No. 02-283

In the Supreme Court of the United States

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction under the Administrative Procedure Act to review an appropriate unit determination of the Federal Labor Relations Authority.

2. Whether a federal district court has jurisdiction to review the legal interpretations that underlie an appropriate unit determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 283 F.3d 339. The opinion of the district court (Pet. App. 11a-23a) is unreported. The opinion of the Federal Labor Relations Authority (Pet. App. 27a-51a) is reported at 55 F.L.R.A. 657. The decision of the Regional Director of the Federal Labor Relations Authority (Pet. App. 52a-83a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2002. Pet. App. 84a. A petition for rehearing was denied on May 22, 2002. The petition for a writ of certiorari was filed on August 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. National Guard dual status technicians are full-time civilian employees of the United States Departments of the Army and Air Force. Pet. App. 2a. Pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. 709, dual status technicians are employed and administered by the Adjutant General of the state Guard for whom they work. Pet. App. 2a. As a condition of their federal civilian employment, dual status technicians are required to maintain military membership in the state National Guard in which they are employed. *Ibid.*

The Association of Civilian Technicians, Inc. (petitioner) represents bargaining units of dual status technicians in 42 territories and States. Pet. App. 53a. Petitioner filed a petition with a regional office of the Federal Labor Relations Authority (FLRA), seeking to consolidate those individual state units into a single unit pursuant to Section 7112(a) of the Federal Service Labor-Management Relations Act (FSLMRA), 5 U.S.C. 7112(a). Pet. App. 53a. Section 7112(a) provides that:

> [t]he Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights under this chapter, the appropriate unit should be established on any agency, plant, installation, function, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

5 U.S.C. 7112(a).

Finding that the proposed consolidated unit was not "appropriate" within the meaning of Section 7112(a), Pet. App. 79a, the FLRA Regional Director dismissed the petition. The Regional Director specifically found that, while the extent of interchange of technicians among the various state National Guards favored a finding of appropriateness, *id.* at 75a, the individual missions, unique to each state National Guard, disfavored such a finding. *Id.* at 76a. The Regional Director also relied on the fact that state Adjutants General employ and administer the technicians in their respective States. *Id.* at 78a.

The Regional Director rejected petitioner's contention that the expanded bargaining rights petitioner would obtain if the consolidated unit was found to be appropriate should weigh in favor of a finding of appropriateness. Pet. App. 79a-80a. The Regional Director concluded that expanded bargaining rights that may accrue after a bargaining unit has been found to be appropriate are not relevant in assessing the appropriateness of a unit in the first instance. *Id.* at 80a.

2. The FLRA dismissed petitioner's application for review of the Regional Director's determination. Pet. App. 27a-51a. The FLRA affirmed the Regional Director's holding that the proposed consolidated unit met neither the "community of interest" nor the "effective dealings" and the "efficiency of [agency] operations" criteria for finding a bargaining unit to be appropriate under Section 7112(a). *Id.* at 50a. The FLRA found that the Regional Director correctly held that the day-to-day authority over the employment of technicians is vested in the state Adjutants General, and that this factor mitigates against finding a consolidated unit appropriate. *Id.* at 40a-42a. The FLRA also held that

the Regional Director properly declined to consider the expanded bargaining rights that may accrue to petitioner upon consolidation as a factor in determining the appropriateness of the proposed unit. *Id.* at 47a-48a.

3. Petitioner filed suit in the United States District Court for the District of Columbia, seeking review of the FLRA's decision under the Administrative Procedure Act (APA), 5 U.S.C. 703, 704. Pet. App. 11a. Petitioner argued that the FLRA erred in failing to give weight to the expanded bargaining rights that would result from a consolidated unit, and in relying on the authority of state Adjutants General to employ and administer technicians. *Id.* at 18a, 20a-21a. In reliance on 5 U.S.C. 7123, the FLRA moved to dismiss petitioner's complaint. Section 7123(a) provides in relevant part that:

> Any person aggrieved by any final order of the Authority other than an order under * * * section 7112 of this title (involving an appropriate unit determination), may * * * institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

5 U.S.C. 7123(a).

The district court granted the FLRA's motion to dismiss. Pet. App. 11a-24a. The court held that "because § 7123 is the 'exclusive statutory scheme' for judicial review of Authority decisions, and because the section precludes judicial review of appropriate unit decisions, [petitioner] may not obtain review of the final decision pursuant to any statute, including the judicial review provisions of the APA." *Id.* at 16a.

