No. 15-2502

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This Court lacks jurisdiction over the petition for review. The case before the Authority was about the United States Department of Homeland Security's ("Agency") failure to schedule bargaining-unit employees in accordance with statute

and regulation, and an arbitrator's award of back pay to affected employees. The Authority denied the Agency's exceptions to the arbitrator's award, leaving the award of back pay intact.

The Agency now challenges the Authority's order. The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("the Statute"), however, prohibits judicial review of Authority orders resolving exceptions to arbitration awards that do not involve an unfair labor practice. 5 U.S.C. § 7123(a)(1); *Am. Fed'n of Gov't Emps., Local 1923 v. FLRA*, 675 F.2d 612, 613 (4th Cir. 1982) ("*Local 1923*"); *Nat'l Ass'n of Gov't Emps., Local R4-106 v. FLRA*, 931 F.2d 887, 1991 WL 62512, at *2 (4th Cir. 1991) (unpublished opinion). In attempting to establish jurisdiction in the face of that statutory bar, the Agency asserts that the Authority violated sovereign immunity by issuing an order that does not comport with the Agency's interpretation of the Back Pay Act. But, as the U.S. Court of Appeals for the D.C. Circuit has now confirmed four times since 2015, the Authority's routine application of the Back Pay Act in reviewing an arbitration award comports with the role Congress assigned the Authority in the Statute and creates no sovereign immunity or constitutional issue to justify judicial review. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Scobey, Mont. v. FLRA*, 784 F.3d 821, 823-24 (D.C. Cir. 2015) ("*Scobey*"); *U.S. Dep't of Health & Human Servs., mot. to dismiss for lack of jurisdiction granted*, No. 15-1068 (D.C. Cir. Sept. 10, 2015); *U.S. Dep't of Homeland Sec. v. FLRA*, *mot. to dismiss for lack of jurisdiction granted*, No. 15-1351 (D.C. Cir. Mar. 9, 2016) (pet. for rehearing pending); *U.S. Dep't of*

Homeland Sec. v. FLRA, *mot. to dismiss for lack of jurisdiction granted*, No. 15-1293 (D.C. Cir. Mar. 9, 2016) (pet. for rehearing pending). This Court should similarly dismiss the Agency's petition for review for lack of jurisdiction. The Agency's theory, if correct, would open up every monetary award against the Government to judicial review. This result would be contrary to Congress's intentional decision to end arbitral proceedings with the Authority to promote the speedy and final resolution of labor disputes and maximize efficiency in the federal service.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(H) of the Statute. 5 U.S.C. § 7105(a)(2)(H). To the extent the time limit to file a petition for review under § 7123 applies here, the Agency's petition was timely filed. 5 U.S.C. § 7123(a). The National Treasury Employees Union ("Union") intervened on the side of the Authority.

STATEMENT OF THE ISSUES PRESENTED

1. Whether, under § 7123(a) of the Statute prohibiting petitions for review of Authority arbitration orders, the Court lacks subject matter jurisdiction to review an Authority order upholding an arbitrator's award of back pay to remedy an unwarranted denial of overtime under the Back Pay Act, 5 U.S.C. § 5596.

2. If the Court exercises jurisdiction, whether the Agency failed to show that the Authority erred in applying federal scheduling statutes, the Agency's internal memoranda, and the Back Pay Act in denying the Agency's exceptions to the arbitrator's award of back pay to the grievants.

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions, as well as unpublished dispositions, are contained in the attached Addendum.

STATEMENT OF THE CASE

This case arises out of a grievance filed by the Union alleging that the Agency violated 5 U.S.C. § 6101(a), 5 C.F.R. § 610.121(a), and Article 34 of the parties' collective-bargaining agreement when it scheduled bargaining-unit employees without ensuring that their schedules included: (1) consistent start and stop times for each regular workday in a basic workweek; and (2) two consecutive days off outside the basic workweek. (Dec., A116; Award, A37.) By way of background, § 6101 and § 610.121 set forth the scheduling parameters for a basic forty-hour administrative workweek for executive-branch employees. *See* 5 U.S.C. § 6101(a) and 5 C.F.R. § 610.121(a). This statutory provision and its accompanying regulation provide an exception to those requirements when the head of an agency determines that the agency would be "seriously handicapped in carrying out its functions or that costs would be substantially increased." 5 U.S.C. § 6101(a)(3); 5 C.F.R. § 610.121(a).

The grievance was submitted to an arbitrator, who found that the Agency's scheduling practices violated § 6101 and § 610.121 and awarded affected bargaining-unit employees back pay. The Agency filed exceptions to the arbitrator's award with the Authority under § 7122 of the Statute, 5 U.S.C. § 7122, which the Authority (Chairman Pope and Member DuBester, Member Pizzella dissenting) denied. *U.S.*

Dep't of Homeland Sec., U.S. Customs & Border Prot. and Nat'l Treasury Emps. Union, 68 FLRA 1015 (2015) (A115-26.) The Agency now challenges the Authority's decision, claiming that the Authority misinterpreted the Back Pay Act and violated sovereign immunity in denying the Agency's exceptions to the arbitrator's award.

STATEMENT OF THE FACTS

A. Statutory and Factual Background: The Union Files a Grievance Alleging That the Agency Violated 5 U.S.C. § 6101(a) and 5 C.F.R. § 610.121(a)

Section 6101 and § 610.121 provide the legal framework for executive-agency employee scheduling. In relevant part, § 6101 generally requires an agency head to schedule employees such that: (1) the "basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive"; and (2) "the working hours in each day in the basic workweek are the same." 5 U.S.C. § 6101(a)(3)(B)-(C). The statute also provides an exception from this general rule: an agency head may deviate from § 6101's scheduling requirements when he "determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased." *Id.* § 6101(a)(3).

The Union's grievance alleged that the Agency deviated from § 6101's scheduling requirements, in violation of the statute, regulation, and the parties' collective-bargaining agreement, when it scheduled Customs and Border Protection Officers and Agricultural Specialists without two consecutive days off or consistent

start and stop times. (Dec., A116; Award, A37, A52.) In its grievance response, the Agency argued that a determination by the Agency's head ("the Basham Memo") provided a blanket exception to § 6101's scheduling requirements for bargaining-unit employees. (Dec., A116; Award, A51.)

In addition to the Basham Memo, the Agency had issued an Agency-wide directive to managers ("Implementing Directive") referencing the Basham Memo and instructing managers on when to make scheduling deviations under § 6101. The Implementing Directive provides that, "[i]n general, the work schedules of CBP Officers and Agriculture Specialists should, to the extent consistent with the accomplishment of the Agency's mission," be scheduled in accordance with § 6101. (Directive, A127.) However, "when circumstances warrant," scheduling deviations may be made in accordance with certain "Management Guidance" set forth in the Directive. (*Id.* at A128.)

The parties were unable to resolve the grievance, and they proceeded to arbitration. (Dec., A116; Award, A37.)

B. The Arbitrator Awards the Grievants Back Pay for the Agency's Violations of § 6101(a) and § 610.121(a)

The arbitrator framed the issue before him as whether the Agency violated § 6101 and § 610.121 in establishing the challenged schedules, and, if so, what would be an appropriate remedy. (Dec., A116; Award, A38-39.) He concluded that the Agency violated those statutory and regulatory requirements when scheduling the

grievants' work, rejecting the Agency's argument that the Basham Memo had excepted the Agency from § 6101's scheduling requirements. (Dec., A116-17; Award, A105, A107.) The arbitrator recognized that an agency may except itself from those requirements if the agency head "determines that his organization would be seriously handicapped in carrying out its function," or "that costs would be substantially increased." (Dec., A117; Award, A52; 5 U.S.C. § 6101(a)(3).) He found, however, that the Basham Memo did not meet those requirements: "while the terms of the Basham Memo represent a general grant of authority from the Agency head to except employees from § 6101(a)(3), the Agency still must show that a scheduling deviation is consistent with its authority and has been properly rooted in the power delegated to its managers and designees." (Dec., A117; Award, A105-06.)

