ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED
No. 22-1028

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS JUDICIAL COUNCIL 2,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

ON PETITION FOR REVIEW OF DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below before the Federal Labor Relations Authority (the "Authority") were the National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2 (the "Union") and the U.S. Department of Justice, Executive Office for Immigration Review. In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. Rulings Under Review

The Union seeks review of two Authority decisions: *U.S. Department of Justice Executive Office for Immigration Review* ("*EOIR I*"), 71 FLRA 1046 (2020) (then-Member DuBester dissenting) and *U.S. Department of Justice, Executive Office for Immigration Review*, 72 FLRA 622 (2022) (denying reconsideration of *EOIR I*) (Chairman DuBester dissenting).

C. Related Cases

This case was not previously before this Court or any other court, nor is the Authority aware of any related cases currently pending before this Court or any other court.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Legislative History

GLOSSARY

Authority	The Federal Labor Relations Authority
BIA	Board of Immigration Appeals
Pet'r Br.	Petitioners' opening brief
EOIR	The U.S. Department of Justice, Executive Office for Immigration Review
EOIR I	*U.S. Department of Justice Executive Office for Immigration Review*, 71 FLRA 1046 (Nov. 2, 2020)
EOIR II	*U.S. Department of Justice, Executive Office for Immigration Review*, 72 FLRA 622 (Jan. 21, 2022)
EOIR III	*U.S. Department of Justice, Executive Office for Immigration Review*, 72 FLRA 733 (April 12, 2022)
FLRA	The Federal Labor Relations Authority
IJ	Immigration Judge
JA	Joint Appendix
Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair Labor Practice
Union	Petitioner, the National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2

STATEMENT REGARDING JURISDICTION

This Court lacks jurisdiction over this Petition for Review of *U.S. Department of Justice Executive Office for Immigration Review* ("*EOIR I*"), 71 FLRA 1046 (2020) (then-Member DuBester dissenting) and *U.S. Department of Justice, Executive Office for Immigration Review* ("*EOIR II*"), 72 FLRA 622 (2022) (Chairman DuBester dissenting) (denying reconsideration of *EOIR I*).

First, the Petition for Review is incurably premature. The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute") allows aggrieved persons to obtain judicial review only of a "final order" of the Authority. 5 U.S.C. § 7123(a). "[A] pending request for administrative reconsideration renders an agency action nonfinal and unreviewable with respect to the party who made the request." *Flat Wireless, L.L.C. v. FCC*, 944 F.3d 927, 933 (D.C. Cir. 2019) (citing *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989) (*per curiam*)). Consequently, "a petition for judicial review filed during the pendency of a request for agency reconsideration will be dismissed for lack of jurisdiction." *Wade v. FCC*, 986 F.2d 1433, 1433 (D.C. Cir. 1993).

In this case, the National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2 (the "Union") moved the Federal Labor Relations Authority ("Authority" or "FLRA") for reconsideration of *EOIR II* on February 7, 2022, two weeks before filing its Petition for Review in this Court. *See U.S. Dep't of Just., Exec. Off. for Immigr. Rev.* ("*EOIR III*"), 72 FLRA 733 (2022) (Chairman DuBester dissenting). The Union's reconsideration motion was still pending before the Authority when the Petition for Review was filed—rendering the Petition for Review incurably premature.

Moreover, on July 21, 2022, the Union filed a Representation Petition with an FLRA Regional Director. (Rep. Pet.) With that Representation Petition, the Union is asking the FLRA to reconsider its previous rulings decertifying it. The Representation Petition could provide the Union with the precise relief that it seeks in this proceeding—recertification as the exclusive representative of Immigration Judges ("IJs"). Until the Representation Petition process is complete, the Petition for Review is incurably premature.

Second, the Statute states, "[a]ny person aggrieved by any final order of the Authority *other than an order under . . . section 7112 of this title (involving an appropriate[-]unit determination)*, may . . . institute an action for judicial review of the Authority's order." 5 U.S.C. § 7123(a)(2) (emphasis added). Here, the Union seeks to circumvent this express jurisdictional bar. The Union would have this Court directly review two Authority decisions determining that a bargaining unit was not appropriate under 5 U.S.C. § 7112. The plain language of § 7123(a)(2) forbids the attempt. This Court has made clear that "section 7123 [of the Statute] precludes direct review of Authority appropriate[-]unit determinations." *Ass'n of Civilian Technicians, Inc. v. FLRA* ("*ACT*"), 283 F.3d 339, 342 (D.C. Cir. 2002).

The Union's assertion of constitutional claims does not give it license to bypass the Statute's exclusive review scheme. For one thing, those constitutional claims are not properly part of the Union's Petition for Review. They were first asserted as part of the Union's second motion for reconsideration, filed on February 7, 2022, which was still pending before the Authority when the Union filed the Petition for

Review. (*See* Union's Second Mot. Recons. Stay.) Nor has the Union amended its Petition for Review to include those claims.

For another, those constitutional claims are "the vehicle by which" the Union seeks to overturn the Authority's prior determinations and require the Authority to recertify the IJs as an appropriate bargaining unit. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012). As a result, the Union's constitutional claims "fall within the exclusive statutory scheme." *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump* ("*AFGE v. Trump*"), 929 F.3d 748, 761 (D.C. Cir. 2019). The Union may not bypass the Statute's procedures by seeking something that the Statute bars—direct review of an FLRA appropriate-unit determination. *Id.*

Instead, the appropriate forum for the Union's constitutional claims—just like any of the Union's other claims stemming from the Authority's unit determination—is an unfair labor practice ("ULP") proceeding before the Authority, with judicial review to follow (if necessary) before a federal court of appeals. *See, e.g.*, *ACT*, 283 F.3d at 342; *Council of Prison Locs. v. Brewer ("Brewer")*, 735 F.2d 1497, 1499-1500 (D.C. Cir. 1984); *Am. Fed'n of Gov't Emps. v. FLRA* ("*AFGE*

1985"), 778 F.2d 850, 857 (D.C. Cir. 1985). The Union's failure to follow that route deprives this Court of jurisdiction.

These jurisdictional flaws require that the Court dismiss the Union's Petition for Review.

STATEMENT OF THE ISSUES PRESENTED

1. Is the Union's Petition for Review incurably premature?

2. Can this Court review an Authority appropriate-unit determination on direct appeal notwithstanding 5 U.S.C. § 7123(a)(2)?

3. Can the Union establish a constitutional interest in being a certified representative when it has no right to engage in collective bargaining under the Statute?

4. Has the Union established a procedural due process violation when the Authority three times considered and rejected the Union's arguments in accordance with Authority procedures?

5. Has the Union sustained its burden of establishing a violation of substantive due process by merely asserting that Authority's decisions were arbitrary and capricious?

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are in the attached Statutory Addendum. (Add. 1.)

STATEMENT OF THE CASE

The Petition for Review seeks to challenge the Authority's appropriate-unit determinations in *EOIR I* and *EOIR II*.

The U.S. Department of Justice, Executive Office for Immigration Review ("EOIR") employs IJs to hear and decide immigration cases. *U.S. Dep't of Just., Exec. Off. for Immigr. Rev., Off. of the Chief Immigr. Judge* (*"EOIR 2000"*), 56 FLRA 616, 617 (2000). In 2019, EOIR filed a petition with an FLRA Regional Director challenging IJs' unionized status on the ground that IJs were management officials under the Statute. EOIR contended that major changes in the scope and nature of IJs' duties justified a reexamination of their status under the Statute. *See EOIR I*, 71 FLRA at 1046.

The Regional Director agreed that there had been a "substantial change" to IJs' duties that altered the "scope or character of the unit since the last certification." *Id.* at 1062-63. After undertaking this

reevaluation, the Regional Director concluded that IJs are not management officials under the Statute. *Id.* at 1047.

The Authority may review a Regional Director's decision on unit certification when established Authority precedent warrants reconsideration. 5 C.F.R. § 2422.31(c)(2). EOIR filed an application for review of the Regional Director's decision, contending, *inter alia*, that *EOIR 2000's* holding that IJs were not management officials conflicted with an earlier case finding that Members of the Board of Immigration Appeals ("BIA") were management officials. *See Dep't of Just., Bd. of Immigr. Appeals* ("*BIA*"), 47 FLRA 505, 509 (1993).

Upon review, the Authority adopted the Regional Director's unchallenged finding that there had been a substantial change in the IJs' duties since *EOIR 2000*. *EOIR I*, 71 FLRA at 1047 (citing 5 C.F.R. § 2422.31(c)). The Authority, like the Regional Director, then reassessed the appropriateness of the IJ bargaining unit. The Authority found that *EOIR 2000* should be overruled because it conflicted with *BIA*. *Id.* at 1048.

EOIR 2000 had attempted to distinguish IJs from BIA Members because IJs' decisions were reviewable by the BIA. *Id.* The Authority,

however, found that "IJ decisions influence the policy of [EOIR] for similar reasons that [BIA] Member decisions influence the policy of [EOIR]." *Id.* at 1048.

The Union moved for reconsideration, which the Authority denied. *See EOIR II*. The Union filed a second motion for reconsideration with the Authority on February 7, 2022. Without waiting for the Authority to decide its second motion for reconsideration, however, the Union filed a Petition for Review in this Court on February 23, 2022. (Pet. for Review.) On July 21, 2022, five months after it filed the Petition for Review, the Union filed a new Representation Petition with the FLRA, asking it to recertify the Union as the exclusive representative of IJs. (Rep. Pet.)