The district court rejected petitioner's argument that the court had jurisdiction to review the legal interpretations that formed the basis for the Authority's appropriate unit determination pursuant to *Crowley Caribbean Transport, Inc.* v. *Peña*, 37 F.3d 671 (D.C. Cir. 1994), and *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991). Pet. App. 22a. The court explained that the FLRA had engaged in "the kind of analysis and explanation used in the ordinary course of adjudicating a particular case, not the kind of 'general policy' pronouncement that would subject the decision (or any portion thereof) to judicial review under the narrow exceptions established in *Crowley* and *McNary*." *Ibid.*

4. The court of appeals affirmed, Pet. App. 1a-10a, holding that Section 7123(a)(2) precludes a district court from reviewing an appropriate unit determination. The court could not "imagine that Congress, having vested in courts of appeals exclusive jurisdiction to review all Authority decisions *except* those relating to appropriate unit determinations, would have intended that such determinations could nevertheless be reviewed by district courts." *Id.* at 5a. The court also noted that its interpretation of Section 7123 is consistent with this Court's interpretation of the judicial review provision in the National Labor Relations Act. *Ibid.* (citing *NLRB* v. *United Food & Commerical Workers Union, Local 23*, 484 U.S. 112 (1987)).

The court of appeals concluded that, under Section 7123, an appropriate unit determination may be reviewed indirectly in a court of appeals after an exclusive representative for the bargaining unit has been certified, one of the parties to the bargaining relationship refuses to bargain with the other, and the FLRA finds that refusal to constitute an unfair labor practice. Pet. App. 6a. However, the court rejected petitioner's

contention that the existence of that mechanism for review suggests that a district court may review an appropriate unit determination directly. *Ibid.*

Relying on *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987), the court of appeals also rejected petitioner's argument that the district court had jurisdiction to review statutory interpretations in the FLRA's decision, even if it lacked jurisdiction to review the decision itself. Pet. App. 7a. The court concluded that the narrow exceptions to that principle set forth in *McNary* and *Crowley* "are inapplicable here." *Id.* at 7a-8a.

ARGUMENT

The court of appeals correctly held that a district court lacks jurisdiction to review an appropriate unit determination. That holding does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioner contends (Pet. 4-7) that a district court has authority to review an appropriate unit determination under 5 U.S.C. 703 and 704, which generally permit review of final agency action for which there is no other adequate remedy in a court. The general review provisions of the APA do not apply, however, when a "statute[] preclude[s] judicial review." 5 U.S.C. 701(a). That is the situation here.

Section 7123 of the FSLMRA provides for judicial review in a court of appeals of "any final order of the Authority," except an order "involving an appropriate unit determination." 5 U.S.C. 7123(a). While Section 7123 refers only to the authority of a court of appeals, the inescapable implication of that provision is that no court may engage in direct review of an appropriate

unit determination. As the court of appeals explained, "having vested in courts of appeals exclusive jurisdiction to review all Authority decisions *except* those relating to appropriate unit determinations," Congress could not have intended that "such determinations could nevertheless be reviewed by district courts." Pet. App. 5a.

As the court of appeals recognized (Pet. App. 6a), an appropriate unit determination may be reviewed indirectly in an action challenging a final decision finding an unfair labor practice. But the existence of that *indirect* method for review of an appropriate unit determination by a *court of appeals* does not in any way suggest that a *district court* may *directly* review an appropriate unit determination. By authorizing a court of appeals to review final decisions finding an unfair labor practice, Section 7123 authorizes a court of appeals, not the district court, to review the underlying appropriate unit determinations that served as a predicate for that decision. In contrast, both by limiting review of Authority decisions to courts of appeals, and by excluding direct review of appropriate unit determinations, Section 7123 clearly precludes a district court from directly reviewing an appropriate unit determination.