Regarding that delegation of power, the arbitrator found that the Implementing Directive demonstrated that managers "had an obligation to retain sufficient documentary records to support" scheduling deviations under § 6101. (Dec., A117; *see also* Award, A107.) He concluded that the Agency did not "provide sufficient justification through documentation, records[,] or other credible evidence to support individual scheduling deviations," thus failing to meet "the reasoned determination standard in which it applied the Basham Memo to its scheduling practices" and violating § 6101 and § 610.121. (Dec., A117; Award, A107.)

As a remedy, the arbitrator ordered the Agency to: (1) cease and desist its unlawful scheduling practices; (2) provide the schedules of employees affected by the

unlawful practices to the Union within sixty days; and (3) pay affected employees back pay pursuant to two formulae that had been adopted by a different arbitrator in resolving a similar scheduling dispute between the parties. (Dec., A117; Award, A108-11.)

C. The Authority Upholds the Arbitrator's Award Under § 6101 and the Back Pay Act

Pursuant to 5 U.S.C. § 7122, the Agency filed exceptions to the arbitrator's award, alleging, in pertinent part,[1] that the award was contrary to § 6101 and the Back Pay Act. (Dec., A115.)

Regarding the arbitrator's finding that the Agency violated § 6101, the Authority rejected the Agency's contention that the Basham Memo alone excepted unit employees from § 6101 and § 610.121's scheduling requirements. (Dec., A120.) To the contrary, the Authority determined, the Basham Memo and its Implementing Directive – read together – provide that "the Agency delegated to managers the authority to make the 'reasoned determination' to deviate from § 6101's scheduling requirements" on a case-by-case basis. (*Id.*, A121.)

The Authority also rejected the Agency's argument that the award was contrary to law because it required the Agency to establish and maintain a record of an

[1] The Agency also alleged that the award was contrary to the Customs Officer Pay Reform Act, 19 U.S.C. § 267, and the Anti-Deficiency Act, 31 U.S.C. § 1341. (Dec., A116.) The Authority denied those exceptions, Dec. A116, and the Agency does not challenge that holding before the Court, *see* Br. 11 n.5, 42-51.

"evidentiary nexus to support its reasoned determination" that § 6101 authorizes a scheduling deviation. (Dec., A122 (internal quotation marks omitted).) The Authority explained that the Implementing Directive required Agency managers "to make the reasoned determination – *i.e.*, to consider mission circumstances and determine whether the Basham Memo's exception is appropriate," and to maintain an evidentiary nexus in the form of supporting records of any scheduling deviations. (*Id.*) Finally, the Authority denied the Agency's remaining contrary-to-§ 6101 claims under § 2425.6(e)(1) of the Authority's Regulations because the Agency had failed to provide any arguments in support of those claims. (*Id.*)

The Agency also argued that the award was contrary to the Back Pay Act because it "required the parties to utilize formulae" set forth in a different arbitration award resolving another scheduling dispute between the parties.[2] (Dec., A123.) However, in two previous cases involving the parties, the Authority had held that the use of those formulae did not violate the Back Pay Act when "the arbitrator sufficiently identifie[d] the specific circumstances under which employees [we]re entitled" to back pay. (*Id.* (citing *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 68 FLRA 253 (2015), *recons. denied*, 68 FLRA 829 (2015); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 68 FLRA 524 (2015)) (internal quotation marks omitted).) As in those prior cases, the Authority reasoned, the arbitrator here satisfied

[2] The Agency does not make that argument before this Court. (*See* Br. 42-45 (challenging Authority's Back Pay Act holding on other grounds).)

the requirements of the Back Pay Act by finding that the Agency's unjustified and unwarranted personnel action resulted in a loss to unit employees, and by "narrowly identif[ying] the specific circumstances under which unit employees" were entitled to back pay. (*Id.*)

The Agency's petition for review followed. The Authority filed a timely motion to dismiss the petition, and the Court referred that motion to this Panel by order dated March 30, 2016.

SUMMARY OF THE ARGUMENT

The framework Congress established in the Statute for judicial review of the Authority's federal-sector arbitration decisions is clear: unless the Authority's order "involves an unfair labor practice," the Authority's decision is final. 5 U.S.C. § 7123(a)(1). It is undisputed that the order in this case does not involve an unfair labor practice. And this Court recognizes no other exception to the statutory bar on judicial review of Authority arbitration orders.

The Agency attempts to create jurisdiction by claiming that the Authority's order violates the Appropriations Clause and implicates sovereign immunity. (Br. 20-42.) That attempt must fail. As the D.C. Circuit explained in *Scobey*, the Back Pay Act indisputably waives sovereign immunity, and Congress empowered the Authority to apply that Act in grievance arbitration without judicial review. Moreover, contrary to the Agency's argument, Congress empowered the Authority and arbitrators to resolve these grievances without judicial review whether they arise out of collective-bargaining

agreements, 5 U.S.C. § 7103(a)(9)(C)(i), *or,* as here, out of a claimed misinterpretation of law, rule, or regulation affecting conditions of employment, 5 U.S.C. § 7103(a)(9)(C)(ii). Thus, "[r]outine statutory and regulatory questions" such as those the Agency raises in this case – whether the Back Pay Act requires an underlying money-mandating statute and the meaning of the Basham Memo and its Implementing Directive – "are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity." *Scobey*, 784 F.3d at 823. Accepting the Agency's reading of the Statute would open the courthouse doors any time the Agency disagreed with an Authority decision imposing monetary liability on the Government, contrary to the framework Congress enacted in the Statute.

Even if this Court were to create an exception to § 7123 to exercise jurisdiction in all Authority cases involving monetary awards against the Government, the Authority neither violated the Back Pay Act nor misinterpreted the Basham Memo and its Implementing Directive in upholding the arbitrator's award of back pay. First, as this Court and the other courts of appeals have recognized, the Back Pay Act's plain language provides that the statute's waiver of sovereign immunity need not be based on a statute at all, but may also be triggered by the violation of an agency rule, regulation, or a collective bargaining agreement. 5 U.S.C. § 5596; *e.g., Woolf v. Bowles*, 57 F.3d 407, 410 (4th Cir. 1995); *Brown v. Sec'y of Army*, 918 F.2d 214, 216 (D.C. Cir. 1990). The Agency mistakenly relies on precedent regarding the scope of jurisdiction of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of

Federal Claims to allege that the Back Pay Act's waiver of sovereign immunity is conditioned upon the violation of an underlying statute that is "money-mandating." But both of those courts possess limited jurisdiction and may only hear Back Pay Act cases that otherwise comport with the Tucker Act, 28 U.S.C. §§ 1346(a), 1491, their enabling statute. (Br. 42.) That the Tucker Act may require a "money-mandating" statute to trigger the Back Pay Act in the Federal Circuit and Court of Federal Claims is inapposite to the scheme for relief under the Statute.

Second, the Agency's claim that the Authority misinterpreted the Basham Memo is based on a misreading of the Authority's order. The Authority did not find that the Basham Memo was "modified or superseded" by its Implementing Directive, but that the Memo delegated the authority to make scheduling deviations under 5 U.S.C. § 6101 on a case-by-case basis to Agency managers and designees. (Decision, A121.) The Authority could not have erred in failing to defer to the Agency's interpretation of the Basham Memo – even if the Agency *had* asked the Authority for deference, which it did not – because the Authority did not find that the Memo was ambiguous. *See* Br. 50; 5 U.S.C. § 7123(c). And nothing in the Agency's opening brief challenges the Authority's delegation finding.

STANDARDS OF REVIEW

The Court reviews the existence of its own jurisdiction de novo. *Li v. Holder*, 666 F.3d 147, 149 (4th Cir. 2011).

Should the Court reach the merits of the case, it will review the Authority's decision in accordance with § 706 of the Administrative Procedure Act and will uphold the Authority's order unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.7 (1983) (quoting 5 U.S.C. § 706(2)(A) and (C)); *U.S. Nuclear Regulatory Comm'n v. FLRA*, 25 F.3d 229, 232 (4th Cir. 1994); *see also* 5 U.S.C. § 706(2)(A); 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The Court reviews the Authority's interpretations of general statutes not committed to its administration *de novo*. *U.S. Nuclear Regulatory Comm'n*, 25 F.3d at 232-33. Thus, because the Authority does not administer the Back Pay Act, the Court does not extend deference to the Authority's interpretation of what the Back Pay Act does and does not require. But the Agency also does not administer the Back Pay Act. This Court therefore owes no deference to the Agency's interpretation of that statute, either.

