Case AT-RP-22-0007

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, BLUE RIDGE PARKWAY, NORTH CAROLINA

AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE

The American Federation of Government Employees (Union) filed with the Federal Labor Relations Authority (Authority) a petition under § 7112(d) of the Federal Service Labor-Management Relations Statute (Statute) for the consolidation of two bargaining units. Without holding an election, the Regional Director (RD) found consolidation appropriate and certified the Union as exclusive representative of the consolidated unit on September 10, 2021.

On December 23, 2021, Erin Lamm (Petitioner) filed with the Authority a petition to decertify the Union as exclusive representative of the consolidated bargaining unit. Because she filed the petition within twelve months of the certification of the Union, the RD ordered the Petitioner to show cause why her petition was not subject to the certification bar imposed by § 7111(f)(4) of the Statute, § 2422.12(b) of the Authority's Regulations, and the Office of the General Counsel's Case Handling Manual. In response to the order, the Petitioner argued that § 7111(f)(4) did not bar her decertification petition because the Authority had not conducted a secret ballot election for the consolidated unit as required by § 7111(f)(4). The Petitioner added that, in terms of policy, applying a certification bar to consolidations would encourage unions to consolidate bargaining units to cut off decertifications.

The RD noted that § 2422.12(b) of the Authority's Regulations (the Regulation) "does not state that a certification bar only attaches to a certification that resulted from an election." The RD said that in *Commodity Futures Trading Commission, Eastern Regional Office, New York, New York and AFGE* (*CFTC*), 70 FLRA 291 (2017), the Authority did not apply the Regulation's certification bar to a petition that was filed before the certification was issued. The RD inferred from the case that the Regulation would bar a decertification petition filed *after* a certification.

Because in the present case the Petitioner filed after the certification, the RD determined that the certification bar applied and dismissed the petition as untimely.

The Petitioner filed with the Authority an application for review of the RD's decision, and the Union filed an opposition. The Petitioner argued that the RD's holding that the Regulation bars a decertification petition filed after a union's certification was an incorrect extrapolation from what the Authority said in *CFTC*. The Petitioner contended that the Authority's Regulations and the General Counsel's Case Handling Manual do not provide a basis for the RD's application of the certification bar. The Union, in opposition, contended that they do.

The Authority issued an order granting the application for review on July 19, 2022. *U.S. Dep't of the Interior, Nat'l Park Serv., Blue Ridge Parkway, N.C. and AFGE and Lamm* (*Interior*), 73 FLRA 120 (2022). With regard to the RD's inference that the Regulation bars a petition filed after a union's certification as the representative of a consolidated unit, the Authority stated that it "made no such express finding in *CFTC*." *Id.* at 122. In response to the Union's reliance on the Regulation, the Authority went on to say,

> However, the RD did not apply § 2422.12(b) independently but, rather, in conjunction with § 7111(f)(4) of the Statute. Moreover, to the extent that the meaning of the Statute and the Authority's Regulations differ as to the necessity of an election to trigger the certification bar, no precedent directly addresses whether § 2422.12(b) of the Regulations can bar a petition that would not otherwise be barred by § 7111(f)(4) of the Statute.

Id. (footnotes omitted).

The Authority found that the RD's decision raises an issue on which there is an absence of precedent. Pursuant to § 2422.31(g) of the Authority's Regulations, the Authority directed the parties to brief the Question Presented that the Authority set forth and invited third parties to submit

briefs as well. *Id.*; 87 Fed. Reg. 44,114-02 (July 25, 2022). Pursuant to that invitation, the Freedom Foundation respectfully submits this amicus brief.

QUESTION PRESENTED

Does § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute?

INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the Authority's order stating that interested parties may submit briefs on the Question Presented, the Freedom Foundation respectfully submits this brief. The Freedom Foundation is a non-profit organization that focuses on public sector labor reform through litigation, legislation, and community activation.