STATEMENT OF THE FACTS

I. The Statutory Framework

When an agency believes that a bargaining unit is not appropriate under § 7103(a)(4) or § 7112(b) and (c) of the Statute, it may file a petition with an FLRA Regional Director seeking a clarification or amendment of the unit certification. 5 C.F.R. §§ 2422.1(b), 2422.2(c). "[T]o show that a previously certified unit is no longer appropriate, a

party must demonstrate that substantial changes have altered the scope or character of the unit since the last certification." *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base ("Wright-Patterson")*, 70 FLRA 327, 238 (2017).

Similarly, when a union wishes to be certified as an exclusive representative of employees in a unit, the union may petition an FLRA Regional Director to hold an election and determine whether certification is appropriate. 5 C.F.R. §§ 2422.1(a), 2422.2(a).

After an investigation or a hearing, the Regional Director issues a Decision and Order. 5 C.F.R. § 2422.30(c). Regional Directors' decisions concerning bargaining units are then reviewable by the Authority. 5 C.F.R. §§ 2422.30(d), 2422.31. The Authority may review Regional Directors' unit-certification decisions for many reasons, including when the Authority believes that its precedent warrants reconsideration. 5 C.F.R. § 2422.31(c)(2).

Section 7112(b) of the Statute proves that "[a] unit shall not be determined to be appropriate . . . if it includes . . . any management official or supervisor." 5 U.S.C. § 7112(b)(1). A "management official" is "an individual employed by an agency in a position the duties and

responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of an agency." *Id.* § 7103(a)(11).

II. Factual Background

EOIR employs IJs to hear and decide immigration cases. *EOIR 2000*, 56 FLRA at 617. In this role, IJs apply immigration statutes, regulations, and relevant case law to the facts before them and issue decisions, under some circumstances, that may be appealed through administrative processes, or sometimes directly in federal court. *Id.*

In 2000, EOIR filed a petition with an FLRA Regional Director challenging the IJs' bargaining-unit status because IJs were management officials under the Statute. *Id.* at 616. Following a hearing, the Regional Director concluded that IJs were not management officials. *Id.* at 618. The Authority agreed, finding that IJs did not influence agency policy because "decisions of Immigration Judges are not published, do not constitute precedent, are binding only on the parties to the proceedings, and are subject to *de novo* review." *Id.* at 622. In so holding, *EOIR 2000* distinguished the facts before it from a previous case finding that BIA Members were management officials

because BIA Members "directly influence[]" agency policy "in the interpretation of immigration laws and the issuance of decisions." *Id.* (quoting *BIA*, 47 FLRA at 509).

In 2019, EOIR again sought to clarify the IJs' bargaining-unit status, contending that major changes in the scope and nature of IJs' duties warranted a fresh review. *See EOIR I*, 71 FLRA at 1046. Among other changes, EOIR argued that the IJs' factual determinations were no longer subject to *de novo* review but clear error review—making those decisions subject to a higher level of deference. *Id.*

The Regional Director agreed that there had been a "substantial change" to IJs' duties that altered the "scope or character of the unit since the last certification." *EOIR I*, 71 FLRA at 1062-63. Recall that one key factor cited by *EOIR 2000* in distinguishing IJs from BIA Members was that IJs' decisions "are subject to *de novo* review." *EOIR 2000*, 56 FLRA at 622. But that had changed in the intervening years. Beginning in 2002, "the BIA accorded IJ factual findings a higher level of deference." *EOIR I*, 71 FLRA at 1057. "Now, IJs' factual findings are overturned only with a showing of clear error while issues of law

continue to be reviewed *de novo*." *Id.* Thus, the Regional Director concluded:

> It is clear . . . that [EOIR] also changed the standard of review of IJ factual determinations from the *de novo* standard, which allowed the BIA to review the totality of the IJs factual findings, to a standard that accords the IJs' factual findings greater deference and elevates the significance of the IJs' factual determinations. **This change represents a substantial change and is sufficient to support reconsideration of the IJs' status, because it elevates a significant part of the IJs' work, while simultaneously reducing the BIA's work of reviewing one significant aspect of the IJ decisions.**

Id. at 1062 (emphasis added).

Thus, "[b]ecause the standard for reconsideration is met," the Regional Director "thoroughly reassess[ed] the IJs' status." *Id.* After undertaking this reevaluation, the Regional Director concluded that IJs are not management officials under the Statute. *Id.* at 1047. In the Regional Director's view, because IJs "merely apply the laws, policies, regulations, and BIA decisions" they "do not create and influence policy." *Id.* at 1046. In support of her conclusion, the Regional Director noted "that IJ decisions are not routinely published"; "they do not create precedent that binds other IJs or the BIA in deciding future cases"; and

the "vast majority of IJ decisions continue to be subject to review by the BIA." *Id.* at 1064-65.

The Regional Director acknowledged, however, that four types of IJ decisions are not reviewable by the BIA: "removals in absentia, credible fear, reasonable fear, and claim status reviews." *Id.* at 1058. The Regional Director noted that IJs had issued over 100,000 such determinations in 2019 alone. *Id.* at 1059. IJs' decisions in these cases can have serious consequences for both the government and the immigrant, as they may result in an order of deportation or a finding that the immigrant is an asylee, refugee, lawful permanent resident, or citizen. *Id.* at 1058-59. Those decisions may be appealed to federal circuit courts and thus represent the final decision of EOIR. *Id.*

In addition, the Regional Director noted a rise since 2000 in "affirmances without opinion," by which the BIA affirms the IJs' decisions in a one-line ruling. *Id.* at 1059, 1067. Those opinions also may be reviewed directly by circuit courts; here too, the IJ articulates the official position of the agency. *Id.* at 1059-60.

EOIR filed an application for review of the Regional Director's decision, contending (among other things) that *EOIR 2000* conflicted

with *BIA*, and that *EOIR 2000* should therefore be overruled. (Agency's Appl. Rev. 34-42.)

In response, the Union chose not to challenge any aspect of the Regional Director's decision—including her finding that there had been a "substantial change" to the "scope and character of the unit" sufficient to support reconsideration of the IJs' status. Far from challenging her decision to reconsider the IJs' status, the Union praised the Regional Director's "thorough, detailed, and carefully considered 25-page decision." (Union Opp'n Agency's Appl. Rev. 8.) In particular, the Union lauded the Regional Director for choosing to "not merely rely on the Authority's precedent from the Authority's 2000 decision," but to instead "under[take] a clean review of the record to determine whether [IJs] are management officials now, in 2020." (*Id.*)

Indeed, the Union conceded that "[i]t is well-established that '[a]n assertion that established law or policy warrants reconsideration' may serve as one of the 'ground[s] on which the Authority may grant an application for review under § 2422.31(c)(2)." (*Id.* at 27 (citing *U.S. Dep't of Transp.*, 63 FLRA 356, 361 (2009)).) But it urged that EOIR's

"mere disagreement" with *EOIR 2000* was not enough to warrant overruling it. (*Id.* at 28.)

In its decision on the Agency's application for review, the Authority noted that it may review a Regional Director's decision where "established law or policy warrants reconsideration." *EOIR I*, 71 FLRA at 1047 (quoting 5 C.F.R. § 2422.31(c)). The Authority recognized that, under its precedent, "a party may not collaterally attack a previous unit certification." *Id.* To overcome this bar, "a party must demonstrate that substantial changes have altered the scope and character of the unit since the last certification to show that a previously certified unit is no longer appropriate." *Id.*

The Authority adopted the Regional Director's unchallenged finding that there had been a substantial change in the IJs' duties since *EOIR 2000*. *Id.* The Authority, like the Regional Director, then reassessed the appropriateness of the IJ bargaining unit. *First*, the Authority rejected EOIR's contention that IJs are "Officers of the United States" under Article II, § 2, clause 2 of the Constitution, *cf. Lucia v. SEC*, 138 S. Ct. 2044 (2020), and thus are "automatically management officials under the Statute." *EOIR I*, 71 FLRA at 1047.

Next, the Authority considered EOIR's argument that *EOIR 2000* should be overruled because it conflicts with *BIA*. *Id.* at 1048. As noted above, *EOIR 2000* sought to distinguish IJs from BIA Members because IJs' decisions were reviewable by the BIA, and thus they did not influence agency policy. *Id.* The Authority, however, found that "IJ decisions influence the policy of [EOIR] for similar reasons that [BIA] Member decisions influence the policy of [EOIR]." *EOIR I*, 71 FLRA at 1048. It therefore determined that "[j]ust like *BIA* where the Authority found that [BIA] Members influence the policy of [EOIR] by interpreting immigration laws and making decisions, IJs also influence the policy of the Agency by interpreting immigration laws when they apply the law and existing precedent to the unique facts of each case." *Id.*

Thus, IJs "influence the Agency's policy in the decisions they render, just as [BIA] Members influence the Agency's policy in the decisions they render." *Id.* at 1049. "Arguing that IJs' decisions do not influence Agency policy while [BIA] Member decisions do," the Authority noted, "is akin to arguing that district court decisions do not shape the law while appellate court decisions do." *Id.*

The Authority recognized the broad, discretionary powers of IJs to "take testimony, receive evidence, and decide the individual cases before them." *Id.* at 1048 n.26. As part of their jobs, IJs are "required to apply binding law and precedent to the facts of the individual case and to render a decision"—extraordinary powers that have important consequences for the immigrants that appear before them. *Id.* (emphasis added). Thus, "[t]he Authority in *EOIR 2000* failed to recognize the significance of IJ decisions and how those decisions influence Agency policy." *Id.* at 1048.