Finally, under § 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee," unless "the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly . . . .").

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE BECAUSE THE AUTHORITY'S ARBITRATION DECISIONS ARE UNREVIEWABLE UNDER § 7123(a) OF THE STATUTE

The Agency cannot overcome the explicit statutory bar to judicial review of Authority decisions on arbitration awards – including those applying the Back Pay Act – that the courts of appeals have repeatedly recognized. Accordingly, the Court should dismiss the Agency's petition for review.

A. Congress Explicitly Denied Judicial Review of Authority Decisions Reviewing Federal-Sector Arbitration Awards Under the Statute

It is axiomatic that Congress confers federal court jurisdiction and that Congress may limit or foreclose review as it sees fit. *See, e.g., City of Arlington, Tex. v. Fed. Commc'ns Comm'n*, -- U.S. --, 133 S. Ct. 1863, 1868 (2013); *Wade v. Blue*, 369 F.3d 407, 410 (4th Cir. 2004). When it enacted the Statute, Congress exercised that prerogative with an "unusually clear congressional intent . . . to foreclose review" of virtually all Authority decisions in arbitration cases under the Statute, *Scobey*, 784 F.3d at 823-24 (internal quotation marks omitted), including the underlying arbitration decision here.

The Statute allows federal employee unions to file grievances over, among other things, "the effect or interpretation, or a claim of breach, of a collective bargaining agreement" *or* "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C.

§ 7103(a)(9)(C)(i)-(ii). Congress set forth specific procedures for bringing those grievances to arbitration, requiring labor contracts to contain grievance procedures with binding arbitration that are "fair," "simple," and "provide for expeditious processing." 5 U.S.C. § 7121(b)(1). Following binding arbitration, parties may file exceptions to the arbitrator's award with the Authority, which the Statute charges with determining whether the award is "contrary to any law, rule, or regulation" or otherwise deficient "on grounds similar to those applied in Federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a). Finally, the Back Pay Act empowers arbitrators and the Authority to remedy federal employees' grievances with back pay. 5 U.S.C. § 5596(b)(1); *see also* 5 U.S.C. § 7122(b) ("The [arbitrator's] award may include the payment of backpay (as provided in section 5596 of this title).").

In light of this statutory framework, § 7123(a) of the Statute's explicit preclusion of judicial review of Authority decisions in arbitration cases conclusively refutes the Agency's jurisdictional argument. That section states, in relevant part:

> Any person aggrieved by any final order of the Authority *other than an order under –*
>
> > (1) section 7122 of this title (*involving an award by an arbitrator*), unless the order involves an unfair labor practice under section [7116][3] of this title . . .
>
> . . .

[3] Although the text of the Statute refers to § 7118, that reference has generally been recognized as an inadvertent miscitation. *Local 1923*, 675 F.2d at 613. Section 7116 of the Statute is the correct reference. *Id.*

> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a) (emphasis added). As this Court has recognized, the plain language of § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricts the jurisdiction of the courts of appeals to review an Authority arbitration decision to those instances that "involve[] an unfair labor practice" under the Statute.[4] *Local 1923*, 675 F.2d at 613.

The legislative history of § 7123(a)'s provisions for limited judicial review underscores Congress's intentional decision to restrict appellate scrutiny of Authority decisions involving an arbitration award. As the statutory framework itself demonstrates, Congress strongly favored arbitrating executive-branch labor disputes and sought to create a scheme characterized by finality, speed, and economy. *Scobey*, 784 F.3d at 823. To this end, the conferees discussed judicial review in the following terms:

> [T]here will be *no judicial review* of the Authority's action on those *arbitrators*['] *awards in grievance cases which are appealable to the Authority*. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined *it would be inappropriate for there to be subsequent review by the court of appeals in such matters*.

[4] The Agency does not contend that the Authority's decision here involves an unfair labor practice, *see supra* p. 10.

H.R. Rep. No. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (emphasis added). The conference committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any* . . . *authority* or administrative body" other than the Authority. *Id.* at 826 (emphasis added).

This Court has recognized that the plain language of the Statute, as supported by its legislative history, bars judicial review of Authority arbitration decisions such as this one. *Local 1923*, 675 F.2d at 613; *Nat'l Ass'n of Gov't Emps., Local R4-106 v. FLRA*, 931 F.2d 887, 1991 WL 62512, at *2 (4th Cir. 1991) (unpublished opinion) ("*Local R4-106*"). As in *Local 1923*, there is "no doubt that the order sought to be reviewed" here "was rendered under 5 U.S.C. § 7122 and that it involved an award by an arbitrator." *Local 1923*, 675 F.2d at 613. Accordingly, the only issue for the Court to resolve in determining whether it has jurisdiction over this case is whether the Authority's decision involves an unfair labor practice under § 7116 of the Statute. *Id.* But it is indisputable that this case does not involve an unfair labor practice. Thus, the inquiry ends: the Court lacks jurisdiction. *Id.; see also Local R4-106*, 1991 WL 62512 at *2 ("Where, as here, 'neither the arbitrator nor the Authority decided an unfair labor practice charge,' this Court lacks jurisdiction to give judicial review.").

Every court of appeals that has considered the issue recognizes this broad jurisdictional bar.[5] The U.S. Court of Appeals for the District of Columbia Circuit, for example, recently reaffirmed Congress's foreclosure of judicial review of similar sovereign immunity challenges in *Scobey*. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Scobey, Mont. v. FLRA*, 784 F.3d 821, 823-24 (D.C. Cir. 2015) ("*Scobey*"). In that case, the same Agency petitioning the Court in this case sought review of an Authority decision upholding a similar award of money damages under the Back Pay Act in another arbitration case. *Id.* at 822. In dismissing the Agency's petition for review, the D.C. Circuit explained that "Congress imposed [a] limitation" on judicial review of Authority decisions in arbitration cases to "protect the features of the arbitral process that . . . Congress had in mind when it set up the scheme" – namely, swiftly resolving labor disputes to allow parties to focus on the business of government. *Id.* at 823 (internal quotation marks omitted).

Under the law of this Circuit and every other Circuit to have considered the issue, therefore, the Agency's petition must be dismissed as an attempt to evade the

[5] *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Scobey, Mont. v. FLRA*, 784 F.3d 821, 823 (D.C. Cir. 2015); *Begay v. Dep't of the Interior*, 145 F.3d 1313, 1315-16 (Fed. Cir. 1998); *Nat'l Treasury Emps. Union v. FLRA*, 112 F.3d 402, 405 (9th Cir. 1997); *U.S. Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region v. FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Phila. Metal Trades Council v. FLRA*, 963 F.2d 38, 40 (3d Cir. 1992); *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 27 (2d Cir. 1986); *Tonetti v. FLRA*, 776 F.2d 929, 931 (11th Cir. 1985); *U.S. Marshals Serv. v. FLRA*, 708 F.2d 1417 (9th Cir. 1983).

strictures Congress placed on judicial review of the Authority's arbitration decisions. *See also Nat'l Treasury Emps. Union v. FLRA*, 112 F.3d 402, 404 (9th Cir. 1997) (rejecting petitioner's argument that a "presumption of judicial review" could somehow overcome "the clear statutory language of § 7123," as supported by the Statute's legislative history).

B. The Court Should Reject the Agency's Attempt to Rewrite the Statute to Allow Judicial Review of Certain Subsets of Grievances

Notwithstanding the Statute's explicit bar to judicial review, the Agency attempts to parse the Statute to create an avenue for appeal depending on the Authority's standard of review. The Agency's statutory construction argument is unavailing.