The two provisions in question, the Regulation and § 7111(f)(4) of the Statute, will of necessity be analyzed separately in this brief. They are not parallel. The RD erroneously conflated the two, as the Authority observed. *Interior*, 73 FLRA at 122. Analysis of the Statute demonstrates that it does not apply to bar decertification petitions under the circumstances set forth in the Question Presented because it does not bar decertification petitions and it does not bar petitions filed within twelve months after a labor organization is certified as an exclusive representative without an election. The Regulation has conflicting provisions that call for different results in both of those respects. The Statute prevails over the conflicting provisions of the Regulation, which are therefore void and unenforceable. Consequently, the answer to the Question Presented is no.

ARGUMENT

I. Whether § 7111(f)(4) of the Statute or § 2422.12(b) of the Authority's Regulations apply to bar any decertification petitions.

A. The express, unambiguous lead-in language of § 7111(f) prohibits the Authority from according exclusive recognition to a labor organization under the conditions enumerated in subsections (f)(1)-(4), a consequence that does not bar decertification petitions.

Section 7111 of the Statute is entitled "Exclusive recognition of labor organizations." It provides in full:

> (f) Exclusive recognition shall not be accorded to a labor organization--
>
> (1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;
>
> (2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;
>
> (3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless--
>
> (A) the collective bargaining agreement has been in effect for more than 3 years, or
>
> (B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or
>
> (4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

The subsection in question, subsection (f)(4), like any of the subsections of § 7111(f), cannot be understood without its lead-in language, which is: "Exclusive recognition shall not be accorded to a labor organization." That clear, unambiguous language plainly expresses the result—the only result—of the presence of any of the four conditions that follow it, namely, that the Statute under

those circumstances "bars the according of exclusive representation to a labor organization." Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (*Legislative History*) 925 (Nov. 19, 1979) (*see* discussion *infra* p. 13).

Section 7111(f) does not bar petitions as untimely; it bars a particular order or relief that a petition might request. Thus, a petition for exclusive recognition filed during the period set forth in subsection (f)(4) would not state a claim upon which the requested relief may be granted, but a petition for decertification would. Use of the shorthand expression of "certification bar" for subsection (f)(4) does not change the effect, or rather the lack of effect, of the presence of the elements of subsection (f)(4) with regard to a decertification petition. As an analogy, when qualified immunity applies, it prohibits an award of money damages, but it does not bar a suit for injunctive relief. *Mead v. Palmer*, 794 F.3d 932, 937 (9th Cir. 2015). Similarly, the unambiguous text of § 7111(f) cannot apply to bar any petitions, whenever filed, requesting decertification. That fact is dispositive of the issue.

The Authority's opinion in *National Aeronautics and Space Administration, Goddard Space Flight Center, Wallops Island, Va.* (*NASA*), 67 FLRA 670 (2014), does not support the contrary proposition that subsection (f)(4) can apply to bar the filing of a decertification petition. *NASA* held that the "contract bar" of § 7111(f)(3) applies to decertification petitions. *NASA* acknowledged but failed to analyze the lead-in language of § 7111(f).

That failure doomed its analysis of the text. Its analysis acknowledged that § 7111(f)(3)(B) refers only to petitions for recognition in creating an exception to the general rule of subsection (f)(3) in cases where "the petition for exclusive recognition is filed not more than 105 days and

not less than 60 days before the expiration date of the collective bargaining agreement." *NASA* said that while "§ 7111(f)(3) is silent regarding other petitions, . . . [w]e note that § 7111(f)(3) does not state that it applies 'only' to petitions for exclusive recognition; it neither provides for its application to decertification petitions nor precludes such application." *Id.* at 672. However, Congress did more than merely omit a mention of other types of petitions in § 7111(f)(3)(B), leaving one to speculate on the implication of that "silence." Rather, in § 7111(f) Congress specified precisely the consequence of the presence of any of the conditions in subsections (f)(1)-(4): "Exclusive recognition shall not be accorded to a labor organization." Those four conditions with that one consequence are exceptions to the general rule of § 7111(b) authorizing the filing of petitions and requiring the Authority to investigate them. The exceptions do not apply to decertification petitions because decertification petitions do not seek exclusive recognition; in fact, they seek the opposite. Instead, decertification petitions, which are authorized by § 7111(b)(1)(B), are, along with other petitions authorized by § 7111(b), subject to the exception set forth in § 7111(b). That exception provides, "An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held."