The Authority further noted that, like BIA Members, IJs often function as appellate judges. *Id.* at 1049 n.27. IJs "review the decisions of Department of Homeland Security ["DHS"] officials in two classes of cases called 'reasonable fear' and 'credible fear' reviews." *Id.* "In this way," the Authority noted, "IJs are similar to [BIA] Members." *Id.* "And although the BIA may review IJs' decisions in many cases, the BIA's decisions are also subject to review—by both the Attorney General and the federal judiciary." *Id.* Thus, "both IJs and [BIA] Members review others' decisions, and issue decisions that higher-level authorities may subject to additional review." *Id.* "These similarities

further undermine *EOIR 2000*'s conclusion that IJs are not management officials, but [BIA] Members are." *Id.*

Thus, the Authority held that *EOIR 2000* conflicted with *BIA*, and thus overruled *EOIR 2000*. *Id.* at 1049. "IJs influence the policy of the Agency in the decisions they render, just as [BIA] Members influence [EOIR's] policy in the decisions they render." *Id.* As a result, IJs "are management officials under § 7103(a)(11), and, therefore, are excluded from the bargaining unit pursuant to § 7112(b)(1)." *Id.*

The Union moved for reconsideration. It charged that the Authority's decision "refus[ed] to analyze" the "detailed factual record establishing meaningful differences between Immigration Judges and" BIA Members. (Union Mot. Recons. Stay 10.) It urged that the Authority should have assumed that the Union challeng[ed] the Regional Director's finding of a "substantial change" because the Union argued that there had been no substantial change in its "post-trial brief" to the Regional Director—despite the fact that the Union obviously filed the post-trial brief *before* the Regional Director ever made her substantial-change finding. (*Id.* at 13.) In advancing this argument, the Union conceded that it had not challenged the Regional

Director's "substantial change" finding in its brief to the Authority opposing the Agency's application for review. (*See id.*)

The Union also argued that *EOIR I* should be reconsidered because the "substantial change" found by the Authority was that IJs "supposedly are equivalent to members of the [BIA]." (*Id.*) In the Union's view, this "was *not* the same 'substantial change' that justified the Regional Director's [decision] in the first instance." (*Id.*) But the "substantial change" found by the Regional Director was that the IJs' decisions were no longer subject to *de novo* review. And this *also* was key to the Authority's reasoning in *EOIR I* for analogizing IJs to BIA Members. *EOIR 2000*, 56 FLRA at 622. So the Union's premise—that the Authority and the Regional Director found two different "substantial changes"—was incorrect.

The Authority denied the Union's motion for reconsideration. *EOIR II*, 72 FLRA at 628. The Authority rejected the Union's claim that the Authority and Regional Director had found different "substantial changes." *Id.* The Authority then rejected the Union's post-hoc attempt to preserve its objection that there had been a substantial change in IJ duties. The Authority reiterated its rule that

"parties are responsible for presenting arguments to the Authority." *Id.* at 628 n.22 (citing 5 C.F.R. § 2422.31(b)). "While the Union is correct that it contested whether a substantial change had occurred in its post-hearing brief before the [Regional Director], the Union glosses over the fact that it implicitly agreed with the [Regional Director]'s finding of a substantial change in proceedings before the Authority." *Id.* (citing Union Opp'n Agency's Appl. Rev. 29).

As to the Union's contention that the "substantial change" found by the Regional Director was not one that "had actually *altered* the scope and character of the IJ's unit," the Authority found this to be incorrect. *Id.* at 628 n.23. In the representation context, the Authority explained, "the term of art 'substantial change' *means* changes that alter the scope and character of a bargaining unit." *Id.* "In other words, the Authority does not use the phrase 'substantial change' in this context except to refer to changes that alter the scope and character of a bargaining unit." *Id.*

The Authority similarly rejected the Union's argument that "the Authority's review of the application is limited to the substantial change found by the" Regional Director, and thus that the Authority

must rubber-stamp the Regional Director's conclusion that the change did not alter the unit's appropriateness. *Id.* at 625. The Authority cited its own regulations that state that review is appropriate when *"[e]stablished law or policy warrants reconsideration."* *Id.* at 625 n.27 (citing 5 C.F.R. § 2422.31(c)). Further, the Union's arguments for why BIA Members should be distinguished from IJs were simply attempts to relitigate the Authority's conclusions in *EOIR I*. *Id.* at 624.

And the Authority noted that "there are two categories of cases– 'reasonable fear' and 'credible fear' reviews—where, if an IJ concurs with the assessment of a [DHS] official, there is no BIA review of the IJ's determination." *Id.* at 626. "The number of 'reasonable fear' and 'credible fear' cases has risen astronomically since *EOIR 2000*"—from only 197 in 2000, to 15,433 in 2019. *Id.* at 626 & n.37. "Therefore, the number of cases where an IJ's determination is not subject to review has dramatically increased." *Id.* at 626.

In her concurring opinion—with which Member Abbott "unequivocally agree[d]," *id.* at 628 n.58—Member Kiko underscored the dramatic changes in the IJs' duties that had occurred since *EOIR 2000*. "The Regional Director (RD) found that, since the Authority's

decision in [*EOIR 2000*] the Agency issued a regulation that ended *de novo* review of IJs' factual findings and, instead, subjected those findings to clear-error review." *Id.* at 629 (Member Kiko concurring). "This substantial change rendered the IJs' factual findings the last word on such matters in the *vast majority* of cases that come before the IJs." *Id.* Further, she noted the substantial increase in "reasonable fear" and "credible fear" cases, where "if an IJ concurs with the assessment of a [DHS] official, no further review is available beyond the IJ." *Id.* "On the magnitude of these changes alone, the IJs now occupy the status of 'management official[s]' who 'bring about or obtain a result as to the adoption of general principles, plans, or course[s] of action for' the Agency." *Id.* (quoting *EOIR I*, 71 FLRA at 1063).

The Union filed a second motion for reconsideration with the Authority on February 7, 2022. In this second motion, the Union charged that the Authority "conducted no meaningful analysis" in *EOIR I* and *EOIR II*. (Union's Second Mot. Recons. Stay 16.) In addition, the Union's second motion for reconsideration asserted, for the first time, constitutional due process claims. (*Id.* at 17-22.)

Without waiting for the Authority to decide its second motion for reconsideration, the Union filed a Petition for Review in this Court on February 23, 2022. (Pet. for Review.) The Union's Petition challenged only *EOIR I* and *EOIR II*. The Petition did not challenge *EOIR III*, which was issued over a month after the Petition for Review was filed. *See EOIR III*, 72 FLRA at 734-36. The Union never amended its Petition for Review to encompass *EOIR III*, nor did it ever file a new petition.

On April 12, 2022, the Authority issued *EOIR III*, in which it denied the Union's second motion for reconsideration. The Authority also rejected the Union's request for a stay, and ordered the Union decertified "no later than seven calendar days from the date of this order." *Id.* at 736. The Regional Director complied, decertifying the Union on April 15, 2022. (Revocation of Cert. ¶ 4.)

On July 21, 2022, five months after it filed the Petition for Review, the Union filed a new Representation Petition with the Regional Director, seeking an election that would recertify the Union. (Rep. Pet.) The Authority will be able to review any decision rendered by the

Regional Director regarding that new Representation Petition. 5 C.F.R. §§ 2422.1(a), 2422.2(a).

SUMMARY OF ARGUMENT

The Union's Petition for Review is incurably premature. The Statute allows judicial review only of a "final order" of the Authority. 5 U.S.C. § 7123(a). A "request for administrative reconsideration renders an agency action nonfinal and unreviewable with respect to the party who made the request." *Flat Wireless*, 944 F.3d at 933. In this case, the Union filed with the Authority a motion for reconsideration of *EOIR II* on February 7, 2022, two weeks before the Union filed its Petition for Review in this Court. *EOIR III*, 72 FLRA at 736. That motion was still pending before the Authority when the Petition for Review was filed. Moreover, the Union on July 21, 2022, filed a Representation Petition that essentially seeks FLRA reconsideration of this matter. (Rep. Pet.; *see* 5 C.F.R. §§ 2422.1(a), 2422.2(a).) The Petition for Review is therefore incurably premature.

Even if the Petition were not incurably premature, this Court still lacks jurisdiction over this case because § 7123(a) of the Statute bars direct judicial review of Authority orders involving appropriate-unit

determinations. 5 U.S.C. § 7123(a)(2) ("Any person aggrieved by any final order of the Authority **other than an order under . . . section 7112 of this title (involving an appropriate[-]unit determination***)*, may . . . institute an action for judicial review of the Authority's order." (emphasis added)); *see also ACT*, 283 F.3d at 342; *Am. Fed'n of Gov't Emps., AFL-CIO v. Loy*, 367 F.3d 932, 935 (D.C. Cir. 2004) ("We cannot review an FLRA unit determination, *see* 5 U.S.C. § 7123(a)(2) . . . ."). Instead of a direct appeal to this Court, the Statute provides an administrative means to challenge any aspect of an FLRA appropriate-unit determination: a ULP proceeding. *ACT*, 283 F.3d at 342.

EOIR I and *EOIR II* are Authority decisions involving an appropriate-unit determination under § 7112. *See, e.g.*, *Nat'l Ass'n of Agric. Emps. v. FLRA* ("*NAAE*"), 473 F.3d 983, 985 (9th Cir. 2007) (dismissing petition for review for lack of jurisdiction under § 7123(a)(2)). Thus, the Statute expressly precludes direct judicial review. 5 U.S.C. § 7123(a)(2).