As noted above, the Authority reviews exceptions to an arbitrator's award to determine whether the award is "contrary to any law, rule, or regulation," 5 U.S.C. § 7122(a)(1), or otherwise deficient "on grounds similar to those applied in Federal courts in private sector labor-management relations," 5 U.S.C. § 7122(a)(2). Under Authority practice (not by statute), it reviews questions of law *de novo* when determining an arbitration award's consistency with law, rule, or regulation under § 7122(a)(1). The Agency thus claims that "there is good reason to conclude that [those] legal issues are not necessarily subject to" the statutory bar because the *de novo* review of legal arguments differs from issues "involving interpretation of collective

bargaining agreements [in which a private-sector] arbitrator is accorded substantial deference." Br. 31, *see* 5 U.S.C. § 7122(a)(1).

But accepting that argument would require the Court to re-write § 7123(a)(1) to add the italicized words:

> (a) Any person aggrieved by any final order of the Authority other than an order under—
>
> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title *or involves the interpretation of a law, rule, or regulation under section 7122(a)(1) of this title*. . . .

Of course, if Congress intended the Statute to have that meaning, it knew how to draft language to make it so. The plain language of § 7123(a)(1) provides that an Authority order under § 7122 – notwithstanding the nature of the Authority's review – is only subject to judicial scrutiny if it involves an unfair labor practice.[6] *See* 5 U.S.C. § 7123(a)(1). That makes sense because, regardless of whether the Authority reviews an arbitration award under § 7122(a)(1) or (a)(2), the policies favoring expeditious resolution of labor disputes that Congress had in mind when it enacted the Statute are the same. *Scobey*, 784 F.3d at 823. Because the statutory language is plain, the Court

[6] As the D.C. Circuit has explained, when the Authority's order does not involve an unfair labor practice, "there is no risk the Authority will leave the path of the law of unfair labor practices and yet escape the review that would bring it back to the straight and narrow." *Am. Fed. of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 504 (D.C. Cir. 2006). And absent such risk, "neither is there any reason for the Congress to have departed from its established policy 'favoring arbitration of labor disputes and accordingly granting arbitration results substantial finality,' which policy underlies the general rule in § 7123 barring judicial review of arbitral awards." *Id.* (quoting *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987)).

should decline the Agency's invitation to look to the Statute's legislative history to create ambiguity. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *Badlands Trust Co. v. First Fin. Fund, Inc.*, 65 F. App'x 876, 879 (4th Cir. 2003) (unpublished opinion) ("We do not consult legislative history where, as here, the plain and unambiguous language of the statute answers the question.").

In any event, nothing in the legislative history the Agency cites mandates a different reading of § 7123(a)(1). According to the Agency, the conference report's reference to judicial review of private-sector arbitration awards and characterization of the Authority's review of arbitration awards as "limited" together indicate that Congress intended to permit judicial review of Authority orders interpreting an arbitration award's consistency with law, rule, or regulation. (*See* Br. 32-35.) But the conference report recognizes that the Authority's review of arbitration awards is "similar" – not *identical* – "to the scope of judicial review" in the private sector.[7] H.R. Rep. No. 95-1717, at 153, 95th Cong. 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2887. And calling the Authority's review of arbitration awards "limited" is consistent with a plain-language reading of the Statute: it does not grant the Authority de novo review over all aspects of the arbitrator's award, but only over the two narrow grounds for exceptions delineated in § 7122 of the Statute. The Statute's

[7] Moreover, in today's legal landscape, arbitrators regularly interpret federal statutes – and the courts routinely bless their doing so. *E.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009).

legislative history nowhere suggests that the scope of judicial review of Authority arbitration orders is dependent on the scope of the Authority's review of the arbitrator's award. The Agency's interpretation of § 7123(a)(1), therefore, lacks support in either the statutory text or its legislative history.

C. This Case Presents No Constitutional Issue

The Agency's assertion that constitutional appropriations issues are at stake in this case is unfounded. The D.C. Circuit's decision in *Scobey* correctly held that the Authority's routine application of the Back Pay Act and other employment statutes under its purview raise no constitutional issues. The Court should decline the Agency's invitation to create a circuit split, and it should dismiss the petition for review.

As an initial matter, it is worth recognizing that the Agency bases its entire argument on judicially created exceptions to the explicit bar on judicial review of Authority arbitration decisions that this Court has not adopted. Alone among the courts of appeals, the D.C. Circuit has created two exceptions to the statutory bar on judicial review – one to review cases in which the Authority purportedly misconstrued its own subject matter jurisdiction under one of the Statute's definitions of "grievance," 5 U.S.C. § 7103(a)(9)(C)(ii), *U.S. Dep't of Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682, 691 (D.C. Cir. 1994) ("*Treasury*"), and one to review collateral constitutional challenges to the Authority's arbitration decisions, *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988) ("*Griffith*"). But the only other circuit to consider

either exception rejected it. *Nat'l Treasury Emps. Union v. FLRA*, 112 F.3d 402, 404 (9th Cir. 1997) ("*NTEU*") (declining to follow *Treasury*). And, as the D.C. Circuit itself recently recognized in *Scobey*, the *Griffith* exception (which the Agency urges the Court to adopt) does not apply to the "routine statutory and regulatory questions" presented in employment-related Back Pay Act cases like this one. *Scobey*, 784 F.3d at 823.

The Court should follow *Scobey*. To begin, the Agency concedes that the Back Pay Act waives sovereign immunity. (Br. 26.) And there is no question that the Authority is authorized to grant a back-pay remedy under the Back Pay Act.[8] 5 U.S.C. §§ 5596(b)(1), 7122(b). Indeed, the Civil Service Reform Act of 1978 *both* specifically amended the Back Pay Act, waiving the federal government's sovereign immunity to empower arbitrators and the Authority to remedy federal employees' grievances with back pay, *and* it explicitly stated that the Authority's decisions in arbitration cases would not be subject to judicial review. Pub. L. No. 95-454, 92 Stat. 1111, 1213, 1216 (codified at 5 U.S.C. §§ 7123(a), 5596). Further, the Agency does not claim that Congress has not appropriated funds for the payment of back pay to Agency

[8] *Compare Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990) (holding that court could not, under estoppel principle, award compensation not authorized by statute); *see also Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 467 (D.C. Cir. 2000) (holding that Back Pay Act does not waive government's sovereign immunity to post-judgment interest on liquidated damages under the Fair Labor Standards Act); *U.S. Dep't of the Army v. FLRA*, 56 F.3d 273, 278-79 (D.C. Cir. 1995) (holding that the Statute did not waive government's sovereign immunity to money damages).

employees. (*See* Br. 21 n.7 & 27.) It is well settled that federal law contemplates payment of any back pay award out of the Agency's regular appropriations. If no money remains to pay, then the Agency may request that Congress allocate a deficiency appropriation. *See* III Government Accounting Office, *Principles of Federal Appropriations Law* 14-47 (3rd ed. 20080, *available at* http://www.gao.gov/legal/redbook/redbook.html (last visited Jul. 20, 2016).[9] Accordingly, while the Authority respects the constitutional implications and import of only drawing funds from the public treasury as Congress has directed (Br. 19-27), the Authority's decision here is congruent with Congress's vision for the federal-sector grievance-arbitration process, its waiver through the Statute and the Back Pay Act of sovereign immunity in Authority arbitration cases, and its appropriation of funding to the Agency for salaries and overtime.

Thus, behind the smoke and mirrors of the Agency's constitutional claims, the Agency is only arguing that the Authority misapplied the Back Pay Act, a statute that Congress expected the Authority to apply in issuing decisions on arbitration awards that are not reviewable by the courts. (Br. 27 (claiming that "the FLRA wrongly

[9] Thus, cases like *U.S. Department of the Air Force v. FLRA*, where Congress failed to authorize funding for specific expenditures, are inapposite. 648 F.3d 841, 844-45 (D.C. Cir. 2011) (court could not uphold negotiability of bargaining proposal for uniform cleaning because Congress did not appropriate funds for cleaning); *see also U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1342 (D.C. Cir. 2012) (remanding to the Authority for further proceedings and holding that appropriations law barred the Navy from providing free bottled water to employees when safe drinkable tap water was available).

concluded that funds are due and must be paid to employees").) As the D.C. Circuit correctly noted in *Scobey*, however, denying judicial review in these circumstances "is exactly what Congress intended." 784 F.3d at 824.