Congress could have, but did not, create broader or additional exceptions that under certain circumstances would bar the filing of a decertification petition or an order decertifying a union. The proper inference from exceptions provided in a statute "is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000). The Statute's legislative history supports the proper inference. Congress considered and did not enact an exception expressly calling for the dismissal of certain decertification petitions within a year of a recognition or certification. H.R. 1589 introduced

January 10, 1977, provided for decertification petitions in its subsection 6(c)(3) and for dismissal of any petition filed pursuant to section 6(c) if "within the previous twelve months an employee organization other than the petitioner, *or other than the employee organization challenged if the petition is filed pursuant to subsection (c)(3)*, has been lawfully recognized or certified as the exclusive representative of any employee included in the unit described in the petition." *Legislative History* at 204 (emphasis added). The final version enacted by Congress does not contain this proposal for dismissal of decertification petitions filed within twelve months of a recognition or certification of an exclusive representative.

The implication of what the Authority in *NASA* misperceived as legislative silence could, it argued, be overcome with textual and contextual evidence of congressional intent. 67 FLRA at 673. In that regard, *NASA* pointed out that § 7111(c) allows a labor organization that "has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section"[1] to intervene with respect to a decertification petition and to be placed on the ballot with the proposed decertification. If the intervening union gets a majority of the votes, it will be certified as the exclusive representative. *NASA* then proposed a scenario in which a collective bargaining agreement with a union is in place, a decertification petition is filed, and another union intervenes and wins the election. "Under that scenario," *NASA* asserted, "if the contract bar did not apply to the decertification petition, then the non-incumbent union would be able to circumvent § 7111(f)(3)'s express direction that '[e]xclusive recognition shall not be accorded to a labor organization' when a lawful, written, collective-bargaining agreement is in place. This would be an 'absurd result' that is avoided simply by interpreting the

[1] § 7111(c)(1).

Statute's silence as to application of the contract bar to decertification petitions as not precluding such application." *Id.*

The erroneous conclusion that a circumvention of § 7111(f)(3) is possible in that scenario results from replacing the text of the law with the shorthand expression "contract bar" and treating the matter as a question of whether the contract bar does or does not apply to decertification petitions. Subsection (f)(3), like subsection (f)(4), does not bar certain petitions; it bars a certain order. Thus, the proper application of the Statute actually prevents rather than causes the absurd result. Exclusive recognition may not be accorded to the intervening union in the hypothetical scenario "if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition unless"[2] one of the exceptions in subsection (f)(3)(A) or (B) applies. It makes no difference under the Statute that the potential recognition would arise out of a decertification petition.

The correct understanding that subsections (f)(3) and (4) bar exclusive recognition in certain cases but do not bar decertification petitions is supported by a consideration of the other two subsections of § 7111(f), which clearly do not apply to decertification petitions. Subsection (f)(1) prohibits exclusive recognition "if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles." Congress would not bar decertifying a labor organization because it is corrupt. Subsection (f)(2) prohibits exclusive recognition "in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition

[2] § 7111(f)(3).

wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition." This subsection expressly refers to a "labor organization seeking exclusive recognition." It would make no sense to prohibit decertifying a labor organization because it lacks support.

Finally, *NASA* argues that applying the contract bar to decertification petitions would be consistent with precedent under Executive Order 11491, which preceded the Statute, and precedent under the National Labor Relations Act. The argument based on precedent seems to be that because the National Labor Relations Board developed a contract bar and applied it to decertification petitions despite the absence of a contract bar in the National Labor Relations Act and the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council did the same also without support in the Executive Order, the Authority should be free to apply subsection (f)(3) to decertification petitions without statutory support as Congress has not objected to those past practices. "[N]othing in the Statute's legislative history," the decision asserted, "indicates a congressional intention to depart from precedent under the executive order or the Act with respect to this issue." *Id.* at 674-75.