The Union's attempt "to challenge the FLRA's orders based on procedural and substantive due process violations" (Pet. for Review 2)

does not create jurisdiction. For one thing, those constitutional claims are not properly part of the Union's Petition for Review. For another, those constitutional claims are "the vehicle by which" the Union seeks to overturn the Authority's prior determinations and require the Authority to recertify IJs as an appropriate bargaining unit. *Elgin*, 567 U.S. at 22. Consequently, the Union's constitutional claims "fall within the exclusive statutory scheme." *AFGE v. Trump*, 929 F.3d at 761. The appropriate forum for the Union's constitutional claims—just like any of the Union's other claims stemming from the Authority's unit determination—is a ULP proceeding before the Authority, with judicial review to follow (if necessary) before a federal court of appeals. *See, e.g.*, *Brewer*, 735 F.2d at 1499-1500; *AFGE 1985*, 778 F.2d at 857. As in *AFGE v. Trump*, there is "no reason why the scheme here would prevent [a court of appeals] from resolving the union['s] constitutional" challenge in the context of a ULP proceeding. *AFGE v. Trump*, 929 F.3d at 758. For that reason, this Circuit has held that ULP processes provide adequate avenues for consideration by the Authority and "later by the courts in review of any such proceeding." *AFGE 1985*, 778 F.2d at 855-61; *see also AFGE v. Trump*, 929 F.3d at 758.

Thus, this is not a case like *Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988) or *Webster v. Doe*, 486 U.S. 592 (1988) where enforcing the Statute's bar on direct review of Authority representation decisions would "deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603. Instead, the Statute's scheme channels such challenges to ULP proceedings, with review to follow (if necessary) before the Court of Appeals. *AFGE v. Trump*, 929 F.3d at 759; *ACT*, 283 F.3d at 342; *Brewer*, 735 F.2d at 1500.

Further, even if the Union were correct that *Webster* and *Griffith* applied to its constitutional claims (and it is not), that would mean only that it could bring its constitutional claims in district court—not via a petition for review in circuit court, as it has attempted to do here. *U.S. Dep't of Treasury, U.S. Customs Serv. v. FLRA* ("*Customs Service*"), 43 F.3d 682, 689 n.9 (D.C. Cir. 1994).

The Union makes two arguments for why it should not have to use the statutorily prescribed ULP procedure to challenge *EOIR I* and *EOIR II*. Both must fail. *First*, the Union contends that it "has already exhausted its administrative remedies" by raising its constitutional arguments with the Authority in its second motion for reconsideration.

(Pet'r Br. 5.) But the Union's second motion for reconsideration was still pending when the Union filed its Petition for Review. Thus, the Union's Petition for Review challenges only *EOIR I* and *EOIR II*—not *EOIR III*, which addressed the Union's due process claims. Additionally, the Union has not properly exhausted its constitutional claims because it has failed to pursue them through the ULP process. *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006).

Second, the Union claims that it "no longer has any viable alternative path to judicial review by proceeding before the Authority because it has been decertified." (Pet'r Br. 6.) This is not true. The Union recently filed a new Representation Petition, which the FLRA is now considering.

Further, the Union could seek review through the ULP process, and indeed has already availed itself of this route. The Union previously filed *five* ULP charges against EOIR stemming from EOIR's attempts to stop recognizing the Union as an exclusive representative after *EOIR I*. (Settlement Agreement Between U.S. Dep't of Just., Exec. Off. for Immigr. Rev. & Nat'l Ass'n Immigr. Judges 1.) Those charges, however, did not include the Union's present constitutional

claims. In response, the Authority's Acting General Counsel filed a consolidated ULP complaint against EOIR. *EOIR II*, 72 FLRA at 626-28. The Union then chose to voluntarily settle its ULP charges with EOIR in December 2021, before the issuance of *EOIR II*. Any difficulties that the Union now faces in pursuing judicial review through the ULP process are thus self-inflicted, stemming from the Union's December 2021 decision to settle its ULP charges rather than pursue them to completion.

Even if the Court had jurisdiction to consider the Union's constitutional claims—and it does not—the claims fail on their merits. The Union cannot establish that it had a constitutionally protected liberty interest in representing IJs. "[T]he First Amendment is not a substitute for the national labor relations laws." *Smith v. Ark. State Highway Emps., Loc. 1315*, 441 U.S. 463, 464 (1979). And the possibility that the Authority could have erred in classifying IJs as managers "hardly establishes that such [classification] violate[s] the Constitution." *Id.*

Even if the Union could establish a protected liberty interest, its procedural due process claim fails because it received all the process

that it was due. Generally, procedural due process is satisfied when the government gives "the putative owner [of a liberty interest] an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). Here, the Union had a chance to present its arguments to the Authority three times. The Authority three times considered and addressed the Union's arguments. The Authority has therefore satisfied its procedural due process obligations.

Finally, the Union makes no showing that the Authority violated its substantive due process rights. Instead, the Union baselessly asserts that the Authority's decisions were arbitrary and capricious and asks the Court to infer bias based on those assertions. (Pet'r Br. 34-44.) The Union, however, bypasses the high standard for showing decisionmaker bias. Moreover, because the Union did not raise its bias claim before the Authority, the Court is barred from considering the bias claim on this basis as well. 5 U.S.C. § 7123(c). The Court should reject the Union's substantive due process claims, because if an assertion that an administrative decision was arbitrary and capricious was all that was needed to find decisionmaker bias, it would open the

floodgates to substantive due process claims. The Petition for Review should therefore be denied in its entirety.

STANDARD OF REVIEW

Before the Court considers the merits of the Union's arguments, it "must determine whether [it] has subject matter jurisdiction." *Broad. Bd. of Governors Off. of Cuba Broad. v. FLRA*, 752 F.3d 453, 465 (D.C. Cir. 2014). The Union bears the burden of establishing jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Congress confers federal court jurisdiction and may limit or foreclose judicial review as it sees fit. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 404 (1940) ("Such jurisdiction as [a court] has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review."). "If a special statutory review scheme exists . . . it is ordinarily supposed that Congress intended that procedure to be the exclusive means of

obtaining judicial review in those cases to which it applies." *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) (internal formatting omitted).

Moreover, 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. 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 [S]ection 7123(c) strictly.").

ARGUMENT

I. The Court Lacks Jurisdiction to Consider the Petition for Review

A. The Union's Petition for Review is Incurably Premature

This Court should dismiss the Petition for Review for lack of jurisdiction because the Petition is incurably premature. The Statute allows judicial review only of a "final order" of the Authority. 5 U.S.C. § 7123(a). A "request for administrative reconsideration renders an agency action nonfinal and unreviewable with respect to the party who made the request." *Flat Wireless*, 944 F.3d at 933 (citation omitted). Consequently, "a petition for judicial review filed during the pendency

of a request for agency reconsideration will be dismissed for lack of jurisdiction." *Wade*, 986 F.2d at 1433. This Court has "described the 'incurably premature' principle as a 'bright line test.'" *Friends of Earth v. U.S. Nuclear Regul. Comm'n*, 851 F. App'x 212, 214 (D.C. Cir. 2021) (quoting *TeleSTAR,* 888 F.2d at 134).

In this case, the Union filed with the Authority a motion for reconsideration of *EOIR II* on February 7, 2022, two weeks before filing its Petition for Review in this Court. *EOIR III*, 72 FLRA at 734. That motion was still pending before the Authority when the Petition for Review was filed.

The Authority's subsequent ruling on the Union's second reconsideration motion does not correct the Union's error. "[T]he filing of a challenge to agency action before the agency has issued its decision on reconsideration is incurably premature." *TeleSTAR,* 888 F.2d at 134. Thus, "when a petition for review is filed before the challenged action is final and thus ripe for review, subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction." *Id.* "To cure the defect, the challenging party must file a new notice of appeal or petition for review from the

now-final agency order." *Id.* The Union has not done so here—nor could it, because the prescribed 60-day period for filing petitions for review has now passed. *See* 5 U.S.C. § 7123(a).

The Petition for Review is also incurably premature because the Union's July 21, 2022 Representation Petition essentially seeks reconsideration of *EOIR I*, *EOIR II*, and *EOIR III*. If granted, the Union's Representation Petition will provide the Union with the relief that it seeks—certification as exclusive representative of IJs. Dismissal of its Petition for Review is thus required.

B. This Court Lacks Jurisdiction to Review Authority Appropriate-Unit Determinations

1. The Statute Expressly Precludes Direct Review of Authority Appropriate-Unit Determinations

Section 7123(a) of the Statute bars review of Authority orders involving appropriate-unit determinations. It states, "[a]ny person aggrieved by any final order of the Authority *other than an order under . . . section 7112 of this title (involving an appropriate[-] unit determination)*, may . . . institute an action for judicial review of the Authority's order." 5 U.S.C. § 7123(a)(2) (emphasis added). This Court has held repeatedly that "[S]ection 7123 [of the Statute] precludes

direct review of Authority appropriate[-]unit determinations." *ACT*, 283 F.3d at 342; *see also Loy*, 367 F.3d at 935 ("We cannot review an FLRA unit determination, *see* 5 U.S.C. § 7123(a)(2)").

The Statute's legislative history confirms that Congress intended to exclude appropriate-unit determinations from judicial review, following National Labor Relations Board ("NLRB") practice. *See* Civil Service Reform Act of 1978, H.R. Conf. Rep. No. 95-1717 at 153 (Oct. 5, 1978); *see also U.S. Dep't of Just. v. FLRA*, 727 F.2d 481, 490-93 (5th Cir. 1984). A House-Senate Conference Committee report stated that "[a]s in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units" under § 7123(a)(2). H.R. Conf. Rep. No. 95-1717, at 153.

Courts have consistently held that the Statute bars direct review of Authority appropriate-unit determinations. "The plain meaning of § 7123 is unambiguous: If the FLRA's final order is *not* an 'appropriate[-]unit determination' under § 7112 and if no other exception applies, then we have jurisdiction." *Eisinger v. FLRA*, 218 F.3d 1097, 1102 (9th Cir. 2000) (emphasis added); *see also Loy*, 367 F.3d at 935; *Nat'l Ass'n of Indep. Lab. v. FLRA*, No. 10-1135, 2010 WL 4340475, at * 1 (D.C. Cir.