In *Scobey*, the D.C. Circuit dismissed the petition for review for lack of jurisdiction, recognizing that the Back Pay Act is a statute within the Authority's purview and that "the case presents no constitutional question, as [the Back Pay Act] waives sovereign immunity." 784 F.3d at 823. The Court explained that "[r]outine statutory and regulatory questions," such as the application of the Back Pay Act in light of an agency overtime policy, "are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity." *Id.* Otherwise, the Court recognized, "Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the Back Pay Act authorizes would be reviewable." *Id.* Moreover, that evisceration would be distinctly asymmetrical: the government could seek judicial review when the Authority awards back pay, but when the Authority denies back pay, the employee would have no recourse, because only decisions adverse to the government could implicate sovereign immunity. *Id.* at 823-24. Accordingly, the D.C. Circuit found the interpretation of § 7123 that the Agency advances here "to be a labored, even silly, construction of the statute." *Id.* at 824. This Court should follow the D.C. Circuit to recognize that the Authority's routine application of the Back Pay Act raises no sovereign immunity concerns.

In attempting to cast doubt on the D.C. Circuit's decision in *Scobey,* the Agency raises three arguments, none of which are persuasive. (Br. 36-41.) First, the Agency contends that *Scobey* is "inconsistent with basic constitutional principles that protect the federal fisc from orders requiring unauthorized expenditures." (Br. 36.) But, as previously shown (*see* pp. 24-25, *supra*), the Authority and the arbitrator issued the monetary award here consistent with the discretion Congress granted under the Statute, the Back Pay Act, and basic principles of appropriations law. Consequently, the Agency must complain that "the issue is not whether a waiver exists, but the *scope* of that waiver in a particular instance." (Br. 36-37 (emphasis in original).) Yet, determining the *scope* of the waiver in arbitration cases – evaluating, as the D.C. Circuit has twice remarked, a "marginal nuance of the Back Pay Act," *Scobey*, 784 F.3d at 824; *Griffith*, 842 F.2d at 494[10] – is exactly what Congress delegated to the Authority in the Statute *without judicial review.* That decision was well within Congress's discretion. *Cf. Wade v. Blue*, 369 F.3d 407, 410 (4th Cir. 2004) ("It is a fundamental precept of our constitutional structure that Congress may, in its discretion, grant, withhold, or

[10] The Agency's complaints about the Authority's decision here are similar to the challenges the D.C. Circuit has previously dismissed as "marginal nuances of the Back Pay Act." *Compare* Br. 42-51 (contending that the Back Pay Act requires "money-mandating" statutes and challenging the Authority's interpretation of agency employment memoranda), *with Scobey*, 784 F.3d at 822 (dismissing the Agency's challenge to the Authority's interpretation of subsection (b)(4) of the Back Pay Act); *Griffith*, 842 F.2d at 494 (dismissing employee's challenge to the Authority's test for receiving back pay under the Back Pay Act).

otherwise limit the jurisdiction of the lower federal courts.") (citing *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943)).

This is why *Scobey* properly held that *Griffith*'s creation of an exception to review "collateral constitutional claims," as *Treasury* characterized it, 43 F.3d at 688, is not at all comparable to the exception the Agency seeks here to review *all monetary awards* against the Government. In *Griffith*, the plaintiff sought a ruling on whether the Due Process Clause guaranteed her a property interest in an annual within-grade pay increase, and the Court exercised jurisdiction to address that question, as the Statute "does not specifically preclude review of constitutional claims." 842 F.2d at 498-99. But it *does* specifically preclude review of Back Pay Act challenges, as discussed above. *See* pp. 20-22, 25-26, *supra.* Accordingly, in *Griffith,* the Court refused to wade into the plaintiff's Back Pay Act challenges, given Congress's explicit decision to grant the Authority power to apply "the interstices of [that] federal statute," which "undisputably was designed to deal with employee working conditions." *Treasury*, 43 F.3d at 689; *Griffith*, 842 F.2d at 494; *cf. McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf.*, 264 F.3d 52, 59-63 (D.C. Cir. 2001) (examining statutory language, legislative history, congressional understanding, and availability of other review to hold that Congress precluded judicial review of as-applied constitutional objections).

Next, the Agency disagrees with *Scobey*'s observation that allowing judicial review would "eviscerate[]" "Congress's creation of a mostly unreviewable system of

arbitration," *Scobey*, 784 F.3d at 823, asserting that arbitration awards concerning "routine factual and contractual issues" would remain immune from judicial review. (Br. 37.) But it is often the resolution of "routine factual and contractual issues" that leads to a back pay award. *See, e.g., Scobey*, 784 F.3d at 822-23 (awarding back pay because of the arbitrator's factual finding that the failure to assign an overtime shift to an employee was not "administrative error"). And it ignores the fact that any *monetary award* that the Government believes the Authority incorrectly issued would be subject to judicial review because, in the Agency's words, judicial oversight will be available whenever the Government thinks necessary to "ensure that constitutional safeguards related to governmental expenditures remain effectively enforced." (Br. 38.) Even a quick search reveals numerous routine arbitration cases involving back pay that, under the Agency's theory, could walk through the courthouse doors.[11] In fact, in just the last two years, the Government has attempted to bring at least five other cases to

[11] *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Laredo, Tex.,* 66 FLRA 567, 568 (2012) (denying agency's exception to the arbitrator's finding that the agency violated a collective-bargaining agreement, thereby committing an "unjustified or unwarranted personnel action" under the Back Pay Act); *Fed. Aviation Admin.,* 64 FLRA 76, 78 (2009) (denying agency's exception claiming the arbitrator misinterpreted a Memorandum of Understanding between the agency and union that led to the erroneous finding of an adverse personnel action under the Back Pay Act; because Authority found that the arbitrator properly applied the Back Pay Act, it rejected the Agency's claim that "the award . . . is barred by sovereign immunity"); *Dep't of Def., Educ. Activity, Arlington,* 56 FLRA 901, 904-05 (2000) (denying agency's exception to the arbitrator's finding that breach of an employee's contractual right to a timely payment of living quarters allowance was an unjustified personnel action under the Back Pay Act).

court, two of which the Agency has cited in its brief, (Br. 7 & n.1), and three others it failed to mention.[12] Given the substantial percentage of the Authority's arbitration docket that involves monetary awards, it was not hyperbole for the D.C. Circuit to suggest that extending judicial review would "eviscerate" the statutory scheme.[13]

Third, the Agency erroneously contends that "*Scobey* creates an anomalous scheme in which courts of appeals can review FLRA decisions on Appropriations

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[12] *See Dep't of Health & Human Servs.*, 68 FLRA 239 (2015), *petition dismissed*, *U.S. Dep't of Health & Human Servs. v. FLRA*, No. 15-1068 (D.C. Cir. July 6, 2015); *U.S. Dep't of Homeland Sec.*, 68 FLRA 807 (2015), *petition voluntarily dismissed*, *U.S. Dep't of Homeland Sec. v. FLRA,* No. 15-1342 (D.C. Cir. Jan. 4, 2016); *Dep't of the Treasury*, 68 FLRA 810 (2015), *petition voluntarily dismissed*, *Dep't of Treasury v. FLRA*, No. 15- 1341 (D.C. Cir. Jan. 4, 2016).

[13] The Agency's theory could also destabilize other statutory schemes affecting the federal workforce. For instance, the Equal Employment Opportunity Commission is empowered to assess monetary relief against federal agencies. 42 U.S.C. § 2000e-16(b). Title VII, however, does not grant federal agencies a right to seek judicial review of the EEOC's awards. 42 U.S.C. § 2000e-16(c); *see also Laber v. Harvey*, 438 F.3d 404, 416 (4th Cir. 2006) (en banc) (observing that "the employing agency has no right to seek judicial review of the [EEOC Office of Federal Operation's] resolution of an employee's claim"). Furthermore, as this Court has recognized, when *a federal employee* exercises his right to sue to enforce an EEOC order, "the issue is not liability or the remedy, as it is in a civil action, but rather whether the federal employer has complied with the OFO's remedial order." *Id.* at 417 (citing *Scott v. Johanns,* 409 F.3d 466, 469 (D.C. Cir. 2005); *Timmons v. White,* 314 F.3d 1229, 1232 (10th Cir. 2003)). Under the Agency's theory, an EEOC award that misinterpreted the relevant EEO statute would be subject to judicial review because it extracts money from the Treasury without appropriate waiver. *See, e.g., Edgardo D., Complainant v. Vilsack*, EEOC No. 0120131723, 2016 WL 536270, at *9 (Jan. 15, 2016) (reversing agency's final decision and awarding $30,000 in nonpecuniary damages); *Maryanne S., Complainant v. Lynch*, EEOC No. 0720140028, 2015 WL 9685713, at *9 (Dec. 30, 2015) (affirming award of $174,500 in non-pecuniary damages and $136,652.50 in attorney's fees over agency objections).