This Court's construction of the analogous review scheme in the National Labor Relations Act reinforces that conclusion. Under the NLRA, a district court may not directly review an NLRB certification decision, except in the extraordinary case in which the NLRB flouts a clear statutory mandate. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-482 (1964). Absent that kind of exceptional circumstance, this Court's NLRB decisions make clear that a party may seek review of a certification decision only in a court of

appeals, and then only in the context of a review of a finding of an unfair labor practice. *Ibid.*; accord *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 133 (1987). Because the Congress that enacted Section 7123 "had in mind a review scheme identical to the NLRB's" (Pet. App. 5a), the court of appeals correctly held that Section 7123 bars district court review of appropriate unit determinations.

Nothing in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), relied on by petitioner (Pet. 4), warrants a contrary conclusion. In that case, the Court held that judicial review is available under the APA unless there is "clear and convincing evidence" that Congress intended to withhold review. That standard is satisfied here. Section 7123 supplies clear and convincing evidence that Congress intended to bar direct judicial review of appropriate unit determinations.

Petitioner also errs in relying (Pet. 6) on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), and *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984). In *Bowen*, the Court held that the availability of a suit in the Court of Claims under the Tucker Act for damages does not preclude a suit for equitable relief under the APA. 487 U.S. at 904. That holding has no bearing on the question whether Section 7123 forecloses direct district court review of appropriate unit determinations.

Block fully supports the court of appeals' holding that judicial review is foreclosed in this case. In that case, the Court held that consumers of dairy products could *not* obtain judicial review under the APA of certain orders issued by the Secretary of Agriculture when a special review provision authorized only handlers of dairy products to obtain judicial review of such orders. The Court explained that while there is a presumption

favoring judicial review, that presumption is overcome when a special review provision authorizes some persons, but not others, to obtain judicial review. 467 U.S. at 349.

The situation is similar here. Section 7123 is a special review provision that provides the exclusive mechanism for review of Authority decisions, and it precludes direct review of an appropriate unit determination. A party may not circumvent that scheme by seeking direct review of an appropriate unit determination in a district court.

2. Petitioner next contends (Pet. 7-9) that even if Section 7123 forecloses direct review of appropriate unit determinations, it does not foreclose review of legal interpretations made in connection with appropriate unit determinations. That contention is foreclosed by this Court's decision in *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). In that case, the Court squarely rejected the contention that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable." *Id.* at 283.

Contrary to petitioner's contention (Pet. 8), nothing in *McNary* suggests that a party may obtain judicial review of the reasons for an unreviewable action. In *McNary*, the Court held that a statutory prohibition on judicial review of individual agency denials of relief did not foreclose judicial review of a class action suit alleging that the agency had engaged in a pattern of procedural due process violations in processing applications for relief. The Court reasoned that the text of the provision at issue barred "direct judicial review of individual denials," not "collateral challenges to unconstitutional practices and policies used by the agency in processing applications." 498 U.S. at 492.

This case is distinguishable from *McNary* in every relevant respect. First, petitioner challenges the *underlying basis* of the FLRA's *substantive* decision; petitioner does not make a *collateral* challenge to the *procedures* that the FLRA uses in processing petitions. Second, petitioner argues that the FLRA has misinterpreted the *statutory* standards for making appropriate unit determinations; petitioner makes no claim that the FLRA has acted *unconstitutionally*. *-McNary* is therefore inapplicable here.

Petitioner's "legal interpretation" exception is not only inconsistent with *Brotherhood of Locomotive Engineers*, and unsupported by *McNary*; it also cannot be reconciled with Section 7123. In making an appropriate unit determination, the FLRA always applies its legal interpretations of the FSLMRA to the facts of a particular case. Acceptance of petitioner's theory that a party may challenge the FLRA's legal interpretations would therefore expose every appropriate unit determination to direct judicial review. That result cannot be reconciled with Congress's considered judgment expressed in Section 7123 that appropriate unit determinations should not be subjected to direct judicial review.

3. Finally, petitioner contends (Pet. 9-13) that the FLRA's appropriate unit determination in this case rests on an erroneous interpretation of the FSLMRA. That contention does not fall within either of the questions presented by petitioner. It is therefore not properly presented here. Review of that contention is also unwarranted because, for the reasons already discussed, Section 7123 precludes direct judicial review of appropriate unit determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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