Actions for the following Panel members - Andrea Fisher Newman; David R. Osborne; Karen M. Czarnecki; Donald Todd; Jonathan Riches; and F. Vincent Vernuccio.

All of the Standard Form 50, Notification of Personnel Actions referenced attached appointment affidavits, none of these affidavits were provided to Judge McIntosh even after they were specifically requested, and to date these affidavits have yet to be provided. Furthermore, none of the Standard Form 50, Notification of Personnel Actions were signed by the President, but instead were signed by the Director of Human Resources. Therefore, in addition to the Panel lacking the statutorily required number of panel members, there is nothing to indicate that **any** of the Panel members have actually been appointed by the President in a manner consistent with the statute.

As it stands, the only actual evidence we have that any of the Panel members were properly appointed, despite our requests, are the press releases illustrating the President's intent

to appoint them. Therefore, the Panel is a nullity, and lacks the authority to issue any decisions – including determining whether to assert or decline jurisdiction over cases and issue decisions to resolve parties' impasses – as that requires a majority vote of the entire Panel. To hold otherwise would result in the Panel exceeding its legal authority under the statute. *See* 5 USC § 7119 (c)(2).

## CONCLUSION

As set forth above, the Federal Service Impasses Panel is, and during all relevant times concerning the case at issue has been, a nullity for two separate and distinct reasons. First, the statute which establishes the Panel unconstitutionally confers upon the President plenary power to appoint principal officers in violation of the Appointments Clause. This statutory flaw is fatal because the Appointments Clause of the Constitution sets forth the exclusive manner of appointment of officers of the United States. The Panel members are principal officers who have not been appointed with the advice and consent of the Senate as is required in the Constitution.

Second, the Panel lacked a sufficient number of members to conduct its business pursuant to the statute when it decided this case at issue, as the statute clearly and plainly requires a total of seven members (Chairman and at least six panel members). The fact that additional members may have been recently added does not cure the defect that existed when the Panel asserted jurisdiction and rendered its decisions against the Plaintiffs. Additionally, there is no proof that any of the Panel members have actually been appointed by the President as is required by the statute. This information was specifically requested via the Freedom of Information Act by AALJ and was not and has not to date been provided. Accordingly, it is proper for this court to conclude it does not exist.

As such, for all the foregoing reasons, the Panel is a nullity and lacks the authority to issue decisions, including determining whether to assert or decline jurisdiction over cases and issue decisions to resolve parties' impasses.

Respectfully submitted,

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Dated: November 15, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on this November 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. I also certify that the foregoing document is being served on all counsel of record and that such service will be accomplished by the CM/ECF system.

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