Clause and sovereign immunity grounds" in unfair-labor-practice cases, but not in arbitration cases. (Br. 39.) It was not *Scobey*, however, but *Congress* that created the scheme of judicial review under which Authority orders resolving exceptions to arbitration awards are unreviewable unless they involve an unfair labor practice. 5 U.S.C. § 7123(a)(1). Indeed, the system of judicial review Congress established in the Statute ensures that the Agency's sovereign immunity concerns will not indefinitely evade review, as they may arise in the judicially reviewable unfair-labor-practice context, *see* 5 U.S.C. § 7123(a)(1), where speed and finality were of less concern to Congress. *See, e.g.*, *Soc. Sec. Admin., Baltimore, Md. v. FLRA*, 201 F.3d 465, 468-71 (D.C. Cir. 2000).

That the Authority's interpretation of the Back Pay Act is not entitled to deference when it *is* reviewable is immaterial. (*See* Br. 41.) Again, Congress could have, but did not, draft the Statute to provide for judicial review of Authority arbitration decisions involving statutes other than the Authority's enabling statute. Instead, Congress provided that a party may file exceptions to an arbitration award with the Authority on the grounds that the award "is contrary to *any* law, rule, or regulation," 5 U.S.C. § 7122(a)(1) (emphasis added), and that the Authority's decisions interpreting those laws, rules, or regulations in the arbitration context would be unreviewable unless they involved an unfair labor practice, *see id.* Moreover, the Back Pay Act is indisputably a statute within the Authority's purview, even if the Authority's interpretations thereof are not due deference. *Scobey*, 784 F.3d at 823;

Treasury, 43 F.3d at 689 (explaining that the Back Pay Act "undisputedly was designed to deal directly with employee working conditions").

Finally, the Agency's bare allegation that substantial money is at stake in this case does not create jurisdiction.[14] (*See, e.g.,* Br. 39.) The Agency does not – and cannot – cite any authority holding that the scope of this Court's jurisdiction to review an Authority order on an arbitration award depends upon the amount of back pay at issue. In fact, the D.C. Circuit explicitly stated in *Scobey* that the non-reviewability of Authority arbitration decisions interpreting statutes regulating working conditions "is exactly what Congress intended," even if the Authority's statutory interpretation were (as the Agency there suggested) "extreme" and the liability imposed on the U.S. Treasury by the Authority's decision were "gigantic." *Scobey*, 784 F.3d at 824. It would make no sense for the Court to create an amount-in-controversy requirement where Congress did not. If Congress wants to create a monetary threshold for jurisdiction over Authority arbitration decisions, it knows how to do so. *See, e.g.,*

[14] Though the Agency attempts to downplay the amount of money at issue in *Scobey* as "only a 'small' sum," (Br. 38 (citation omitted)), the Agency argued to the D.C. Circuit in *Scobey* that the decision implicated "approximately 70 other arbitrations." Brief of Petitioner U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana at 48, *Scobey*, 748 F.3d 821 (D.C. Cir. 2015) (No. 14-1052), 2014 WL 5823869 at *48. Moreover, the Agency's assertion regarding the amount of money at issue in this case and two related cases before the D.C. Circuit is without support in the record. *See, e.g.*, *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (appellate court normally will not consider facts outside the record on appeal).

28 U.S.C. § 1332 (allowing federal court jurisdiction over diversity cases when the amount in controversy exceeds $75,000).

II. EVEN IF THIS COURT HAD JURISDICTION OVER THE PETITION FOR REVIEW, THE AGENCY'S CLAIMS LACK MERIT

A. Under its Plain Language, Legislative History, and Case Law, the Back Pay Act's Sovereign Immunity Waiver is Not Conditional Upon the Violation of a "Money-Mandating" Statute

The Agency incorrectly claims that the Back Pay Act's waiver of sovereign immunity is "conditional, and requires a corresponding 'money-mandating statute' in order to permit payment of federal funds," citing case law from the Federal Circuit and the Court of Federal Claims. (Br. 42.) Although the Agency did not raise this argument before the Authority, (*see* Dec., A123 (addressing Agency's Back Pay Act arguments)), it is well settled that a successful Back Pay Act claim need not be based on a statute that is "money-mandating" for Tucker Act jurisdictional purposes – nor on any statute at all.

As the Supreme Court has recognized, the Back Pay Act mandates compensation by the federal government when an employee "is found by appropriate authority under *applicable law, rule, regulation, or collective bargaining agreement*" to have been affected by an unjustified and unwarranted personnel action that resulted in the employee's loss of pay, allowances, or differentials. 5 U.S.C. § 5596(b)(1) (emphasis added); *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988) (interpreting the Back Pay Act itself as mandating compensation). The Act's plain language is broad,

encompassing violations not only of statute, but also of agency rule, regulation, or contract. *See, e.g., Scobey*, 784 F.3d at 822; *In re Levenson*, 587 F.3d 925, 936 (9th Cir. 2009); *Ward v. Brown*, 22 F.3d 516, 521 (2d Cir. 1994); *see also Hambsch v. United States*, 490 U.S. 1054, 1058 (1989) (O'Connor, Scalia, and Kennedy, JJ., dissenting from denial of cert) (recognizing that violation of an agency personnel rule may be source of Back Pay Act award). The Office of Personnel Management's implementing regulations echo this broad language, providing that the underlying authority for a Back Pay Act claim may be "applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement." 5 C.F.R. § 550.803. The Back Pay Act's legislative history, too, confirms that the violation of a "money-mandating" statute is not a prerequisite for an award: the House committee report states that the phrase "applicable law" is intended "to cover those laws and regulations, now or hereafter in effect, which provide the basis for operations under the Government personnel systems." H.R. Rep. No. 89-32, at 4 (1965).

Thus, the Back Pay Act's broad language "clearly does not contemplate that the Back Pay Act's waiver of sovereign immunity applies only to laws, rules, regulations, or collective bargaining agreements that [are money-mandating and] contain their own separate waiver of sovereign immunity." *Adam v. Norton*, 636 F.3d 1190, 1195 (9th Cir. 2011) (holding that the Back Pay Act's waiver of sovereign immunity extends to interest on back pay awarded under the Age Discrimination in Employment Act

("ADEA")). As the U.S. Court of Appeals for the Ninth Circuit has recognized, "reading such a limitation into the Act would result in a fragmented back pay scheme completely at odds with the Act's purpose of establishing 'a single, general, and comprehensive pay adjustment authority to be applied after an erroneous or unwarranted personnel action is corrected.'" *Id.* (quoting H.R. Rep. No. 89-32, at 1 (1965)).

The Agency's reliance on decisions of the Federal Circuit and the Court of Federal Claims is misplaced. Each of the cases the Agency cites analyzes whether 5 U.S.C. § 6101 is a "money-mandating statute" for purposes of the Court of Federal Claims' jurisdiction under the Tucker Act.[15] (*See* Br. 42-45 (citing, *e.g.*, *Sanford v. Weinberger*, 752 F.2d 636 (Fed. Cir. 1985).) But, as just discussed, the courts of appeals have recognized that, outside the question of the Court of Federal Claims' jurisdiction, a successful Back Pay Act claim need not be based on a statute that is "money-mandating" for Tucker Act purposes. *Compare Woolf v. Bowles*, 57 F.3d 407,

[15] Under the Tucker Act, the Court of Federal Claims only has jurisdiction to hear "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2012); *see also Adams v. United States*, 125 Fed. Cl. 608, 610 (2016). The Tucker Act waives the United States' sovereign immunity to allow a suit for money damages, *United States v. Mitchell*, 463 U.S. 206, 215 (1983), but it does not confer any substantive rights, *United States v. Testan*, 424 U.S. 392, 398 (1976). Therefore, a plaintiff seeking to invoke the Court of Federal Claims' Tucker Act jurisdiction must identify an independent source of a substantive right to money damages from the United States arising out of a contract, statute, regulation or constitutional provision. *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1306 (Fed. Cir. 2008); *Adams*, 125 Fed. Cl. at 610.