Oct. 1, 2010) ("Because petitioner has not explained how the court can reach a decision in its favor without reviewing the Authority's determination that the employees are not an appropriate unit, the court lacks jurisdiction. . . .").

2. The Authority Decisions Under Review Involve an "Appropriate-Unit Determination"

EOIR I and *EOIR II* are Authority decisions involving an appropriate-unit determination. A "determination by the [FLRA] that certain government employees are professionals is an order involving an appropriate collective bargaining[-]unit determination." *NAAE*, 473 F.3d at 985 (dismissing petition for review for lack of jurisdiction under § 7123(a)(2)).

In *NAAE*, the Ninth Circuit considered a petition for review of an FLRA decision finding that federal agricultural inspectors were not "professional employees" under the Statute and thus were not part of an appropriate professionals-only bargaining unit. 473 F.3d at 986. There, despite the union's argument that "the FLRA's professional status ruling was not a component of its appropriate[-]unit determination," the court found that "the antecedent question of whether agricultural specialists are professionals was in this case a portion of the FLRA's

appropriate[-]unit determination. We lack jurisdiction to review that finding." *Id.* at 988. The court concluded:

> [W]hen the FLRA decides professional status it typically, if not always, does so as a necessary and integral component of an appropriate[-]unit determination. . . . **In such a case, the FLRA's resolution of the employee's status is a required element of the appropriate[-]unit determination and thus part of an "order under . . . section 7112."**

Id. (emphasis added).

Here, as in *NAAE*, the Authority issued its decisions following a Regional Director's Decision and Order on the agency's petition to clarify a unit certification. *EOIR I*, 71 FLRA at 1053; *NAAE*, 473 F.3d at 985-86. And as in *NAAE*, the Authority applied the Statute's definitions from § 7103(a) to an identified class of employees whose status was in question. *See EOIR I*, 71 FLRA at 1047-49 (analyzing the Statute's definition of management officials at § 7103(a)(11) related to IJs). The Authority found "that IJs are management officials under § 7103(a)(11), and, therefore, are excluded from the bargaining unit pursuant to § 7112(b)(1)." *EOIR I*, 71 FLRA at 1049; *see also EOIR II*, 72 FLRA at 622. The Authority's decisions in *EOIR I* and *EOIR II* were thus Authority decisions "involving an appropriate[-]unit determination" under § 7112—the kind of Authority order over which

the Statute expressly precludes judicial review. 5 U.S.C. § 7123(a)(2).

The Union's characterization of *EOIR II* as "an order denying a motion to reconsider" not an order involving "an appropriate[-]unit determination" is spurious. (Pet'r Br. 7.) In *EOIR II*, the Authority considered the Union's allegations that: (1) EOIR's petition was an "impermissible collateral attack on the Union," (2) the Authority "did not adequately consider precedent concerning the unit in question in this case," and (3) EOIR regulations showed that IJs were not management employees. 72 FLRA at 624-25. All of those arguments relate to the Authority's appropriate-unit determination. Indeed, the very reason that the Union filed its motion for reconsideration was to seek changes to EOIR's appropriate-unit determination.

3. The Representation Petition and ULP Processes Provide Adequate Means for the Union to Obtain Review

Instead of a direct appeal to this Court, there are two ways that the Union may obtain review of the Authority's decisions. The Union has already availed itself of the first: filing a new Representation

Petition with the Regional Director, whose determination can then be appealed to the Authority. 5 C.F.R. §§ 2422.1(a), 2422.2(a).

And the Statute provides another means to challenge any aspect of an FLRA appropriate-unit determination: a ULP proceeding. *ACT*, 283 F.3d at 342. As *ACT* explained,

> In holding that FLRA [S]ection 7123 precludes direct review of Authority appropriate[-]unit determinations, we emphasize that the [union] remains free to obtain *indirect* judicial review by refusing to bargain, drawing an unfair labor practice charge, and appealing that charge to the Authority and then to a court of appeals.

Id.

That the Union seeks to "challenge the FLRA's orders based on procedural and substantive due process violations" (Pet. for Review 2), does not create jurisdiction. For one thing, those constitutional claims are not properly part of the Union's Petition for Review. They were first raised in the Union's second motion for reconsideration, which was still pending when the Union filed the Petition for Review. (*See* Union's Second Mot. Recons. Stay.) Nor has the Union amended its Petition for Review to include those claims.

For another, constitutional claims only confer courts with jurisdiction if they are "wholly collateral" to statutory review provisions.

Elgin, 567 U.S. at 22. But a claim is "not wholly collateral" to statutory review provisions "if it serves as the 'vehicle by which' a party seeks to prevail in an administrative proceeding." *Tilton v. SEC*, 824 F.3d 276, 287 (2d Cir. 2016); *accord Bennett v. SEC*, 844 F.3d 174, 186-87 (4th Cir. 2016). In this case, the Union's constitutional claims are "the vehicle by which" the Union seeks to overturn the Authority's prior determinations and require the Authority to recertify the IJs as an appropriate bargaining unit.

As a result, the Union's constitutional claims "fall within the exclusive statutory scheme." *AFGE v. Trump*, 929 F.3d at 761. The Union may not bypass the Statute's procedures by seeking something that the Statute bars—direct review of an FLRA appropriate-unit determination. *Id.* Rather, the Union must follow the administrative-judicial review route Congress charted, in "painstaking detail," through the Statute's scheme. *See Elgin*, 567 U.S. at 10-11; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994).

Thus, the appropriate forum for the Union's constitutional claims—just like any of the Union's other claims stemming from the Authority's unit determination—is a ULP proceeding before the

Authority, with judicial review to follow (if necessary) before a federal court of appeals. *See, e.g.*, *Brewer*, 735 F.2d at 1499; *AFGE 1985*, 778 F.2d at 857; *see also Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967-68 (D.C. Cir. 1990) (finding that this Court lacked subject-matter jurisdiction to consider constitutional due process claims where the plaintiffs had failed to raise a related ULP claim before the Authority). As this Court found in *Loy*, "Parties may not bifurcate their case, pursuing only statutory claims before the FLRA while litigating closely related constitutional claims in the district court." 367 F.3d at 936.

Here, the Union's constitutional claims are "premised on the same facts" as those in *EOIR I* and *EOIR II*, as well as its current Representation Petition. (Pet'r Statement of Issues 1; Rep. Pet.) Allowing the Union to bring its constitutional claims directly in circuit court, while leaving its remaining statutory challenges to the Authority's unit determination to be litigated separately, would encourage "bifurcation of claims," *Steadman*, 918 F.2d at 965, allowing those based on the Statute to proceed before the Authority while those based on the Constitution go straight to circuit court. The result is that

litigants bringing constitutional challenges would be able to "circumvent Congress' careful work in crafting the intricate remedial scheme of the [Statute]." *Id.*

This conclusion is reinforced by *AFGE v. Trump*. There, the President had issued executive orders advising agencies to pursue specific goals in collective-bargaining negotiations. *AFGE v. Trump*, 929 F.3d at 752-53. Federal unions brought, among other things, constitutional challenges to the executive orders. *Id.* at 753. They argued that the FLRA's procedures were inadequate to address their constitutional claims and that they should be allowed to bypass the Statute's strictures. *Id.* at 757-58.

This Court rejected that argument. Noting the availability of ULP procedures and other statutory options, this Court ruled that "the unions here are not cut off from review and relief." *Id.* at 757. "Rather, they can ultimately obtain review of and relief from the executive orders by litigating their claims through the statutory scheme in the context of concrete bargaining disputes." *Id.* This was so, the Court emphasized, even for the unions' constitutional claims. *Id.* at 758. Indeed, the Court noted that it "need not map the precise contours of the FLRA's

authority to adjudicate the claims in this case" because "even if the FLRA could not address the claims, circuit courts could do so on appeal from the FLRA." *Id.*

As in *AFGE v. Trump*, there is "no reason why the scheme here would prevent [a court of appeals] from resolving the union['s] constitutional" challenge in the context of a ULP proceeding. *Id.* For that reason, this Circuit has held that ULP processes provide adequate avenues of review to the Authority and "later by the courts in review of any such proceeding." *AFGE 1985*, 778 F.2d at 855-61; *see also AFGE v. Trump*, 929 F.3d at 758.

This is not a case like *Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988) or *Webster v. Doe*, 486 U.S. 592 (1988) where enforcing the Statute's bar would "deny any judicial forum for a colorable constitutional claim." (Pet'r Br. 2 (quoting *Elgin*, 567 U.S. at 9).) Instead, the Statute's scheme channels such challenges to ULP proceedings, with review to follow (if necessary) before the Court of Appeals. *AFGE v. Trump*, 929 F.3d at 759; *ACT*, 283 F.3d at 342; *Brewer*, 735 F.2d at 1500. As *Elgin* explained, "*Webster*'s standard does not apply where Congress simply channels judicial review of a

constitutional claim to a particular court." *Elgin*, 567 U.S. at 9; *see also Thunder Basin*, 510 U.S. 207 n.8. Thus, in *Elgin*, the Court held that the plaintiffs had to follow a statutory scheme that provided for an administrative review process followed by direct appeal to the Federal Circuit, even though they brought constitutional challenges. 567 U.S. at 13, 16-17.

So too here. The Statute merely directs that constitutional challenges be routed through the ULP procedure; it does not cut off review of such claims entirely.

Griffith does not apply for another reason. In the context of § 7123(a)'s general bar on judicial review of Authority arbitration decisions, *Griffith* could not find "clear and convincing" evidence of a congressional intent to specifically preclude judicial review of constitutional claims. 842 F.2d at 494-95. But in the context of an appropriate-unit determination, this Court *has* specifically found "'clear and convincing evidence' of Congressional intent to preclude judicial review." *ACT*, 283 F.3d at 342. In particular, *ACT* emphasized the Statute's legislative history, which declares: "As in the private sector, there will be *no judicial review* of the Authority's determination of the

appropriateness of bargaining units." *Id.* (emphasis added) (quoting H.R. Conf. Rep. No. 95-1717 at 153).

And, in the similar context of a constitutional challenge to an NLRB unit-certification decision, the court in *Schwarz Partners Packaging, LLC v. NLRB* held that "it is well-settled . . . that the indirect method of review through defending against unfair labor practice claims is the sole method of review for NLRB certification decisions under the [National Labor Relations Act]." 12 F. Supp. 3d 73, 88 (D.D.C. 2014).

4. Even if *Webster* and *Griffith* Applied (and They Do Not), the Appropriate Forum for the Union to Bring its Claims is District Court, Not Circuit Court

Even if the Union were correct that *Webster* and *Griffith* applied to its constitutional claims (and it is not), that would mean that it could bring its constitutional claims in district court—not via a petition for review in Circuit Court. This Court has found that "a claim that the arbitration or FLRA procedures were unconstitutional would have to be brought as a collateral challenge in the district court, as was the case in *Griffith*." *Customs Service*, 43 F.3d at 689 n.9; *see also Steadman*, 918 F.2d at 968 (a federal employee may "bring an equitable claim based on

the Constitution *in federal district court* after having exhausted his [statutory] remedy." (emphasis added)). Notably, the claims in *Griffith* were first brought in district court, not the Court of Appeals. *See Griffith*, 842 F.3d at 489. As the Union's constitutional claims include challenges to the Authority's procedures, they must be brought in district court.

In the related NLRB context, "[a] *District Court* may enjoin Board action, especially representation proceedings, only under highly exceptional circumstances," such as "threatened Board action which violates the Constitution." *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968) (emphasis added). Like the narrow exception for a "clear and mandatory" violations of a specific statutory prohibition under *Leedom v. Kyne*, 358 U.S. 184 (1958), any exception to the Statute's reviewability bar for violations of the Constitution "is premised on the original federal subject matter jurisdiction of the district courts." *Customs Service*, 43 F.3d at 688 n.6.

5. The Union's Arguments for Why FLRA Administrative Processes Are Inadequate Are Meritless

The Union makes two arguments for why it should not have to use the statutorily prescribed procedures to challenge *EOIR I* and *EOIR II*.

First, it contends that it "has already exhausted its administrative remedies" by raising its constitutional arguments with the Authority in its second motion for reconsideration. (Pet'r Br. 5.) This argument fails for three reasons.

To begin with, if the Union truly believed that it had exhausted its administrative remedies, it would not have filed a new Representation Petition with the FLRA after it filed the Petition for Review with this Court. And presumably the Union would not have filed the new Representation Petition if it felt that doing so would be futile.

Moreover, the Union did not administratively exhaust its constitutional claims because it did not raise them in briefs it presented to the Authority before *EOIR I* or *EOIR II*. (Union Auth. Briefs.) Nor did the Authority address any due process claims in either *EOIR I* or *EOIR II*. And those are the only two decisions the Union sought review of in its Petition. (*See* Pet. For Review 1).

The Union raised its constitutional claims only in its second motion for reconsideration, which was still pending when the it filed its Petition for Review. Because the Union did not raise its due process claims in connection with *EOIR I* and *EOIR II*, it is barred from raising

those claims in connection with the Petition. *See* 5 U.S.C. § 7123(c) ("No objection that has not been urged before the Authority, or its designee, shall be considered by the court. . . .").

Further, the Union must proceed through the ULP process to obtain judicial review of its constitutional claims—and it has not done so. The doctrine of administrative exhaustion provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford*, 548 U.S. at 88-89. Thus, "as a general rule . . . courts should not 'topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*.'" *Id.* (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

As noted above, under the Statute, the ULP process is the sole means to obtain judicial review of an Authority appropriate-unit determination. *ACT*, 283 F.3d at 342. It is not enough that the Union "may conclude—correctly or incorrectly—that exhaustion is not efficient in that party's particular case." *Woodford*, 548 U.S. at 89. Exhaustion requirements, by their very nature, "are designed to deal with parties

who do not want to exhaust." *Id.* The Union cannot choose to bypass the ULP process simply to suit its own preference.

Second, the Union claims that it "no longer has any viable alternative path to judicial review by proceeding before the Authority because it has been decertified." (Pet'r Br. 6.) This is not true. Even if the Union could not bring another ULP charge in its own name, an individual former unit member could challenge actions taken by EOIR following the Authority's decision to decertify the Union—and in so doing, obtain review of any constitutional challenges to those decisions.

This is because the Statute allows non-bargaining-unit employees to bring ULP charges. Section 7102 of the Statute gives employees the right to form or join a labor organization, or to refrain from such activity, without penalty, and protects employees in the exercise of those rights. 5 U.S.C. § 7102.

Any attempt by an agency to interfere with the rights of employees under the Statute is considered a ULP. 5 U.S.C. § 7116(a)(1). A charge may be brought by "any person" who claims that an agency has "engaged in . . . any [ULP] prohibited under 5 U.S.C. § 7116." 5 C.F.R. § 2423.3(a). When a party charges a labor organization

or agency with a ULP, the General Counsel will investigate the charge and decide whether to issue a complaint. 5 U.S.C. § 7118(a)(1).

The Authority has consistently allowed non-bargaining-unit employees to bring ULP charges. *See Nat'l Army & Air Technicians Ass'n*, 7 FLRA 154, 158 (1981); *Antilles Consol. Educ. Ass'n*, 36 FLRA 776, 780 (1990); *Am. Fed'n of Govt Emps., Loc. 3354, AFL-CIO*, 58 FLRA 184, 185 (2002); *see also Dep't of Health and Hum. Servs.*, 16 FLRA 586, 586-87 (1984) (hearing a complaint brought by General Counsel alleging that agency violated the rights of employees under § 7116(a)(1) who were no longer bargaining-unit members due to their transfer to a new office). Thus, the Union's loss of recognition does not bar former bargaining-unit employees from challenging the Union's decertification in a ULP proceeding.

Indeed, the Union has *already* had considerable success challenging EOIR's attempts to enforce *EOIR I* via ULP procedures. It filed *five* ULP charges challenging actions taken by EOIR to implement *EOIR I*. (Settlement Agreement Between U.S. Dep't of Just., Exec. Off. for Immigr. Rev. & Nat'l Ass'n Immigr. Judges 1.) Those charges, however, did not include the Union's present constitutional claims. In

response, the Authority's Acting General Counsel filed a consolidated ULP complaint against EOIR, holding that, despite *EOIR I*, EOIR was still obligated to bargain with the IJs. *EOIR II*, 72 FLRA at 626-28.

The Union chose to voluntarily settle its ULP charges with EOIR in December 2021, before the issuance of *EOIR II*. The Union may have had good reasons for choosing to settle with EOIR at that time. But it was clear well before December 2021 that the ULP process was the only way to lawfully obtain circuit court review of an Authority appropriate-unit determination. *See ACT*, 283 F.3d at 342. Thus, any difficulties that the Union now faces in pursuing judicial review through the ULP process are self-inflicted, stemming from the Union's December 2021 decision to settle its ULP charges rather than pursuing them to completion, with judicial review to follow (if necessary) in this Court.

II. The Union's Constitutional Claims Are Without Merit

Even if the Court had jurisdiction to consider the Union's constitutional claims—and it does not—those claims must fail on their merits.

A. The Union Has No Protected Liberty Interest

The Supreme Court has "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). It is "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 720 (quotation omitted).

The Union cannot establish that it had a constitutionally protected liberty interest in continuing as an exclusive IJ representative. The Supreme Court has held that "the First Amendment is not a substitute for the national labor relations laws." *Smith*, 441 U.S. at 464. Thus, any liberty interest that the Union has to serve as the statutorily authorized bargaining agent derives from the Statute, not the Constitution.

The relevant labor-relations law here, the Statute, bars management employees from collective bargaining. Section 7112(b) of the Statute says that "[a] unit shall not be determined to be appropriate . . . if it includes . . . any management official or supervisor." 5 U.S.C.

§ 7112(b)(1). Section 7103(a)(11) of the Statute, in turn, defines a "management official" as "an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of an agency." 5 U.S.C. § 7103(a)(11).

Here, the Authority reasonably determined that IJs, whose decisions are reviewable only under a clear error standard, and whose fear-review determinations are unreviewable if they concur with the assessments of DHS officials, influence the policy of EOIR by "interpreting immigration laws when they apply the law and existing precedent to the unique facts of each case." *EOIR I*, 71 FLRA at 1046, 1048. The Authority thus reasonably found that IJs were management employees.

Any rights that the Union has to represent IJs in collective bargaining with federal agencies derives from the Statute, not the Constitution. As in *Smith*, the possibility that the Authority could have erred in classifying IJs as managers "hardly establishes that such [classification] violate[s] the Constitution." *Smith*, 441 U.S. at 464. The Union cites no case law in support of the notion that judicial

officers have a constitutional right to unionize that is independent of the Statute. And "a mere violation of law does not give rise to a due process claim." *Am. Fed'n of Gov't Emps., Loc. 446 v. Nicholson*, 475 F.3d 341, 353 (D.C. Cir. 2007).

B. The Union's Procedural Due Process Claims Are Meritless

The Union's procedural due process claim also fails because the Union received all the process that it was due. Procedural due process "requires notice and opportunity for hearing appropriate to the nature of the case." *Pearson v. Dist. of Columbia*, 644 F. Supp. 2d 23, 46 (D.D.C. 2009), *aff'd,* 377 F. Appx. 34 (D.C. Cir. 2010) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Generally, procedural due process is satisfied when the government gives "the putative owner [of a liberty interest] an opportunity to present his claim of entitlement." *Logan*, 455 U.S. at 434.

The Union was given, and availed itself of, the opportunity to present its arguments to the Authority three times. The Authority three times considered and addressed the Union's arguments. The Union then filed a new Representation Petition, and thus the FLRA will again address this issue.

The Authority needed to do nothing more to satisfy its procedural due process obligations. *See Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 2798 v. Pope*, 808 F. Supp. 2d 99, 112 (D.D.C. 2011) ("[E]ven assuming, *arguendo*, that the agency made an error in calculating the timeliness of the motion for reconsideration, that would not suffice to state a claim for violation of procedural due process."), *aff'd*, No. 11-5308, 2012 WL 1450584 (D.C. Cir. Apr. 12, 2012). The erroneous non-constitutional arguments raised by the Union do not change that conclusion.

1. The Union Waived Any Challenge to the Regional Director's Finding of a Substantial Change Because It Did Not Contest that Finding Before the Authority

The Union's argument that EOIR's motion for unit clarification was a collateral attack on the Union is not a constitutional claim. It also fails on the merits. To obtain reassessment of a unit's status, a party must show "that substantial changes have altered the scope of or character of the unit since the last certification." *Wright-Patterson*, 70 FLRA at 328. If there was a substantial change, the petition is a valid application for reassessment of unit status, not a collateral attack. *Id.*

The Regional Director's finding that such a substantial change had occurred meant that her—and the Authority's—reevaluation of the

lawfulness of the bargaining unit was not a collateral attack. Although the Regional Director ultimately held IJs were not management officials, she only reached that conclusion after determining that the Agency's petition was not a collateral attack because there had been a substantial change to the bargaining unit. *EOIR I*, 71 FLRA at 1062-63. Before the Authority, the Union itself characterized the Regional Director's findings as "thorough, detailed, and carefully considered." *Id.* at 1046-47; (Union Opp'n Agency's Appl. Rev. 8).

The Authority's review of the Regional Director's decision was not, as the Union suggests (Pet'r Br. 29), limited to rubber-stamping the Regional Director's analysis. Instead, FLRA regulations expressly permit review of a Regional Director's decision when "[e]stablished law or policy warrants reconsideration" of Authority precedent. *EOIR II*, 72 FLRA at 625 & n.27 (quoting 5 C.F.R. § 2422.31(c)).

The Authority's decisions were thus not collateral attacks on the unit. Even if they were, the Union cites no case law establishing that allowing "collateral attacks" on a previously certified bargaining unit violates the Constitution.

Finally, the Union' contends that the Authority invented a "new rule" by requiring the Union to challenge the Regional Director's "substantial change" finding before the Authority to obtain the Authority's review of that issue. (Pet'r Br. 20, 25-26.) This argument lacks merit. FLRA regulations require parties to file applications for review if they wish to preserve objections to a Regional Director's determinations. *EOIR II*, 72 FLRA at 624 n.22 (citing 5 C.F.R. § 2422.31(b)). The Union's failure to do so does not create a procedural due process violation.

In nearly all adjudicatory bodies, parties must raise issues in their initial briefs to preserve review of the matter. *See Zhang v. U.S. Citizen & Immigr. Servs.*, 978 F.3d 1314, 1323 (D.C. Cir. 2020) (failure to raise an issue before the district court results in forfeiture); *INEOS USA L.L.C. v. FERC*, 940 F.3d 1326, 1329 (D.C. Cir. 2019) (party forfeited appellate review of a matter for failing to make the argument in its opening brief); Sup. Ct. R. 14(1)(a) ("Only questions set out in the petition . . . will be considered by the Court.").

The Authority holds parties to the same standard. If a party wants the Authority to pass upon an argument, it must first present the

argument to the Regional Director. 5 C.F.R. § 2429.5. And to preserve the argument for review by the Authority, a party must also raise the issue in its application for review of the Regional Director's decision. *See* 5 C.F.R. § 2422.31(b).

Contrary to the Union's suggestion (Pet'r Br. 25-26), the process for reviewing Regional Directors' determinations has existed since the Statute was enacted. 5 U.S.C. § 7105(f). Authority regulations further provide that a party must raise an issue in an application for review within 60 days after the Regional Director's decision, or waive Authority review of the issue. *See* 5 C.F.R. § 2422.30(c)-(d). Such applications for review "must specify the matters and rulings to which exception(s) is taken." 5 C.F.R. § 2422.31(b).

The Regional Director's finding of a substantial change is a "matter" that the Union had a responsibility to challenge in some way to gain Authority review. *See* 5 C.F.R. § 2422.31(b); *cf. U.S. Small Bus. Admin.*, 34 FLRA 392, 395 (1990) (Authority finding that since "[n]o review is sought" of the Regional Director's decision to include certain employees in the represented unit, the Authority was not required to review that decision).

Here, the Union made a strategic choice in its brief opposing the Agency's application for review to not challenge any aspect of the Regional Director's decision—including her finding that there had been a "substantial change" to the "scope and character of the unit" sufficient to support reconsideration of the IJs' status. More important, the Union chose not to file its own application for review to contest the Regional Director's substantial-change finding. It elected instead to praise the Regional Director for choosing to "not merely rely on the Authority's precedent from the Authority's 2000 decision," but to instead "under[take] a clean review of the record to determine whether [IJs] are management officials now, in 2020." (Union Opp'n Agency's Appl. Rev. 8.)

The Union made this choice despite knowing that the Authority's regulations permit review of a Regional Director's decision when "[e]stablished law or policy warrants reconsideration" of Authority precedent. 5 C.F.R. § 2422.31(c). In fact, the Union conceded in its brief to the Authority that "[i]t is well-established that '[a]n assertion that established law or policy warrants reconsideration' may serve as one of the 'ground[s] on which the Authority may grant an application

for review under § 2422.31(c)(2)." (Union Opp'n Agency's Appl. Rev. 27 (citation omitted).) It is not unreasonable—much less a due process violation—to hold the Union to its strategic decision to defend the Regional Director's opinion in its entirety.

The Union abandoned its collateral-attack argument by failing to challenge the Regional Director's "substantial change" finding before the Authority in any way. *Cf. U.S. Dep't of the Army Mil. Traffic Mgmt. Command*, 60 FLRA 709, 710 (2005) (finding that the union had abandoned its claim that the Regional Director erred by providing the Authority with no supporting argument or evidence). As a result, it suffered no procedural injustice.

2. The Dispute was Not Moot and *EOIR II* and *EOIR III* Were Not Advisory Opinions

The Union's mootness arguments fail because the agreement between the parties, and EOIR's thirteenth-hour attempt to withdraw its petition, had no effect on the validity of previously rendered FLRA decisions.

The Authority issued *EOIR I* ***before*** EOIR moved to withdraw the petition. (*Compare* Pet'r Br. 30, *with EOIR II*, 72 FLRA at 623 & n.15.)

Once the Authority issued *EOIR I*, the only way that a party could alter it was through a motion for reconsideration. 5 C.F.R. § 2429.17.

The Union timely filed for reconsideration, which EOIR at first opposed. EOIR only moved to withdraw the petition close to eight months after the Authority rendered the initial decision. (Pet'r Br. 30; *EOIR I*, 71 FLRA at 1053). EOIR's motion to withdraw the petition, which the Authority reasonably characterized as a motion for reconsideration, was therefore too late. *EOIR II*, 72 FLRA at 623 n.15.

And the settlement reached between the Union and EOIR—which was the impetus for EOIR's motion to withdraw—had no legal effect on the decision the Authority had rendered. Rather, as the Authority found in *EOIR III*, parties cannot negotiate a unit determination—the Statute gives that power exclusively to the Authority. 72 FLRA at 736 ("[I]t is a fundamental principle of the [Statute] that parties cannot 'negotiate over the unit status of employees, which is a matter reserved exclusively to the Authority.'" (quoting *Nat'l Fed'n of Fed. Emps., Loc. 15*, 43 FLRA 1165, 1171 (1992))).

The Settlement Agreement *itself* expressly contemplated further action by the Authority regarding EOIR's representation petition. It stated that EOIR

> agrees to recognize the Union as the exclusive representative of non-supervisory [IJs] at [EOIR], **unless or until such time as the [Authority] denies the Union's pending [m]otion for [r]econsideration of [*EOIR I*], and the [Authority] or the [Regional Director] issues a new certification or revokes the Union's recognition or certification of representative.**

Id. at 736 n.29 (emphasis added). Thus, as the Authority observed, "contrary to the Union's implied assertion, the settlement agreement does not resolve the dispute, but merely memorializes [EOIR's] willingness to recognize the Union *until* the Authority issued *EOIR II*." *Id.* at 736.

The Union cites no case law establishing that the Authority is subject to the same mootness rules as an Article III court because it cannot. Unlike Article III courts, administrative agencies have "substantial discretion" to decide issues potentially precluded by mootness. *Bldg. & Constr. Trades Dep't. v. Solis*, 600 F. Supp. 2d 25, 34 (D.D.C. 2009). As agencies are "creatures of [A]rticle I," their jurisdiction is not limited to actual cases and controversies like Article

III courts. *Tenn. Gas Pipeline Co. v. Fed. Power Comm'n*, 606 F.2d 1373, 1380 (D.C. Cir. 1979).

Even if Article III court mootness standards applied, however, the Union could not meet them. In that context, "as long as the parties have a concrete interest, however small, in the outcome of litigation, the case is not moot." *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 442 (D.C. Cir. 2020) (citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)).

When the Authority decided *EOIR I*, the Authority had held that IJs were management officials and should be excluded from the bargaining unit. 71 FLRA at 1049. The Union thus retained a concrete interest in the outcome of subsequent decisions because the IJs had lost their unit status, and the Union its ability to collectively bargain on their behalf, under the Statute. The dispute was not moot, and the Authority's subsequent decisions were thus not advisory.

3. The Authority's Internal Case Processing Guidelines Did Not Deprive the Union of Due Process

The Union seizes on Chairman DuBester's statement in his *EOIR II* dissent that "my colleagues have issued an ultimatum that, if I do not respond to their (fifth round of) revisions to the majority opinion in this case–within three weeks of that opinion's circulation on December 21,

2021–they will issue their majority opinion without my participation." (Pet'r Br. 33-34 (citing *EOIR II*, 72 FLRA at 630 (Chairman DuBester dissenting)).) The Union contends that this shows that the Authority violated its procedural due process rights.

The Union cites no case law in support of this conclusory argument. Nor does it respond in any way to the Authority's analysis in *EOIR III* rejecting this claim. As the Authority observed, "The Union fails to explain—and we fail to see—how the Authority's *internal* processing guidelines and timelines deprived the Union of any due-process interest." *EOIR III*, 72 FLRA at 735. "Furthermore, the Authority clearly provided the Union with the opportunity to be heard regarding its interest in the representation proceeding at issue, as evident by *EOIR I* and *EOIR II*." *Id.* As noted above, that was all that procedural due process required.

C. The Union's Substantive Due Process Claims Are Meritless

To state a claim that the FLRA has violated its substantive due process rights, the Union must, besides establishing a constitutional interest, allege conduct that is "'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Butera v. Dist. of*

Columbia, 235 F.3d 637, 651 (D.C. Cir. 2001) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)); *see Elkins v. Dist. of Columbia*, 527 F. Supp. 2d 36, 49 (D.D.C. 2007) ("The government's infringement of the recognized property interest must constitute a grave unfairness: Inadvertent errors, honest mistakes, agency confusion, even negligence in the performance of official duties, do not warrant redress." (quoting *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988))).

The Union has alleged no such "shocking" conduct. Its attempt to transform adverse Authority decisions into substantive due process violations with baseless allegations of bias must be rejected. "Courts have long recognized 'a presumption of honesty and integrity in those serving as adjudicators.'" *Pro. Air Traffic Controllers Org. v. FLRA* ("*PATCO*"), 685 F.2d 547, 573 (D.C. Cir. 1982) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). "Absent a strong showing to the contrary, an agency adjudicator is presumed to act in good faith and to be capable of ignoring considerations not on the record." *PATCO*, 685 F.2d at 573 (citations omitted). Further, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v.*

United States, 510 U.S. 540, 555 (1994). This Court has, in turn, applied that standard to administrative proceedings. *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944 (D.C. Cir. 1999).

Here, the Union makes no colorable showing of bias or partiality. The Union's hyperbolic assertions that *EOIR I* and *EOIR II* "[l]ack[] any coherent explanation or legal reasoning" and "fail[] to provide any meaningful factual or legal analysis" are belied by simply reading those decisions. (Pet'r Br. 38.) The Union's unsupported allegations of bias rest on mere disagreement with the Authority's decisions—and this Court has made clear that such disagreement does not create a due process violation. *Liteky*, 510 U.S. at 555; *Pioneer Hotel, Inc.*, 182 F.3d at 944. If the Union is attempting to argue that the Authority's decisions were arbitrary and capricious (which they were not), that alone cannot show a due process violation because of bias. Were it otherwise, any petitioner could claim that a violation of the Administrative Procedure Act was a substantive due process violation.

Given the Union's failure to allege any probative facts showing that Authority Members have "demonstrably made up [their] mind[s] about important and specific factual questions and [are] impervious to

contrary evidence," this Court presumes that the Authority's decisions are based on the Members' understanding of the law, not bias. *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998) (internal quotations omitted).

If more was needed, the Union's substantive due process claim based on the Authority's alleged bias is barred by § 7123(c) of the Statute because it was never presented to the Authority.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court deny the Petition for Review.

Respectfully submitted,

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August 8, 2022

FED. R. APP. P. RULE 32(a) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Century Schoolbook font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 12,800 words excluding exempt material.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Deputy Solicitor
Federal Labor Relations Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. 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/ Rebecca J. Osborne
Rebecca J. Osborne
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Federal Labor Relations Authority

ADDENDUM

Relevant Statues, Regulations, and Legislative History

TABLE OF CONTENTS

AUTHORITY **PAGE**

STATUTES

5 U.S.C. § 7102. Employees' Rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7103(a)(11). Definitions; application

(a) For the purpose of this chapter--

> (11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or **influence the policies of the agency;**

5 U.S.C. § 7105(f). Powers and Duties of the Authority

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the

Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

5 U.S.C. § 7112. Determination of Appropriate Units for Labor Organization Representation

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

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

5 U.S.C. § 7116(a). Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. § 7118(a)(1). Prevention of Unfair Labor Practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

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.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining

order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

REGULATIONS

5 C.F.R. § 2422.1(a), (b). What is your purpose for filing a petition?

You, the petitioner, may file a petition for the following purposes:

(a) Elections or eligibility for dues allotment. To request:

> (1)(i) An election to determine whether employees in an appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, and/or
>
> (ii) A determination of eligibility for dues allotment in an appropriate unit without an exclusive representative; or
>
> (2) An election to determine whether employees in a unit no longer wish to be represented for the purpose of collective bargaining by an exclusive representative.
>
> (3) Petitions under this subsection must be accompanied by an appropriate showing of interest.

(b) Clarification or amendment. To clarify, and/or amend:

> (1) A recognition or certification then in effect; and/or
>
> (2) Any other matter relating to representation.

5 C.F.R. § 2422.2 (a), (c). Who may file a petition?

An individual; a labor organization; two or more labor organizations acting as a joint-petitioner; an individual acting on behalf of any employee(s); an agency or activity; or a combination of the above may file a representation petition. But,

(a) Only a labor organization may file a petition under § 2422.1(a)(1);

* * * * *

(c) Only an agency or a labor organization may file a petition under § 2422.1(b) or (c).

5 C.F.R. § 2422.30(c), (d). When does a Regional Director investigate a petition, issue notices of hearings, take actions, and issue Decisions and Orders?

(c) Regional Director action. After investigation or hearing, the Regional Director can direct an election, or approve an election agreement, or issue a Decision and Order.

(d) Appeal of Regional Director Decision and Order. A party may file with the Authority an application for review of a Regional Director Decision and Order.

5 C.F.R. § 2422.31(b), (c). When do you file an application for review of a Regional Director Decision and Order?

(b) Contents. An application for review must be sufficient for the Authority to rule on the application without looking at the record. However, the Authority may, in its discretion, examine the record in evaluating the application. An application must specify the matters and rulings to which exception(s) is taken, include a summary of evidence relating to any issue raised in the application, and make specific references to page citations in the transcript if a hearing was held. An application may not raise any issue or rely on any facts not timely presented to the Hearing Officer or Regional Director.

(c) Review. The Authority may grant an application for review only when the application demonstrates that review is warranted on one or more of the following grounds:

(1) The decision raises an issue for which there is an absence of precedent;

(2) Established law or policy warrants reconsideration; or,

(3) There is a genuine issue over whether the Regional Director has:

(i) Failed to apply established law;

(ii) Committed a prejudicial procedural error; or

(iii) Committed a clear and prejudicial error concerning a substantial factual matter.

5 C.F.R. § 2423.3(a). Who may file charges?

(a) Filing charges. Any person may charge an activity, agency, or labor organization with having engaged in, or engaging in, any unfair labor practice prohibited under 5 U.S.C. 7116.

5 C.F.R. § 2429.5. Matters not previously presented; official notice.

The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the Regional Director, Hearing Officer, Administrative Law Judge, or arbitrator. The Authority may, however, take official notice of such matters as would be proper.

5 C.F.R. § 2429.17. Reconsideration.

After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for

reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.

LEGISLATIVE HISTORY

Civil Service Reform Act of 1978, H.R. Conf. Rep. No. 95-1717 at 153 (Oct. 5, 1978).

B. Judicial Review of the decisions of the Federal Labor Relations Authority.

The Senate bill made reviewable in court decisions of the Authority concerning unfair labor practices, including awards of arbitrators relating to unfair labor practices. Otherwise, the Senate provides that all decisions of the Authority are final and conclusive, and not subject to further judicial review except for questions arising under the Constitution. (Section 7204(L); Section 7216(F); Section 7221(J).) The Senate provides that decisions of arbitrators in adverse action cases would be appealable directly to the Court of Appeals or Court of Claims in the same manner as a decision by the MSPB (Section 7221(B)).

In the House Bill, unfair labor practice decisions are appealable as in the Senate. In addition, all other final decisions of the Authority involving an award by an arbitrator, and the appropriateness of the unit an organization seeks to represent are also appealable to the Courts (Section 7123(A)). Under the House bill decisions by arbitrators in adverse action cases are first appealable to the Authority before there may be an appeal to the Court of Appeals.

In the case of arbitrators[‘] awards involving adverse actions, the Conferees elected to adopt the approach in the Senate bill. The decision of the arbitrator in such matters will be appealable directly to the Court

of Appeals (or Court of Claims) in the same manner as a decision by the MSPB.

In the case of those other matters that are appealable to the Authority the conference report authorizes both the agency and the employee to appeal the final decision of the Authority except in two instances where the House recedes to the Senate. As in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units and there 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.