To the contrary, Congress manifested its intention to depart from precedent by creating a detailed framework in § 7111 for the exceptions to the right to petition that does not exist in the National Labor Relations Act or in the Executive Order. For that reason, the National Labor Relations Act and the Executive Order are not analogous to the Statute in this respect and the precedent thereunder is inapposite. Where Congress has created a statutory scheme with specificity, an agency may not supplant it or add to it something that is not there. *In re J.P. Morgan Bank, N.A.*, 799 F.3d 36, 42 (1st Cir. 2015); *Texas v. United States*, 328 F. Supp. 3d 662, 716 (S.D. Tex. 2018). In the statutory scheme in question, Congress struck a balance among policy

considerations such as stability and workplace democracy. "The agency's policy choices must be made within the bounds established by Congress in adopting the statutory text that *constrains* those choices." *Szonyi v. Barr*, 942 F.3d 874, 887–88 (9th Cir. 2019).

Accordingly, while the reasoning of *NASA* sheds no light on the question presented regarding subsection (f)(4), examination of the case helps to demonstrate that the text, context, and legislative history of subsection (f)(4) establish that it does not apply to bar any petitions for decertification.

B. The elements of § 2422.12 of the Authority's Regulations encompass some decertification petitions.

The Regulation provides as follows:

> Certification bar. Where there is a certified exclusive representative of employees, a petition seeking an election will not be considered timely if filed within twelve (12) months after the certification of the exclusive representative of the employees in an appropriate unit. If a collective bargaining agreement covering the claimed unit is pending agency head review under 5 U.S.C. 7114(c) or is in effect, paragraphs (c), (d), or (e) of this section apply.

The Regulation applies to "a petition seeking an election." A decertification petition seeks an election. § 7111(b). The result of the presence of the elements of the Regulation affects decertification petitions. Unlike § 7111(f), which precludes relief unrelated to decertification petitions, the Regulation renders petitions untimely. Thus, the elements of the Regulation apply to some decertification petitions.

II. Whether a certification bar can result from certification of a labor organization, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute.

A. Section 7111(f)(4) does not bar any petitions as a result of certification of a labor organization, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute.

Two elements of subsection (f)(4) are arguably missing in the case of a certification of a labor organization, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d): (1) "any petition under this section" and (2) an election.

The first of those elements was discussed in *CFTC*, 70 FLRA 291 (2017). In that case, AFGE successfully petitioned for the consolidation of bargaining units and after the consolidation objected on the basis of subsection (f)(4) to the holding of a representation election requested by another union. AFGE asserted that an election "for the unit described in any petition under this section" occurred and that a majority chose to be represented by a labor organization. The Authority disagreed: "[T]he election AFGE refers to was not petitioned for under 'this section'--§ 7111. Instead AFGE's petition was filed under a different section of the Statute, § 7112. Thus, the conditions necessary for § 7111(f)(4) to apply were not met." *Id.* at 295 (footnotes omitted). In the present case, the Authority's order does not reflect any discussion of this holding of *CFTC* by the RD. *See Interior*, 73 FLRA at 121-22.

The element of "any petition under this section" is arguably ambiguous. It could refer to the petition that led to the secret ballot election, as the Authority assumed in *CFTC*, or it could refer to the pending petition. The latter is the more natural meaning. Under that meaning, the expression "in any petition under this section" serves the purpose of requiring that the secret ballot election was held for the same unit as the one described in the pending petition. Modifying "petition" with the prepositional phrase "under this section" distinguishes the petitions covered by subsection (f)(4) from the narrower group of petitions covered by subsection (f)(2) ("a petition filed pursuant to subsection (b)(1)(A)"). *CFTC*'s interpretation defeats those purposes and seems to be that the phrase "in any petition under this section" modifies the distant verb "conducted" earlier in the sentence. In other words, *CFTC* would give the subsection this awkward reading: if

the Authority has, within the previous 12 calendar months, conducted a secret ballot election in any petition under this section for the unit described and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

Where statutory language is uncertain or ambiguous, "it may be proper to consider the statute in light of the relevant legislative history." *Tovar v. U.S. Postal Serv.*, 3 F.3d 1271, 1274 (9th Cir. 1993). The legislative history of subsection (f)(4) reveals that the language in question is merely a paraphrase of earlier proposals that clearly denote the pending petition. H.R. 1589 introduced January 10, 1977, provided in its section 6(b)(4) that the Board shall grant a petition for recognition unless "the Board has, within the previous twelve months, conducted a secret ballot election involving any employees included in the unit *described in the request for recognition* in which a majority of the valid ballots cast chose not to be represented by any labor organization." *Legislative History* at 200 (emphasis added).

The predecessor of the current § 7111(f) was designated § 7111(h) in the proposed draft of title VII (labor-management relations) used by the House Committee on Post Office and Civil Service in the consideration of H.R. 11280 (dated June 15, 1978). The proposed § 7111(h) provided in pertinent part:

> Exclusive recognition shall not be accorded to a labor organization—
>
> . . . (4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election involving any of the employees in the *unit described in the petition* and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative or chose not to be represented by any labor organization. . . .

Id. at 332 (emphasis added). The phrase "unit described in the petition" is clearly not referring to some earlier petition. The bill as reported out of the committee replaced "unit described in the petition" with the present language "unit described in any petition under this section." *Id.* at 398.

No commentary suggested the change was substantive. On September 13, 1978, Rep. Udall of Arizona proposed a substitute for an amendment to the bill as reported out of the committee. The House adopted his amendment. *Id.* at 962. Rep. Udall's amendment did not change the language in question. It retained in the bill the language now in the Statute, "unit described in any petition under this section." *Id.* at 913. The sectional summary of Rep. Udall's substitute reveals this language to be a paraphrase of the earlier version with no intended change in meaning because it summarized this subsection with the language of the *earlier version*: "Subsection (h) (4) of the substitute bars the according of exclusive representation to a labor organization where, within the previous 12 calendar months, the Authority has conducted a secret ballot election for the *unit described in the petition*, and in the election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative." [3]

Thus, the legislative history eliminates any ambiguity left by the text. Subsection 7111(f)(4)'s element of "any petition under this section" is met because the Petitioner filed her petition for decertification under "this section," *i.e.*, § 7111.

The next element is the element of an election. In the present case, the unit was described in a petition under this section. Was a secret ballot election conducted for that unit? Subsection (f)(4) states this element twice: "Exclusive recognition shall not be accorded to a labor organization . . . if the Authority has, within the previous 12 calendar months, *conducted a secret ballot election* for the unit described in any petition under this section *and in such election* a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative." The secret ballot election starts the clock. Without an election, there is no period within which subsection (f)(4) bars the according of exclusive representation. *See U.S. Dep't of*

[3] *Id.* at 925 (emphasis added). The sectional summary is also admirably clear on what the subsection does: it bars "the according of exclusive representation."

Defense Pentagon Force Protection Agency and AFGE, 68 FLRA 761, 766 (2015) ("[U]nder § 7111 of the Statute, employees can file a new petition for representation twelve months after an election, provided there is no contract bar.")

Where, as here, "a statute is unambiguous, resort to legislative history and policy considerations is improper." *In re Koenig Sporting Goods*, 203 F.3d 986, 988 (6th Cir. 2000). In the present case, an election was not conducted. *Interior*, 73 FLRA at 121. The element of an election, which the Statute requires, is not met.

B. The elements of § 2422.12(b) of the Authority's Regulations do not exclude consolidations without an election.

The Regulation sets a time bar to the filing of petitions (in contrast to the Statute's recognition bar). Also in contrast to the Statute, the twelve-month period of that bar does not start at the time of an election. It starts at the time of a certification of an exclusive representative. The Regulation does not require an election, as the RD noted. *Id.* A certification of an exclusive representative occurs after a consolidation. § 7112(d). Nothing in the Regulation suggests that the certification must be pursuant to § 7111. Thus, the elements of the Regulation can be met by a consolidation without an election.

III. Neither § 7111(f)(4) of the Statute nor § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute.

A. Section 7111 of the Statute requires the Authority to investigate decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute and where appropriate conduct a hearing and an election.

Subsection 7111(f)(4) does not apply to bar a decertification petition under the circumstances set forth in the Question Presented, i.e., where the petition was filed within twelve

months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute. For the reasons discussed above, subsection (f)(4) does not bar any decertification petitions and it does not bar any petitions filed within twelve months after a labor organization is certified without an election. Subsection (f)(4) creates no exceptions to § 7111(b)(1)(B)'s authorization of decertification petitions. The exception applicable to decertification petitions is in § 7111(b). That exception also does not apply without an election.[4] In summary, Congress did not create an exception barring a decertification petition filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit. That decision may reflect concern that "[l]arger units might also preclude employees from eliminating or changing representation by virtue of size and a 30% of interest for decertification." Labor-Management Relations Task Force, *Option Paper Number Four* (Sept. 20, 1977) in *Legislative History* at 1386.

In the absence of an applicable exception, the Authority must adhere to § 7111(b)'s requirement that if any person files a petition authorized § 7111(b)(1) or (2),

> the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof.

Because Congress used the imperative word "shall," the Authority's obligation to investigate § 7111 petitions is mandatory. *Eisinger v. FLRA*, 218 F.3d 1097, 1102 (9th Cir. 2000). As there is no applicable exception in the present case, the Authority is required to investigate it, hold a

[4] "An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held." § 7111(b).

hearing if it has reasonable cause to believe a question of representation exists, and supervise or conduct an election if it finds that a question of representation exists.

B. Section 2422.12(b) of the Authority's Regulations does not apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute.

The Authority acknowledged in this case that the Regulation and the Statute differ on the element of an election. *Interior*, 73 FLRA at 121 & n.29. The divergence between the two extends much further than that. As discussed above, the elements are different and the result of the presence of the elements is different. The Statute unambiguously establishes a bar to the according of exclusive representation that runs twelve months from an election that results in a certification. In contrast, the Regulation establishes a time bar to the filing of petitions that runs twelve months from a certification.

Those inconsistencies result in many situations in which the Statute requires the Authority to investigate a petition (and, where appropriate, conduct a hearing and an election) whereas the Regulation prevents the Authority from doing so because the petition "will not be considered timely." The situations include those of the present case and any in which the petition does not seek recognition of an exclusive representative, a certification did not result from an election, or a certification occurred within the previous twelve months but the election occurred earlier than the previous twelve months. That is a direct conflict.

A conflict between a statute and a regulation renders the regulation void and unenforceable. *Cherokee Nation v. Bernhardt*, 936 F.3d 1142, 1156 (10th Cir. 2019). To be valid, regulations must be consistent with the statute under which they were promulgated. *United States v. Larionoff*, 431 U.S. 864, 873 (1977). A regulation that does not carry into effect the will of Congress as expressed in the statute "but operates to create a rule out of harmony with the statute, is a mere

nullity." *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936). More specifically, a regulation of the Authority that contravenes § 7111 is invalid. *Eisinger*, 218 F.3d at 1105.

Therefore, to the extent that § 2422.12(b) of the Authority's Regulations is in direct variance with § 7111(f), it is void. *See United States v. Maxwell*, 278 F.2d 206, 210-11 (8th Cir. 1960). Because the conflicting provisions of the Regulation are void and unenforceable, the Regulation too does not apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute.

CONCLUSION

For the foregoing reasons, the Statute clearly does not apply to bar the petitions described in the Question Presented. The Regulation does not either because it is void in the respects in which it conflicts with the Statute. Accordingly, the answer to the Question Presented is: No, neither § 7111(f)(4) of the Statute nor § 2422.12(b) of the Authority's Regulations apply to bar decertification petitions filed within twelve months after a labor organization is certified, without an election, as exclusive representative of a consolidated bargaining unit under § 7112(d) of the Statute.

RESPECTFULLY SUBMITTED,

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STATEMENT OF SERVICE

I certify that on this the 25th day of August, 2022 at Olympia, Washington I served the following parties by U.S. First Class Mail:

Nicholas P. Provenzo, Esq., c/o National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Ste. 600, Springfield, VA 22160-2110	■ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☐Electronically via email
Cathie McQuiston, Esq., Deputy General Counsel, AFGE, AFL-CIO, 80 F Street, NW, Washington, DC 20001	■ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☐Electronically via email
Eboni Speller, Regional Human Resources Specialist, Interior Region 2 Human Resources (ER/LR), National Park Service, Department of the Interior, 1924 Building, 100 Alabama St SW, Atlanta, GA 30303	■ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☐Electronically via email
Brent Hudspeth, Acting Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, 229 Peachtree Street, NE, Ste. 900, International Tower, Atlanta, GA 30303.	■ U.S. First Class Mail ☐ Via Legal Messenger ☐ Overnight Courier ☐Electronically via email

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