411 (4th Cir. 1995) (suggesting that Title VII may be source of Back Pay Act award in noncompetitive, mandatory failure-to-promote cases) *with Bussie v. United States*, 96 Fed. Cl. 89, 96-97 (Fed. Cl. 2011), *aff'd*, 443 F. App'x 542 (Fed. Cir. 2011) (unpublished) (holding that Title VII is not a money-mandating statute conferring Tucker Act jurisdiction because Title VII claims are within the exclusive jurisdiction of the federal district courts); *compare Adam*, 636 F.3d at 1194 ("[T]he ADEA is without question an 'applicable law' for purposes of the Back Pay Act.") *with Struck v. United States*, Nos. 15-788, 15-822, 15-831, 2015 WL 4722623, at *2 (Fed. Cl. Aug. 7, 2015) (holding that the ADEA is not a money-mandating statute for Tucker Act purposes). Indeed, though the Back Pay Act explicitly provides that an award may be based on the violation of a collective-bargaining agreement, the Court of Federal Claims lacks jurisdiction over a Back Pay Act claim grounded in the breach of a collective-bargaining agreement because such an agreement is not a "contract" for Tucker Act purposes. 5 U.S.C. § 5596(b)(1); *Zacardelli v. United States*, 68 Fed. Cl. 426, 433 (2005) ("The [collective-bargaining agreement] does not constitute an express or implied contract for employment with the United States for purposes of Tucker Act jurisdiction."). Neither this Court's jurisdiction nor that of the Authority is governed by the Tucker Act. Thus, the Tucker Act case law on which the Agency relies is inapposite.

B. The Authority Correctly Interpreted the Basham Memo and its Implementing Directive

The Agency fails to show that the Authority incorrectly found that the Basham Memo delegated the authority to make scheduling deviations under § 6101 to Agency managers and designees. (Decision, A121.) Contrary to the Agency's argument, the Authority reasonably held that the Basham Memo created a conditional – not a blanket – exception to § 6101's scheduling requirements. (*Id.* at A120.)

Just as it did before the Authority, *see* Decision at A120, the Agency fails to point to any specific language in the Basham Memo indicating that then-Commissioner Basham had excepted all unit employees from the scheduling requirements without requiring further Agency action. It ignores the conditional wording of the Memo, which provides that only in cases in which the Agency would be seriously handicapped or costs would be substantially increased could the Agency except unit employees from § 6101's scheduling requirements. (Basham Memo, A13; *see also* Decision, A120-21.) Instead, the Agency argues that no such clear language of exception is required. (Br. 46.) It claims that the Authority erroneously required "additional language or evidence" indicating then-Commissioner Basham's intent to create a blanket exception to § 6101's scheduling requirements. (*Id.* (internal quotation marks omitted).) But the Authority required no such additional language: it only sought *some* language of intent. Even under that low threshold, however, as the

Authority found, the Basham Memo neither "implicitly [n]or explicitly" created a wholesale exception to § 6101. (Decision, A122.)

The Implementing Directive confirms the Authority's interpretation of the Basham Memo. As the Authority found, the Implementing Directive makes clear that scheduling deviations may only occur in qualifying circumstances, and that managers must maintain sufficient documentary records to support the use of the Basham-Memorandum exception in particular instances. (Decision, A121.) Contrary to the Agency's assertions, the Authority did not find that the Implementing Directive "modified" or "superseded" the Basham Memo. (*See* Br. 48.) Nor did the Authority find the language of the Directive ambiguous.[16] (*See id.*) As the Authority's decision states, the Authority – correctly – determined that the Basham Memo delegated authority to Agency managers to make § 6101 exemption determinations on a case-by-case basis. (Decision, A121.) Nothing in the Agency's brief challenges this delegation finding.

* * *

But, ultimately, there is no reason for the Court to reach the interpretation of the Implementing Directive. For all of the reasons set forth above, the Court lacks jurisdiction over the Agency's petition for review.

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[16] Further, the Agency made no deference argument to the Authority. (Br. 50.) Accordingly, that issue would not be before the Court under 5 U.S.C. § 7123(c) even if the Authority *had* found the Implementing Directive ambiguous. *EEOC v. FLRA,* 476 U.S. 19, 23-24 (1986).

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction. If, however, the Court chooses to exercise jurisdiction in this case, the petition for review should be denied because the Authority did not err in upholding the arbitrator's award of back pay.

Respectfully submitted,

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August 2, 2016

STATEMENT REGARDING ORAL ARGUMENT

The Authority believes that this case presents a straightforward question of statutory interpretation, but oral argument may assist the Court in considering this issue.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,662 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font in Garamond.

August 2, 2016

/s/ Stephanie J. Fouse
STEPHANIE J. FOUSE

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2016, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. A paper copy will be filed with the Court within one business day. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Stephanie J. Fouse
STEPHANIE J. FOUSE

ADDENDUM

Attachment 1 – Statutory Provisions

Attachment 2 – Unpublished Dispositions

ATTACHMENT 1
STATUTORY PROVISIONS

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means—

> **(1)** an Executive agency;
>
> **(2)** the Administrative Office of the United States Courts, the Federal

Judicial Center, and the courts named by section 610 of title 28;

(3) the Library of Congress;

(4) the Government Printing Office;

(5) the government of the District of Columbia;

(6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and

(7) the United States Botanic Garden.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2) (A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest—

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was

in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

(5) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

5 U.S.C. § 6101. Basic 40-hour workweek; work schedules; regulations

(a)(1) For the purpose of this subsection, "employee" includes an employee of the government of the District of Columbia and an employee whose pay is fixed and adjusted from time to time under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, but does not include an employee or individual excluded from the definition of employee in section 5541(2) of this title, except as specifically provided under this paragraph.

(2) The head of each Executive agency, military department, and of the government of the District of Columbia shall—

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

(3) Except when the head of an Executive agency, a military department, or of the government of the District of Columbia determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that—

(A) assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;

(C) the working hours in each day in the basic workweek are the same;

(D) the basic nonovertime workday may not exceed 8 hours;

(E) the occurrence of holidays may not affect the designation of the basic workweek; and

(F) breaks in working hours of more than 1 hour may not be scheduled in a basic workday.

(4) Notwithstanding paragraph (3) of this subsection, the head of an Executive agency, a military department, or of the government of the District of Columbia may establish special tours of duty, of not less than 40 hours, to enable employees to take courses in nearby colleges, universities, or other educational institutions that will equip them for more effective work in the agency. Premium pay may not be paid to an employee solely because his special tour of duty established under this paragraph results in his working on a day or at a time of day for which premium pay is otherwise authorized.

(5) The Architect of the Capitol may apply this subsection to employees under the Office of the Architect of the Capitol or the Botanic Garden.

The Librarian of Congress may apply this subsection to employees under the Library of Congress.

(b)(1) For the purpose of this subsection, "agency" and "employee" have the meanings given them by section 5541 of this title.

(2) To the maximum extent practicable, the head of an agency shall schedule the time to be spent by an employee in a travel status away from his official duty station within the regularly scheduled workweek of the employee.

(c) The Office of Personnel Management may prescribe regulations, subject to the approval of the President, necessary for the administration of this section insofar as this section affects employees in or under an Executive agency.

