AMERICAN CENTER
for LAW & JUSTICE

[redacted]

November 17, 2023

Attn: Kiran Ahuja
Director
Office of Personnel Management
1900 E St NW
Washington, D.C. 20415

RE: Upholding Civil Service Protections and Merit System Principles

To Whom It May Concern:

The American Center for Law and Justice ("ACLJ") submits the following comment regarding the Notice of Proposed Rulemaking issued by the Office of Personnel Management, as published in the Federal Register on September 18, 2023 (hereafter, the "NPRM").

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion[1] and have submitted formal comments regarding proposed rulemaking on a wide variety of issues.

The ACLJ urges the Office of Personnel Management ("OPM") to reject its proposed revision to 5 C.F.R Chapter 1, Subchapter B. First, there are discrepancies between OPM's stated intent for

[1] *See, e.g., Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause).

the NPRM and their actual motivations. Second, these revisions overstep Constitutional boundaries and will increase waste and inefficiency within the federal government. Finally, these intended changes will make unelected bureaucrats completely unaccountable to the American people.

First, OPM's stated intent for the revisions is different from their actual motivation. OPM states that the purpose of the NPRM is to "enhance the efficiency of the Federal civil service and promote good administration and systematic application of merit system principles." However, contrary to OPM's stated intent, the Biden Administration recently explained in a press release that this NPRM is a preemptive response to the potential revitalization of Schedule F in a future administration.[2] Thus, the Biden Administration has admitted its true motivation does not square with the OPM's stated reason for the rule.

As you know, creating Schedule F in the Excepted Service provided needed flexibility for the federal workforce and allowed for increased accountability for poor-performing employees. The Schedule F Executive Order was quickly rescinded by the Biden Administration[3], because they want politically biased civil servants to interfere with and thwart the enactment of any future elected Republican President's agenda. Through these proposed revisions, the Biden Administration aims to insulate unelected bureaucrats, meddle in the agenda of future administrations, and defy the will of the American people who lawfully cast their vote for any future conservative President's agenda. This is unlawful, malicious, and unconscionable.

Department of Commerce v. New York held that the stated intent behind the actions of executive agencies cannot be different from the agencies' actual motivation. 139 S. Ct. 2551 (2019). OPM's stated intent of enhancing efficiency is demonstrably different from their actual motivation of impeding future implementation of Schedule F to undermine future administrations. The Court also found that the Administrative Procedure Act (APA) requires agencies to provide reasoning for their actions. OPM's reasoning does not suffice as it does not reflect their true motivations. Thus, OPM is also in violation of the APA.

The NPRM seeks to unconstitutionally usurp Presidential authority. The Constitution gives the President authority over the executive branch only. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* further clarifies the extent of this authority. 561 U.S. 477 (2010). There, the Supreme Court held that the President has general authority to remove subordinates,

[2] *RELEASE: Biden-Harris Administration Issues Proposed Rule to Reinforce and Clarify Protections for the Nonpartisan Career Civil Service*, U.S. Office of Personnel Management, (Sept. 15, 2023), https://www.opm.gov/news/releases/2023/09/release-biden-harris-administration-issues-proposed-rule-to-reinforce-and-clarify-protections-for-the-nonpartisan-career-civil-service/.

[3] *Executive Order on Protecting the Federal Workforce*, The White House, (Jan. 22, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/22/executive-order-protecting-the-federal-workforce/.

and it is unconstitutional to shield inferior officers from Presidential control. *Id.* at 513-14. Thus, OPM's revisions are constitutionally impermissible, as they shield inferior officers from the President's control. After all, "the President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484. Furthermore, the Court held that the President cannot "choose to bind his successors by diminishing their powers," which is exactly what the Biden administration is attempting to do by hindering the ability of future administrations to carry out their policy agendas and reinstate Schedule F. *Id.* at 497.

Second, the revisions will have a negative effect on the stated intent of OPM's rule by resulting in government inefficiency and waste. By further restricting the movement and removal of federal employees, it is far more difficult for agencies to efficiently reassign employees to necessary positions and remove employees for insubordination and poor performance. Retaining employees who impede workflow, whether intentionally or unintentionally, also hinders the application of merit system principles. Intentional steps taken to make the system more inefficient violate the merit system principles in 5 C.F.R. 2301(5) and (6). These principles require that the "federal workforce should be used efficiently and effectively" and "employees should be retained on the basis of adequacy of their performance." Additionally, retaining employees who refuse to execute the initiatives set forth by the duly elected President is a waste of taxpayer dollars. American taxpayers should not be forced to fund lazy, incompetent, or insubordinate federal employees who fail to complete their work, seek to undermine the democratic process by failing to carry out the President's agenda, or both.

Third, OPM's revisions will leave the bureaucracy completely unaccountable to the American people. As OPM acknowledges, career civil servants are theoretically accountable to the Constitution, the President, and the American people. OPM assumes that all career civil servants will carry out the duly elected President's agenda in an objective, impartial manner. While many civil servants do respect the will of the President, this does not obviate the need for accountability and disciplinary mechanisms for employees that do not. Insulating federal employees from removal and answerability emboldens political activists with the federal government to disrupt or delay Presidential initiatives. In turn, this further entrenches an unaccountable fourth branch that can intentionally disrupt, delay, and undermine the votes and enactment of the will of the American people with impunity.

Thus, the ACLJ respectfully requests that OPM reject any change to 5 C.F.R. Chapter 1, Subchapter B. OPM's reasoning for these changes is inadequate, unlawful, and would actively subvert our Constitution by empowering unelected bureaucrats to ignore and violate the will of the American people.

Very truly yours,

AMERICAN CENTER FOR LAW &
JUSTICE

Jordan Sekulow
Executive Director