5 U.S.C. § 7103(a)(9)(C). Definitions; application

(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

5 U.S.C. § 7105(a). Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 7121(b). Grievance procedures

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall--

> **(A)** be fair and simple,
>
> **(B)** provide for expeditious processing, and
>
> **(C)** include procedures that--
>
> > **(i)** assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;
> >
> > **(ii)** assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and
> >
> > **(iii)** provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order--

> > **(i)** a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and
> >
> > **(ii)** the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.
>
> **(B)** Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and

in the same manner as if the agency had taken the disciplinary action absent arbitration.

5 U.S.C. § 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient:

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under:

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, 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.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

19 U.S.C. § 267. Overtime and premium pay for customs officers

(a) Overtime pay

(1) In general

Subject to paragraph (2) and subsection (c) of this section, a customs officer who is officially assigned to perform work in excess of 40 hours in the administrative workweek of the officer or in excess of 8 hours in a day shall be compensated for that work at an hourly rate of pay that is equal to 2 times the hourly rate of the basic pay of the officer. For purposes of this paragraph, the hourly rate of basic pay for a customs officer does not include any premium pay provided for under subsection (b) of this section.

(2) Special provisions relating to overtime work on callback basis

(A) Minimum duration

Any work for which compensation is authorized under paragraph (1) and for which the customs officer is required to return to the officer's place of work shall be treated as being not less than 2 hours in duration; but only if such work begins at least 1 hour after the end of any previous regularly scheduled work assignment and ends at least 1 hour before the beginning of the following regularly scheduled work assignment.

(B) Compensation for commuting time

(i) In general

Except as provided in clause (ii), in addition to the compensation authorized under paragraph (1) for work to which subparagraph (A) applies, the customs officer is entitled to be paid, as compensation for commuting time, an amount equal to 3 times the hourly rate of basic pay of the officer.

(ii) Exception

Compensation for commuting time is not payable under clause (i) if the work for which compensation is authorized under paragraph (1)--

(I) does not commence within 16 hours of the customs officer's last regularly scheduled work assignment, or

(II) commences within 2 hours of the next regularly scheduled work assignment of the customs officer.

(b) Premium pay for customs officers

(1) Night work differential

(A) 3 p.m. to midnight shiftwork

If the majority of the hours of regularly scheduled work of a customs officer occurs during the period beginning at 3 p.m. and ending at 12 a.m., the officer is entitled to pay for work during such

period (except for work to which paragraph (2) or (3) applies) at the officer's hourly rate of basic pay plus premium pay amounting to 15 percent of that basic rate.

(B) 11 p.m. to 8 a.m. shiftwork

If the majority of the hours of regularly scheduled work of a customs officer occurs during the period beginning at 11 p.m. and ending at 8 a.m., the officer is entitled to pay for work during such period (except for work to which paragraph (2) or (3) applies) at the officer's hourly rate of basic pay plus premium pay amounting to 20 percent of that basic rate.

(C) 7:30 p.m. to 3:30 a.m. shiftwork

If the regularly scheduled work assignment of a customs officer is 7:30 p.m. to 3:30 a.m., the officer is entitled to pay for work during such period (except for work to which paragraph (2) or (3) applies) at the officer's hourly rate of basic pay plus premium pay amounting to 15 percent of that basic rate for the period from 7:30 p.m. to 11:30 p.m. and at the officer's hourly rate of basic pay plus premium pay amounting to 20 percent of that basic rate for the period from 11:30 p.m. to 3:30 a.m.

(2) Sunday differential

A customs officer who performs any regularly scheduled work on a Sunday that is not a holiday is entitled to pay for that work at the officer's hourly rate of basic pay plus premium pay amounting to 50 percent of that basic rate.

(3) Holiday differential

A customs officer who performs any regularly scheduled work on a holiday is entitled to pay for that work at the officer's hourly rate of basic pay plus premium pay amounting to 100 percent of that basic rate.

(4) Treatment of premium pay

Premium pay provided for under this subsection may not be treated as being overtime pay or compensation for any purpose.

(c) Limitations

(1) Fiscal year cap

The aggregate of overtime pay under subsection (a) of this section (including commuting compensation under subsection (a)(2)(B) of this section) and premium pay under subsection (b) of this section that a customs officer may be paid in any fiscal year may not exceed $25,000; except that the Commissioner of Customs or his designee may waive this limitation in individual cases in order to prevent excessive costs or to meet emergency requirements of the Customs Service.

(2) Exclusivity of pay under this section

A customs officer who receives overtime pay under subsection (a) of this section or premium pay under subsection (b) of this section for time worked may not receive pay or other compensation for that work under any other provision of law.

(d) Regulations

The Secretary of the Treasury shall promulgate regulations to prevent--

(1) abuse of callback work assignments and commuting time compensation authorized under subsection (a)(2) of this section; and

(2) the disproportionately more frequent assignment of overtime work to customs officers who are near to retirement.

(e) Definitions

As used in this section:

(1) The term "customs officer" means an individual performing those functions specified by regulation by the Secretary of the Treasury for a customs inspector or canine enforcement officer. Such functions shall be consistent with such applicable standards as may be promulgated by the Office of Personnel Management.

(2) The term "holiday" means any day designated as a holiday under a Federal statute or Executive order.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) —

(A)(i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)1 of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)2) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1346(a). United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of

title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites1 States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a

contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

31 U.S.C. § 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

> **(A)** make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
>
> **(B)** involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
>
> **(C)** make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or
>
> **(D)** involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.
>
> **(2)** This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

42 U.S.C. § 2000e-16(b), (c). Employment by Federal Government

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.;

contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying

out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

ATTACHMENT 2
UNPUBLISHED DISPOSITIONS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1068 **September Term, 2015**

FLRA-0-AR-5024

Filed On: September 10, 2015

United States Department of Health and Human Services,

Petitioner

v.

Federal Labor Relations Authority,

Respondent

National Treasury Employees Union,

Intervenor

BEFORE: Griffith, Kavanaugh, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. This case presents no exception to the statutory bar to judicial review of a decision of the Federal Labor Relations Authority resolving exceptions to an arbitrator's award. See 5 U.S.C. § 7123(a); Cf. U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA, 43 F.3d 682 (D.C. Cir. 1994).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert J. Cavello
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1351 **September Term, 2015**

FLRA-0-AR-4933

Filed On: March 9, 2016

United States Department of Homeland Security,
Petitioner

v.

Federal Labor Relations Authority,
Respondent

BEFORE: Tatel, Brown, and Griffith, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the opposition thereto, and the reply; and the cross-motion to hold in abeyance, the oppositions thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Petitioner has not shown that this case falls within an exception to the statutory bar to judicial review of a decision of the Federal Labor Relations Authority involving an arbitrator's award. See 5 U.S.C. § 7123(a); see also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Scobey, Mont. v. FLRA, 784 F.3d 821 (D.C. Cir. 2015). Cf. Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988) (holding that 5 U.S.C. § 7123(a)(1) does not prevent the court from hearing constitutional challenges to FLRA arbitration decisions); Dep't of the Treasury, U.S. Customs Service v. FLRA, 43 F.3d 682, 691 (D.C. Cir. 1994) ("Our review is available for the limited purpose of determining whether the Authority exceeds its jurisdiction."). It is

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1351 **September Term, 2015**

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1293 **September Term, 2015**

FLRA-0-AR-4968

Filed On: March 9, 2016

United States Department of Homeland Security,
Petitioner

v.

Federal Labor Relations Authority,
Respondent

National Treasury Employees Union,
Intervenor

BEFORE: Tatel, Brown, and Griffith, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss for lack of jurisdiction, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Petitioner has not shown that this case falls within an exception to the statutory bar to judicial review of a decision of the Federal Labor Relations Authority involving an arbitrator's award. See 5 U.S.C. § 7123(a); see also U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Scobey, Mont. v. FLRA, 784 F.3d 821 (D.C. Cir. 2015). Cf. Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988) (holding that 5 U.S.C. § 7123(a)(1) does not prevent the court from hearing constitutional challenges to FLRA arbitration decisions); Dep't of the Treasury, U.S. Customs Service v. FLRA, 43 F.3d 682, 691 (D.C. Cir. 1994) ("Our review is available for the limited purpose of determining whether the Authority exceeds its jurisdiction.").

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam