ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1183

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3690, AFL-CIO,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE
FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

NOAH B. PETERS
Solicitor

REBECCA J. OSBORNE
Deputy Solicitor

SARAH C. BLACKADAR
Attorney

Federal Labor Relations Authority
1400 K Street, N.W.
Washington, D.C. 20424
(202) 218-7908

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (the "Authority") were the U.S. Department of Justice, Federal Bureau of Prisons Federal Correctional Institution Miami, Florida and the American Federation of Government Employees Local 3690 Council of Prison Locals, C-33. In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. Ruling Under Review

The Union seeks review of the Authority's Decision in *U.S. Department of Justice Federal Bureau of Prisons Federal Correctional Institution Miami, Florida and American Federation of Government Employees Local 3690 Council of Prison Locals, C-33*, 71 FLRA (No. 125) 660 (April 2, 2020) (Member Abbott concurring; Member DuBester dissenting).

C. Related Cases

This case was not previously before this Court or any other court. There are no related cases currently pending before this Court or any court of which counsel for the Authority is aware.

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

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GLOSSARY OF ABBREVIATIONS

Agency	U.S. Department of Justice Federal Bureau of Prisons Federal Correctional Institution Miami, Florida
Arbitrator	Dennis J. Campagna
Award	The Arbitrator's September 14, 2018 Award
Augmentation	The temporary reassignment of non-custodial staff to custody positions when a shift is short of custody staff
Authority	Respondent, the Federal Labor Relations Authority
CBA	The Master Agreement signed by the Federal Bureau of Prisons covering all 122 of its correctional facilities
Decision	The decision of the Authority in this case, dated April 2, 2020
Master Agreement	The Master Agreement signed by the Federal Bureau of Prisons covering all 122 of its correctional facilities
MOU	Memorandum of Understanding
PA	The Petitioner's Appendix, which is the Joint Appendix
Pet'r Br.	Petitioner's opening brief
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair Labor Practice
Union	Petitioner, American Federal of Government Employees Local 3690, Council of Prison Locals, C-33

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The American Federation of Government Employees Local 3690, Council of Prison Locals, C-33's (the "Union") seeks review of the decision of the Federal Labor Relations Authority (the "Authority" or "FLRA") in *U.S. Department of Justice Federal Bureau of Prisons Federal Correctional Institution Miami, Florida and American Federation of Government Employees Local 3690 Council of Prison Locals, C-33*, 71 FLRA (No. 125) 660 (April 2, 2020) (Member Abbott concurring; Member DuBester dissenting) (the "Decision").[1]

The Union's Petition for Review, however, suffers from two fatal jurisdictional flaws. First and foremost, it is jurisdictionally barred by Section 7123(a) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute"). Section 7123(a) precludes circuit courts from asserting jurisdiction over Authority decisions resolving exceptions to arbitration awards, except where the decision "involves an unfair labor practice." 5 U.S.C. § 7123(a)(1); *Broad. Bd. of Governors Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 456 (D.C. Cir. 2014) ("*Cuba Broadcasting*"). In order to "involve" an unfair labor practice ("ULP"), the Authority's order must "include some sort of substantive evaluation of a statutory unfair labor

[1] The Decision is included in the Petitioner's Appendix ("PA") at PA 201-17. In the Authority's Decision and other documents in Petitioner's Appendix the Union is referred to as Local 3960. (*See, e.g.*, PA 1, 37, 144, 201.) This is an error, the Union is Local 3690, for consistency and accuracy Local 3690 is used in this brief. (*See* PA 197.)

practice." *Ass'n of Civilian Technicians, N.Y. State Council v. FLRA*, 507 F.3d 697, 699 (D.C. Cir. 2007) ("*ACT*") (internal quotation marks omitted).

Here, the Authority's Decision reviews an arbitrator's award adjudicating solely contractual claims—specifically, the Union's claim that the U.S. Department of Justice Federal Bureau of Prisons Federal Correctional Institution Miami, Florida (the "Agency") breached Article 18 of the parties' master collective bargaining agreement ("CBA" or the "Master Agreement") by refusing to negotiate over staffing assignments. Although the Union might have framed its claims in terms of a ULP, it chose not to do so, and even resisted the Agency's attempts to characterize its claims as a ULP. The Union presumably took this tack because this Court has *twice* ruled in ULP proceedings that the plain language of Article 18 covers staffing assignments and the Agency did not have a duty to negotiate further concerning such assignments. *See Fed. Bureau of Prison v. FLRA*, 654 F.3d 91, 96 (D.C. Cir. 2011) ("*BOP I*"); *see also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 670 (D.C. Cir. 2017) ("*BOP II*"). Thus, the Authority's Decision did not involve a ULP.

Second, under the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee." 5 U.S.C. § 7123(c). Here, the Union never raised with the Arbitrator Dennis J. Campagna (the "Arbitrator") or the Authority the arguments it now makes to this Court: that the Agency committed a ULP by refusing to negotiate, that the Agency repudiated a Memorandum of

Understanding ("MOU") which constituted a ULP, or that the Authority's Decision violated a clear statutory mandate. Its failure to do so deprives this Court of the ability to consider those arguments under § 7123(c). *See U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., Silver Spring, Md. v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993) (finding that this Court lacked jurisdiction to hear objections that the petitioner failed to raise before the Authority).

Neither the Arbitrator's Award nor the Authority's decision addressed ULPs or the law concerning ULPs. And the Union below did not raise any of the arguments that it now makes to this Court in a its attempt to retroactively transform this matter into one involving a ULP. As a result, this Court lacks appellate jurisdiction under § 7123(a)(a) and § 7123(c) of the Statute, and the Union's Petition for Review must be dismissed.

STATEMENT OF THE ISSUE PRESENTED

Does the Court have jurisdiction to review the Authority's Decision vacating an arbitration award that addressed purely contractual claims when 5 U.S.C. § 7123(a) limits of judicial review of Authority arbitration decisions to cases involving a ULP?

Can this Court, consistent with 5 U.S.C. § 7123(c), consider new arguments that the Union raises for the first time on appeal?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

The Union seeks to challenge the Authority's Decision vacating the Arbitrator's September 14, 2018 award (the "Award") for failing to draw its essence from the parties' agreement. (PA 201.)

Article 18 of the parties' Master Agreement sets forth the procedures the Agency must observe when assigning personnel to shifts at the Agency's prisons. *BOP I*, 654 F.3d at 93. Article 18 represents the final product of the parties' impact and implementation bargaining, not the "starting point for constant negotiations over every agency action." *Id.* at 95 (internal quotations omitted).

In 2011, this Court first considered the extent to which Article 18 covered Agency personnel assignments. *Id.* It concluded that Article 18 represents "the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift." *Id.* It further determined that, "[b]ecause the parties reached an agreement about how and when management would exercise its right to assign work, the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain." *Id.* at 96. "Article 18 therefore covers and preempts challenges to all specific outcomes of the assignment process." *Id.*

In 2017, this Court again considered Article 18 in the context of the Agency's attempt to use consolidated relief rosters without engaging in interim bargaining. *BOP II*, 875 F.3d at 673. The Court found that the Agency did not have a duty to

engage in interim bargaining because Article 18 covered personnel assignments and preempted challenges to the outcomes of those assignments. *Id.* at 674-75. The Court therefore found that the Authority erred when it concluded "that negotiation of the procedures for assigning work does not cover all assignments devised in compliance with those procedures." *Id.* at 676.

The case at bar developed against this legal background. In 2016, the Agency changed its staff assignment practices for vacant custody positions at the prison. (PA 3.) The new practices included using non-custody employees to fill vacant custody positions at the prison, a practice known as "augmentation." (PA 3.)[2] Prior to 2016, the Agency generally left those positions vacant or filled them with overtime shifts from custody employees. (PA 3-4.)

The Union requested bargaining over the impact and implementation of the Agency's change. (PA 5.) The Agency declined, citing Article 18 of the parties' collective bargaining agreement ("CBA"). (PA 5.)[3] After the Agency refused to

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[2] "Custody," in this context, refers to shifts where employees are responsible for directly supervising prisoners. (PA 110-11.) "Non-custody" shifts are those in other departments such as education, food services, recreation, and medical services. (*Id.*) All prison employees are initially trained as correctional officers. (PA 111.)

[3] The Award indicates that the Agency's Human Resource Manager responded to the Union's request on "January 8, 2018" but this section of the Award list all events in chronological order, and is likely an error that should read "January 8, 2016." However, the record does not contain a copy of this written notice.

bargain, the Union filed a grievance alleging violations of multiple articles of the CBA. (PA 5.)

In his Award, the Arbitrator found that the issue before him was whether the Agency's use of augmentation violated Article 16, 18, 27, or 28 of the Master Agreement. (PA 18.) The Arbitrator found that the Agency had a past practice of non-augmentation at this prison. (PA 20.) He also found that this past practice was an unwritten contractual term. (PA 20-21.) Thus, a change in that practice was equivalent to a change in the parties' contract, and the Agency had a duty to bargain over the impact and implementation of augmentation at this particular prison. (PA 22-23.) The Award, however, failed to mention this Court's previous decisions interpreting Article 18 and holding clearly that the Agency had no further duty to bargain over staffing assignments. (PA 13-31; *see BOP I*, 654 F.3d at 96; *BOP II*, 875 F.3d at 670.)

The Agency filed multiple exceptions to the Award, including that it failed to draw its essence from the parties' agreement. (PA 37-72.) The Agency argued that it had no duty to bargaining over the use of augmentation because it was simply a specific type of reassignment. (PA 44-46.) The Agency argued that it and the Union had already bargained over the procedures for assignment and reassignment of shifts and work assignments, resulting in Article 18 of the Master Agreement. (PA 47-48.)

The Authority agreed and found that the parties' past practice, while helpful for interpreting ambiguous terms in a contract, could not alter the plain language of the

contract (as the Award did here). (PA 202 (citing *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maintenance Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (Member DuBester dissenting).) The Authority acknowledged the long history of Article 18, including a plethora of Authority decisions and two D.C. Circuit opinions interpreting Article 18. (PA 202-03.)[4] The Authority then set aside the Award because it failed to draw its essence from the parties' agreement. (PA 201.) The Authority found that the Arbitrator erred when he created a new contractual term, purportedly derived from a past Agency practice, that directly contradicted the established meaning of Article 18 of the Master Agreement. (PA 203.) The Authority also found that the Arbitrator erroneously required that the Agency engage in additional impact and implementation bargaining. (PA 203.) Notably, the Authority's decision did not involve a ULP and did not address substantive law concerning ULPs.

The Union did not move to reconsider the Authority's decision. Instead, it filed the instant Petition for Review. Despite the clear bar of § 7123(c) prohibiting parties from raising new issues on appeal, the Union argues for the first time that its

[4] Following *BOP II*, the Authority vacated a series of arbitration awards that found that other articles in the parties' agreement took precedent over Article 18, and required the agency to bargain. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1029-30 (2018) (Member DuBester dissenting); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 749 (2019) (Member DuBester dissenting); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596 (2018) (Member DuBester dissenting); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Big Springs, Tex.*, 70 FLRA 442 (2018) (Member DuBester concurring).

grievance involved a ULP, that the Agency's alleged repudiation of the MOU constituted a ULP, and that the Authority's decision violated clear statutory mandates.

STATEMENT OF THE FACTS

I. This Court has already ruled—twice—on the meaning of Article 18 of the Master Agreement.

Over twenty years ago, the parties reached an agreement regarding what procedures the Agency would observe when assigning personnel to shifts at the Agency's numerous prisons. *BOP I*, 654 F.3d at 93. That agreement, memorialized in Article 18 of the Master Agreement, represented the final product of the parties' impact and implementation bargaining concerning personnel assignments and was meant to preclude further negotiations over personnel assignments. *Id.* at 95.

This Court first considered the scope of Article 18 in 2011, in *BOP I*. *See Id.* It concluded that Article 18 represents "the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift." *Id.* The Court rejected the narrower interpretation of Article 18 adopted by the Authority in *BOP I*: "Because the parties reached an agreement about how and when management would exercise its right to assign work, the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain." *Id.* at 96. "Article 18 therefore covers and preempts challenges to all specific outcomes of the assignment process." *Id.*

In 2017, Article 18 was again before this Court after the Authority found that Article 18 did not cover the use of consolidated relief rosters. *BOP II*, 875 F.3d at 673. The Court again rejected a narrow interpretation of the covered-by doctrine and the parties' agreement, holding that Article 18 precluded further negotiations over staffing assignments. *Id.* at 674-75. *BOP II* held that the Authority erred when it concluded "that negotiation of the procedures for assigning work does not cover all assignments devised in compliance with those procedures." *Id.* at 676.

Informed by these two decisions, the Authority subsequently vacated four arbitration awards that relied on the same erroneous interpretation of Article 18 that this Court had twice rejected. *See Fed. Corr. Inst. Big Spring, Tex.*, 70 FLRA 442 (2018); *Fed. Corr. Complex Lompoc, Cal.*, 70 FLRA 596 (2018); *Fed. Corr. Complex Florence, Colo.*, 70 FLRA 748 (2018); *Fed. Corr. Inst. Phoenix, Az.*, 70 FLRA 1028 (2018). Two of those cases involved the Agency's use of augmentation. In both cases, the Authority found that the arbitration award failed to draw its essence from the parties' agreement because it held that the agency had a duty to bargain over the outcome of the assignment process, in contravention of *BOP I* and *BOP II*. *Fed. Corr. Complex Florence, Colo.*, 70 FLRA at 748; *Fed. Bureau of Prisons Fed. Corr. Inst. Phoenix, Az.*, 70 FLRA at 1028.

II. The Arbitrator considered only the Agency's alleged contractual violations of the parties' agreement.

In 2016, the Agency began assigning non-custody employees to fill vacant custody positions at the prison, a practice known as "augmentation." (PA 3-5.) The non-custody employees were originally trained for custody positions, and received regular refresher trainings, but had, over time, been assigned to various non-custody departments within the prison. (PA 111, 203.) Those employees did not routinely fill custody shifts prior to 2016. (PA 20, 203.) Instead, the Agency either left the additional custody posts vacant or filled them with custody employees on an overtime basis. (PA 203.)

In 2016, the Agency changed its staffing practices and began using augmentation to fill vacant custody posts. (PA 20, 203.) The Union objected to the Agency's use of augmentation without notice and an opportunity for the Union to bargain. (PA 5-6.) When the Agency refused to bargain, citing Article 18 of the parties' agreement, the Union filed a grievance. (PA 5-6.)

The Agency denied the grievance and the Union invoked arbitration. (PA 5-6.) The Arbitrator had authority to resolve only the issues alleged in the Union's demand for arbitration. (PA 2.) He found that the issue before him was whether the Agency "violated the Ma[s]ter Agreement at, among other Articles, Article 18 (Hours of Work) and Article 28 (Uniform, Clothing) by augmenting [n]on-[c]ustody staff to work in [c]ustody [p]osts." (PA 2.)

Before the Arbitrator, the Union alleged that when the Agency failed to follow its past practice and refused to bargain over the implementation of a change to that practice, it violated Article 4 of the Master Agreement. (PA 13.) Article 4 requires the Agency to provide notice of changes to working conditions and opportunity to negotiate in accordance with the parties' Master Agreement. (PA 21.) The Agency responded that augmentation was merely a method of reassigning employees. (PA 16.) The Agency further argued that it did not have a duty to bargain over the use of augmentation because Article 18 reflected the fully-negotiated procedures that the parties agreed the Agency would use for reassignments. (PA 16.)

In his Award, the Arbitrator determined that it was the Agency's practice before 2016 not to use augmentation to fill vacant custody posts. (PA 20.) The Arbitrator found that "[t]hus, a binding past practice was established and violated at [Federal Correctional Institution] Miami." (PA 13.) The Arbitrator then accepted the Union's argument that Articles 3, 4, and 5 required the Agency to bargain over the implementation of augmentation at the prison. (PA 20-21.) In so doing, the Arbitrator implicitly rejected the Agency's argument that it had no obligation bargain over augmentation because it had already done so when the parties negotiated Article 18. (PA 20-23.) The Arbitrator found that the Agency also violated Article 27, regarding safe working conditions, when it violated the past practice of non-augmentation. (PA 23-27.) The Arbitrator awarded backpay to custody staff who lost overtime opportunities because of the Agency's use of augmentation. (PA 35.)

III. The parties' arguments concerning the Award before the Authority were based on the parties' agreement, not the Statute.

The Agency filed exceptions to the Award with the Authority, arguing that the Award failed to draw its essence from the parties' agreement and was contrary to law. (PA 37-72.) The Agency argued that the Award, which required the Agency to bargain over the outcome of staffing assignments, could not be squared with the plain language of Article 18 or this Court's decisions regarding Article 18. (PA 48-49 ("Even with this unequivocal contract language, and the explanation of the breadth of Article 18 from the FLRA and the D.C. Circuit . . . [the Arbitrator] still manages to interpret Article 18, in conjunction with his take on Articles 3, 4, and 5, to require the Agency to give notice and bargaining before reassigning non-custody employees to cover custody posts."); *see also* PA 70-71.) The Agency noted that the Award directly conflicted with Sections o, r, and s of Article 18 that cover reassignments when the Agency moves employees to different shifts or posts. (PA 49.) Section o of Article 18 dictates the procedure that the Agency must follow when making changes to employees' shifts. (PA 141.) While it requires the Agency to give 24-hour notice when changing an employees' shift time, it also states that "[w]ork assignments on the same shift may be changed without advanced notice." (PA 141.) Section r requires the Agency to "make reasonable efforts to assure that" employee shift changes do not affect the employees' days off. (PA 142.) And Section s states that shift and assignment changes must be confirmed in writing. (PA 142.)

The Agency also argued that the Union's claims should more logically be brought as a ULP, rather than as the contractual claims the Union asserted in the grievance. (PA 50.) But the Union, in its opposition to the Agency's exceptions, emphasized that this was *not* a ULP case, citing the Arbitrator's finding "that the Agency committed an unjustified and/or unwarranted personnel action by violating Article 18 of the parties' agreement." (PA 155.) The Union further argued that the Award represented "a plausible interpretation of the agreement." (PA 158.) Finally, the Union reiterated its position that Articles 3, 4, and 5 require the Agency to bargain with the Union over the use of augmentation and that Article 18 does not extend to the use of this specific reassignment practice. (PA 157-58.)

IV. The Authority set aside the Award because it did not draw its essence from the parties' agreement.

The Authority set aside the Award because it failed to draw its essence from the parties' agreement—specifically, because the Arbitrator relied on past practice rather than the plain wording of the Master Agreement. (PA 203.) At the outset, the Authority noted that the Award concerned only whether the Agency's conduct violated various articles of the parties' CBA. (PA 201-02.) The Authority found that the entire Award flowed from "the Arbitrator's determination that the Agency's previous restraint from utilizing . . . augmentation amounted to a 'past practice,' and an 'unwritten contractual right.'" (PA 202.) The Authority determined that the Arbitrator's use of past practice was untenable here because it directly contradicted

the plain wording of the Master Agreement that allowed the Agency to reassign employees in accordance with Article 18 without additional bargaining. (PA 202-03).

The Authority then discussed this Court's two decisions holding that Article 18 represents the parties' complete agreement regarding scheduling and work assignment procedures. (PA 202-03.) The Authority found that the Award directly contradicted the established meaning of Article 18, as determined by this Court and the Authority. (PA 203.) The Authority therefore set aside the Award because it failed to draw its essence from the agreement. (PA 203.)

This Petition for Review followed.

SUMMARY OF THE ARGUMENT

The Court does not have jurisdiction to hear the Petition for Review because the Authority's Decision resolving exceptions to the Arbitrator's Award does not involve a ULP. 5 U.S.C. § 7123(a). Section 7123(a) of the Statute expresses an "unusually clear congressional intent" to "foreclose review" of the Authority decisions in arbitration cases. *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988). The Union's grievance, the Award, and the Authority's Decision do not discuss any law governing ULPs. Further, the Union's grievance did not allege, and neither the Arbitrator nor the Authority adjudicated, a claim that the Agency committed a ULP. Thus, this Court lacks jurisdiction.

The Court strictly interprets § 7123(a). As early as 1987, this Court rejected the argument that federal court jurisdiction may be conferred simply because a party may

be able to recast a contractual claim as a ULP—as the Union's brief seeks to do here (Pet'r Br. 15-16)— after an arbitrator and Authority rendered their decisions. *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 66 (D.C. Cir. 1987) ("*OEA*").

In subsequent cases the Court has reiterated this principle. While this Court found that its jurisdiction extends beyond cases involving on-the-merits adjudication of ULPs, an Authority's order must "include some sort of substantive evaluation of a statutory" ULP before this Court's jurisdiction may be invoked. *Ass'n of Civilian Techs., N.Y. State Council v. FLRA*, 507 F.3d 697, 699 (D.C. Cir. 2007). This case does not involve a ULP, the covered-by doctrine, or an allegation of a ULP based on an Agency contract repudiation, despite the contrary assertions that the Union presents for the first time on appeal. (Pet'r Br. 11-12, 20-21.) This case merely involves the Authority's Decision granting exceptions to an arbitration award based on its failure to draw its essence from the parties' agreement.

This Court's most recent decision addressing the scope of § 7123(a) also dictates that this Petition be dismissed for want of federal court jurisdiction. In *National Weather Service Employees Organization v. FLRA*, ("*NWSEO*"), the Court emphasized that § 7123(a) requires "that a statutory [ULP] be discussed in some way in, or be some part of, the Authority's order" before this Court may exercise jurisdiction over the matter. 966 F.3d 875, 880 (2020) (quoting *OEA*, 824 F.2d at 65).

Here, the Union never attempted to describe its grievance as a ULP until it filed its Petition for Review, and the Authority's order does not—in any part—discuss

a ULP. The Union's last-ditch effort to recast its grievance as a ULP, either for refusing to negotiate or for repudiating a contract, cannot create jurisdiction. The Union never raised those issues before the Authority, and the Court should decline to hear them for the first time on appeal. 5 U.S.C. § 7123(c).

In addition, the Union's argument that this Court could have jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958) is unavailing. *Leedom* is a doctrine that, in extremely rare circumstances, may be invoked to establish federal district court jurisdiction. But it has no application whatsoever to *appellate* jurisdiction. *Am. Fed'n of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 502 (D.C. Cir. 2006) ("*AFGE*") ("*Leedom v. Kyne* implicates the jurisdiction of the district court, not that of the court of appeals"). Moreover, the *Leedom* doctrine is does not apply in cases like this, where "the statutory preclusion of review" is express, rather than implied. *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). Finally, the Union has not met its high burden of demonstrating that the Authority acted "in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *Id.*

Similarly unavailing is the Union's attempt to assert jurisdiction under *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994) ("*Customs*"). *Customs* represented an unusual circumstance in which the Authority interpreted import and export laws and regulations. 43 F.3d at 686. *Customs* says that this Court may review cases in which the Authority exceeds its own jurisdiction by

interpreting a law that does not "affect[] working conditions." *Id.* at 690-91. As the Authority's Decision dealt only with contract interpretation, not the interpretation of any statute, *Customs* is inapplicable.

Even if the Court had jurisdiction to review this Petition, the Authority acted reasonably in setting aside the Award. Indeed, it had little choice. The meaning of Article 18 of the Master Agreement has been made clear through the course of at least a dozen cases that have been adjudicated since 2003. (PA 202-03.) And this Court has *twice* ruled that Article 18 allows the Agency to make any staffing assignments or reassignments it chooses so long as it does so in accordance with Article 18 procedures—precedents the Arbitrator failed to discuss. As the Award cannot be squared with this Court's precedent or the plain language of Article 18, the Authority's Decision must be upheld.

The Union's citation to the *Steelworkers* trilogy is unavailing. The *Steelworkers* cases do not require the Authority to blindly ratify every arbitrator's decision, no matter how untethered from the language of the parties' CBA. Moreover, the Authority's reason for overturning the Award—because it did not draw its essence from the parties' agreement—is similar to those considered by federal courts in the private sector. Even if this Court had jurisdiction to review it, then, the Authority's Decision complied with applicable law and was neither arbitrary nor capricious.

The Union's Petition should therefore be dismissed or denied.

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 Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 465 (D.C. Cir. 2014); *CTS Corp. v. Env't Prot. Agency*, 759 F.3d 52, 57 (D.C. Cir. 2014) ("This Court, as a matter of constitutional duty, must assure itself of its jurisdiction to act in every case."). "Federal courts are courts of limited jurisdiction[,]" and the burden is on the party seeking judicial review to establish that its petition lies within the Court's limited jurisdiction. *Kokkonen v. Guardian Life. Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Jurisdiction to review Authority decisions is restricted by "the language of the [S]tatute," which provides that Authority orders involving an arbitration award cannot be reviewed by this Court "unless the order involves a [ULP]." *OEA*, 824 F.2d at 64; *see also* 5 U.S.C. § 7123(a)(1). "If the Authority's Decision was based solely on the collective bargaining agreement between [the agency] and [the union], then [this Court] do[es] not have jurisdiction." *U.S. Dep't of Navy, Naval Undersea Warfare Center Division Newport, Rhode Island, v. FLRA*, 665 F.3d 1339, 1344 (D.C. Cir. 2012) ("*Undersea Warfare*").

If the Court finds it has jurisdiction, the scope of its review is narrow. *See, e.g.*, *Am. Fed. Of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 721 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)). The Court will uphold the Authority's decisions unless they are "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law." *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU*"); *see also Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998); 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The Court "affords considerable deference to the Authority," in interpreting and administering its own Statute. *See Fed. Deposit Ins. Corp. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotation marks omitted); *see also Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983). In addition, the Court considers the Authority's factual findings "conclusive" if they are "supported by substantial evidence on the record considered as a whole." 5 U.S.C. § 7123(c).

Finally, under § 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee . . . unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord NTEU*, 754 F.3d at 1040 ("[w]e have enforced [S]ection 7123(c) strictly"); *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n.5 (D.C. Cir. 2005).

ARGUMENT

I. The Court does not have jurisdiction to review the Authority's Decision because it does not involve a ULP.

This Court does not have jurisdiction over this case in light of the clear statutory bar to judicial review of Authority decisions concerning arbitration awards that do not involve ULPs. 5 U.S.C. § 7123(a). Congress may limit or foreclose review of agency decisions as it sees fit. *See, e.g.*, *City of Arlington, Tex. v. Fed. Commc'n Comm'n*, 569 U.S. 290, 297 (2013); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). With respect to § 7123(a), this Court has concluded "that Congress required that a statutory [ULP] actually be implicated to some extent in the Authority's order" before this Court may exercise jurisdiction over an Authority decision concerning an arbitration award. *OEA*, 824 F.2d at 66; *see also Griffith*, 842 F.2d at 490 (noting that § 7123(a) of the Statute expresses an "unusually clear congressional intent" to "foreclose review" of Authority decisions in arbitration cases).

The legislative history of § 7123(a) underscores Congress's intent to restrict appellate scrutiny of Authority decisions involving arbitration awards. The Conference Report explains:

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

H.R. REP. NO. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (available at: https://go.usa.gov/xPfNk). The Conference Report states that once an arbitrator's award becomes "final," it is "not subject to further review by any . . . authority or administrative body" besides the Authority. *Id.* at 826.

Thus, the plain language of § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards, except where the Authority's order "involves an unfair labor practice." *ACT*, 507 F.3d at 699; *see also OEA*, 824 F.2d at 70-71. Accordingly, this Court lacks jurisdiction over petitions that seek review of Authority decisions resolving exceptions to arbitration awards where the Authority neither discusses nor evaluates a statutory ULP. *See, e.g.*, *U.S. Dep't of Homeland Sec. v. FLRA*, 784 F.3d 821, 823 (D.C. Cir. 2015); *Broad. Bd. of Governors Office of Cuba Broad.*, 752 F.3d at 457; *Patent Office Prof. Ass'n v. FLRA*, 180 Fed. Appx. 176 (D.C. Cir. 2006); *U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339, 1342 (D.C. Cir. 1993); *cf. NWSEO.*, 966 F.3d at 879-80.

The Authority's decision does not "involve" a ULP unless it "include[s] some sort of substantive evaluation of a statutory [ULP]." *ACT,* 507 F.3d at 699 (internal quotation marks omitted). "A mere 'passing reference' to a [ULP in an Authority

decision] will not suffice," to create federal court jurisdiction. *AFGE*, 453 F.3d at 503. Nor will the fact that a ULP charge existed as some point in history of the parties' dispute. *ACT*, 507 F.3d at 699.

The Union argues, frivolously, that the Authority intentionally avoided discussing a ULP to escape judicial review. (Pet'r Br. 22.) The Authority, however, did not discuss a ULP because the parties—including the Union—framed the issues before the Authority and the Arbitrator as contractual—not ULP—issues. (PA 3-5; 155; *see also* 5 C.F.R. § 2429.5 (stating that the Authority will only address arguments actually raised and adequately supported by the parties).) The issues before the Arbitrator in this case were purely contractual: whether the Agency violated the parties Master Agreement by using augmentation to reassign some non-custody staff to vacant custody positions. (PA 3-5.) So too, the Union's opposition to the Agency's exceptions to the Award contested only the proper interpretation of the Master Agreement. (PA 144-59.) Like the Arbitrator in his Award, and the parties in their exceptions, the Authority's Decision did not discuss substantive law governing ULPs. (PA 201-05.)

OEA addressed an identical situation. *OEA*, 824 F.2d at 66. In *OEA*, the Court considered two consolidated cases. *Id.* at 69-71. In the first, the union filed a grievance alleging that the agency had violated the contract by refusing to negotiate over changes to overtime practices. *Id.* at 68. The arbitrator—citing only the parties' contract—ordered the agency to bargain over the changes, and awarded backpay. *Id.*

The Authority upheld the arbitrator's bargaining order but set aside the backpay award. *Id.* at 68-69. The union petitioned for review with this Court, claiming jurisdiction existed "because the underlying agency conduct could have been characterized as a statutory [ULP]." *Id.*

This Court rejected that argument. "Although the underlying conduct was indeed *capable* of characterization as a statutory [ULP], particularly by virtue of the fact that the agreement tracks the [Statute], it is clear beyond cavil that it was *not* so characterized by any party, the arbitrator, or the Authority." *Id.* at 69 (emphasis in original). This is exactly the scenario the Union's Petition today presents to the Court, which thus lacks jurisdiction under § 7123(a). [5]

This Court has applied *OEA*'s rationale in subsequent cases. "If the aggrieved party choses to go the grievance procedure route, but characterized its claim as a statutory [ULP], judicial review certainly would be available." *U.S. Dep't of Interior v. FLRA*, 26 F.3d 179, 183 (D.C. Cir. 1994) ("*Interior*"). "However, if the aggrieved party characterized its claim as a violation of the collective bargaining agreement,

[5] The Union's Petition is easily distinguished from the second case the Court considered in *OEA*. There, the Authority determined that a grievance was barred because it involved the same issues that the union has previously filed as a ULP with the Authority's General Counsel. *Id.* at 70-71. To make that determination, the Authority was required to review the prior ULP charge, and its decision ultimately hinged on its interpretation of ULP law. *Id.* Thus, because Authority's decision contained a "substantive evaluation of a statutory [ULP]," it was reviewable under § 7123(a)(1). *Id.* at 71. Here, there are no such prior proceedings on the issues raised by the Union's grievance, and no such substantive evaluation of a statutory ULP.

judicial review could be had only if the claim 'involved' a [ULP]." *Id.* (internal alterations omitted).

In *Interior*, for example, the agency made jurisdictional arguments based on passing references in the union's brief, and a single sentence in the Authority's decision, suggesting that under different circumstances the case might be brought as a ULP. *Id.* at 184. The Court, however, found it lacked jurisdiction because it was "clear that a [ULP] was neither 'an explicit ground for,' nor 'necessarily implicated by, the Authority's [d]ecision,'" and denied the petition. *Id.* at 184-85. This case compels the same result.

That conclusion is not altered by the Union's tortured attempt to squeeze this case into this Court's jurisdiction by claiming that the case involves "statutory bargaining obligations" and arguing at length about how the Agency's policy changed the conditions of employment for its employees. (Pet'r Br. 13-18.) If the Union believed that to be the case, it should have raised those issues with the Arbitrator and Authority. But it did not do so. Only now, when it needs a basis for jurisdiction for its Petition, has the Union reversed course and argued for the first time that the Agency committed a ULP when it refused to negotiate over use of augmentation. (*Compare* Pet'r Br. 14-18, *with* PA 13-31 (Award), PA 144-59 (Local 3690 Opposition to Agency's Exceptions).) By failing to raise those objections before the Authority, the Union has waived them and cannot now rely on them to assert jurisdiction. 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. . . .").

Similarly unavailing is the Union's attempt to invoke this Court's jurisdiction by relying on a single sentence in a footnote in the Agency's exceptions to the Arbitrator's Award that "[t]he current case is clearly a ULP brought through an Arbitration." (Pet'r Br. 15 (citing PA 50).) The Agency made that claim in the midst of an attempt to persuade the Authority to apply the "covered-by" doctrine, which is a defense in ULP proceedings, "as a defense to a *contractual* duty to bargain." (PA 51 (emphasis added).) Under the covered-by doctrine, "[i]f a union and an employer in a collective-bargaining relationship reach an agreement on a subject during contract negotiations, neither side has a duty to bargain any further over that subject once the parties execute a collective bargaining agreement." *BOP II*, 875 F.3d at 669. Agencies use this doctrine as a defense to claims that they committed a ULP by failing to negotiate with a union concerning a subject by arguing that the subject is "covered-by" a fully negotiated term in the agreement. *See, e.g., id.*

In attempting to rely on the Agency's footnote to secure jurisdiction (Pet'r Br. 15), the Union does not mention the arguments it made to the Authority that emphasized the contractual—not statutory—nature of the dispute. (PA 155.) The Union asserted that its claim was a "Back Pay Act grievance" in which the Arbitrator "found that the Agency committed an unjustified and/or unwarranted personnel

action." (*Id.*) The Union asserted that the covered-by defense could not be asserted in connection with such contractual violations. (*Id.*)

The Union's tactical decision to contest, before the Authority, the Agency's claims that the matter involved a ULP was one it was free to make, but the decision has the consequence of depriving this Court of jurisdiction. First, the Union's argument highlights the fact that the Union never presented its claim before the Authority as a ULP and fought any attempt to characterize it as such. Second, the Authority agreed with the Union's position that the covered-by doctrine was inapplicable to this case (PA 202), and the Union is thus precluded from reversing that position in the current case. *See Zedner v. United States*, 547 U.S. 489, 504 (2006) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) (alterations omitted))).

Third, however the Agency may have characterized the case, no Member of the Authority, not even the dissenting Member, referred to or analyzed any statutory ULP. If a "mere 'passing reference' to a [ULP in an Authority decision] will not suffice," to create federal court jurisdiction, *AFGE*, 453 F.3d at 503, then a petition to review a decision with *no* reference to a ULP surely lacks such jurisdiction.

It is of no moment that the Union might have been more successful from the start if it had framed its claims as ULPs (though that too is unlikely given the Court's

holdings in *BOP I* and *BOP II*). *OEA*, 824 F.2d at 68-69. The Union did not frame its claims as ULPs, which is demonstrated by the Union's own words, the Award, and the Authority's Decision. The Union's eleventh-hour attempt to change course in order to manufacture federal court jurisdiction where there clearly is none must therefore fail.

A. The Union cannot create jurisdiction with this Court by claiming that the Agency committed a ULP by repudiating an MOU, because the Union never raised that objection until it filed its brief with this Court.

The Union cannot create jurisdiction by raising a wholly new argument on appeal: namely that the Agency committed a ULP when it repudiated the local MOU. (Pet'r Br. 13, 19-24.)

Again, the Statute precludes the Court from considering objections not raised before the Authority. 5 U.S.C. § 7123(c); *see also U.S. Dep't of Air Force v. FLRA*, 680 F.3d 826, 830 (D.C. Cir. 2012) (holding that strict enforcement § 7123(c) ensures that the Authority's expertise is brought to bear on each party's arguments and promotes both "agency autonomy and judicial efficiency."). So too, the Authority's regulations provide that parties may not raise arguments or request remedies that could have been, but were not, presented to the arbitrator. 5 C.F.R. § 2425.4(c).

The Union did not argue to either the Arbitrator or Authority that the Agency repudiated the MOU. (*Compare* Pet'r Br. 13-19 *with* PA 1-36 (Award discussing only contractual claims); *see also* PA 144-59 (the Union Opposition to the Agency's

Exceptions that did not argue that the Agency repudiated the parties' MOU).) As it failed to raise this claim before either the Arbitrator or Authority, the Union waived any arguments it may have had concerning this alleged ULP. 5 U.S.C. § 7123(c). The Court should therefore reject the Union's attempt to generate jurisdiction based on a claim it abandoned long before it appeared before this Court.

This Court should also reject the Union's attempt to use *Undersea Warfare* to belatedly reframe the contractual dispute heard by the Arbitrator and Authority as a ULP. (Pet'r Br. 20-22.) In *Undersea Warfare*, this Court found that it had jurisdiction to review an Authority decision requiring an agency to bargain over providing bottled water because the decision necessarily implicated a statutory ULP. 665 F.3d at 1343. That was because the decision "could not possibly have been upheld based on the contract because the contract provided no ground for the Authority's decision." *Id.* at 1345. Specifically, the Authority 1) identified no provision of the collective bargaining agreement supporting its decision, and in finding a duty to bargain, 2) relied on two of its prior cases finding that agencies had a *statutory* duty to negotiate over the removal of water coolers; and 3) required the agency to bargain with an employee organization with which the agency had no collective bargaining agreement. *Id.* at 1345-46.

The facts of this case are markedly different. The Authority explicitly based the Decision on the language of a specific provision of the Master Agreement: Article 18. (PA 202-03.) Nor is there any dispute that the Union and Agency are parties to the Master Agreement. And, in rendering the Decision, the Authority did not rely on

precedent concerning a statutory duty to bargain. Instead it relied on precedent, including two of this Court's cases, finding that Article 18 of the Master Agreement was unambiguous. (PA 202, n.12 (this Court "has twice examined Article 18, as was contained in the parties' agreement executed in 1998, and ruled that it "covers and preempts challenges to all specific outcomes of the assignment process." (citing *BOP I*, 654 F.3d at 96; *BOP II*, 875 F.3d at 670)).) While those previous disputes (*BOP I* and *BOP II*) may have involved ULPs, the Authority considered those cases only to the extent that they shed light on the meaning of Article 18. (PA 202-03.)

Nor does the Authority's reference to *BOP I and II* show that the Authority's Decision "found that the covered-by doctrine permitted the Agency to repudiate the MOU." (Pet'r Br. 20.) In fact, the Authority made the opposite point. "*Although the prior cases [BOP I and BOP II] were decided under the 'covered-by' principle*, neither the Authority nor [this Court] has found management's reassignment authority under Article 18 to be ambiguous." (PA 202-03 (emphasis added).) Again, the Authority relied on those cases to underscore that Article 18 was a clear contractual term. (PA 202-03.) The Authority then applied precedent that past practice cannot alter a clear contractual term. The quality and nature of the Authority's reliance on *BOP I* and *BOP II* thus distinguishes this case from *Undersea Warfare*.

If anything, *BOP I* and *BOP II* demonstrate that there is a path to judicial review when disputes involve both contractual and statutory claims, and that the path was not followed here. That conclusion is buttressed by this Court's recent decision

in *National Weather Service Employees Organization v. FLRA*, which makes clear that the Union could have brought a contractual and a ULP claim arising from the same set of facts. 966 F.3d 875, 879 (2020). If the Authority evaluated exceptions related to both claims, then the whole of the Authority's decision would potentially be subject to judicial review. *Id.* By contrast, the Union here brought only contractual claims at arbitration and opposed the Agency's exceptions based on the Union's interpretation of the Master Agreement—not any statutory ULP ground. (PA 13-36.)

The Authority's Decision neither explicitly nor implicitly implicated a ULP. *AFGE*, 453 F.3d at 503. The issues presented by the Union and addressed by the Arbitrator and Authority were purely contractual. (PA 13-36, 201-05.) The Decision did "not contain a substantive discussion of a [ULP] claim." *ACT*, 507 F.3d at 700. There is in this case "no risk the Authority will leave the path of the law of ULPs and yet escape the review that would bring it back to the straight and narrow." *Id.* (quoting *AFGE*, 453 F.3d at 505). This Court should therefore decline the Union's invitation to rewrite the history of this case and instead hold that it lacks jurisdiction under § 7123(a).

B. Language in the Decision concerning the *Steelworkers* trilogy did not impact substantive law concerning ULPs.

The Union cannot rescue the Petition from dismissal with the false claim that this case affects the law of ULPs because the Authority allegedly repudiated the *Steelworkers* trilogy in its Decision. (Pet'r Br. 23-24.) That is so for two reasons.

First, the Union grossly mischaracterizes the Authority's discussion of *Steelworkers*. (Pet'r Br. 24-25.) The Authority did ***not*** hold that *Steelworkers* was inapplicable to federal-labor-management relations or that the Authority "has the sole discretion to inset its opinion in place of the Arbitrator's." (Pet'r Br. 25.) The Decision explicitly recognized that the *Steelworkers* trilogy provides "valuable guidance" concerning the review of arbitration awards. (PA 205.) The Authority merely found that the *Steelworkers* cases do not require the Authority to give "blind deference" to arbitrators or "ignore erroneous arbitral awards that run counter to the plain language, or judicial interpretations, of contractual provisions." (PA 205.) The Authority's observation is not novel; federal courts adjudicating private-sector cases have come to the same conclusion. *See, e.g.*, *Penn. Power Co. v. Local Union No. 272, Int'l Broth. of Elec. Workers*, 276 F.3d 174, 178-80 (3d Cir. 2001) (vacating arbitrator's award because it wrote into the parties' agreement a requirement of parity between the benefits offered to supervisory and union employees that had no basis in the parties' agreement); *Int'l Union, United Auto Workers v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000) (vacating an arbitration award where the arbitrator failed to consider the binding effect of a prior arbitration and because "his award also contravened the Agreement's 'plain language.'"). The Union's claim that the Authority's Decision conflicts with this Court's decision in *NWSEO* (Pet'r Br. 24-25), is thus untrue.

Second, the Union fails to explain how the Authority's commentary on the *Steelworkers* trilogy—which concern the review of arbitration awards—affects

substantive law governing ULP cases. (*See* Pet'r Br. 23.) The Award that the Authority reviewed did not adjudicate a statutory ULP. (PA 1-5.) The Union opposed the Agency's exceptions based on the Union's interpretation of the parties' Master Agreement. (PA 144-59.) The Authority then set aside the arbitration award because it failed to draw its essence from the parties' agreement. (PA 201.)

If the Authority's discussion of the rules applicable to review of arbitration awards "involves" substantive ULP law, then there would be no arbitration award that could fall outside this Court's jurisdiction. Accepting the Union's argument here would undermine the clear Congressional bar on judicial review of arbitration awards. *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988). It would also require the Court to disregard the text of the Statute and over forty years of precedent. As the Union offers no coherent reason to do so, the Court should dismiss the Petition.

C. The Court does not have jurisdiction under the narrow exception created by *Leedom v. Kyne*.

The Union's *Leedom* claims fail, because not only has the Union asserted those claims in the wrong court, it also has not met the "nearly insurmountable" burden of establishing entitlement to *Leedom* jurisdiction. *U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993).

Leedom jurisdiction may only be invoked in federal district court. *AFGE*, 453 F.3d at 506. Futher, to invoke *Leedom* jurisdiction, the Union must demonstrate: "(i) the statutory preclusion of review is implied rather than express . . . (ii) there is no

alternative procedure for review of the statutory claim; *and* (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (internal citations and quotations omitted) (emphasis added). The Union's Petition does not to meet those requirements.

First, by raising a *Leedom* claim in this Court, the Union ignores two of this Court's decisions that explicitly hold that *Leedom* claims against the Authority may only be brought in federal district court. In each of those cases, this Court rejected petitioners' attempts to side step § 7123(a)'s bar to judicial review because "[t]he *Leedom* exception . . . is premised on the original federal subject matter jurisdiction of the district courts" and thus cannot be first asserted in a Court of Appeals. *AFGE*, 453 F.3d at 506 (quoting *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 688 n. 6 (D.C. Cir. 1994)).

Second, even if the Union had made a claim for *Leedom* jurisdiction in the proper court, the Union still could not meet the criteria necessary to assert *Leedom* jurisdiction. "The *Leedom v. Kyne* exception applies . . . only where the statutory preclusion of review is implied rather than express." *Nyunt*, 589 F.3d at 449 (citing *Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991)); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 63-64 (D.C. Cir. 2001)). In this case, § 7123 of the Statute expressly excludes orders "under [§] 7122 of this title (involving an award by

an arbitrator)" from the scope of judicial review. 5 U.S.C. § 7123(a). By contrast, *Leedom* "involved preclusion that had been *inferred* from the National Labor Relations Act, and is therefore merely an application of the familiar requirement that there be 'clear and convincing evidence' of legislative intent to preclude review." *McBryde*, 264 F.3d at 63 (emphasis in original) (quoting *MCorp.*, 502 U.S. at 44). As "the specific language of § 7123, the structure of the [Statute's] arbitration and review provisions, and the relevant legislative history all provide clear and convincing evidence that Congress intended to cut off judicial review of FLRA decisions regarding arbitration awards of the sort involved in this case," *Leedom* jurisdiction is unavailable in this case. *Griffith*, 842 F.2d at 492.

Finally, the Union's attempt to invoke *Leedom* jurisdiction fails because the doctrine "is not one to 'review' . . . a decision [an agency] made within its jurisdiction." 358 U.S. at 188. Rather, it applies only when an agency violates a "clear and mandatory" statutory provision in a manner that is "so extreme that one may view it as jurisdictional or nearly so." *Nyunt*, 589 F.3d at 449 (quoting *Griffith*, 842 F.2d at 493).

The Petition, however, is plainly one to review a decision of the Authority made within its jurisdiction to take "such actions" as it "consider[s] necessary" in resolving exceptions to arbitration awards under 5 U.S.C. § 7122(a). That includes setting aside arbitration wards on "grounds similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a)(2). The Authority's

Decision followed its own regulations in setting aside the Award, because the Award failed "to draw its essence from the parties' collective bargaining agreement." 5 C.F.R. § 2425.6. The Union thus cannot establish that the Authority disregarded a "clear and mandatory" statutory provision. The Authority's application of its own standard of review for arbitration awards does not amount to the disregard of "a specific and unambiguous statutory directive." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP*, 437 F.3d 1256, 1264 (D.C. Cir. 2006).

That conclusion is not altered by the Union's argument that the Decision failed to adhere to *Steelworkers* cases. (Pet'r Br. 25-39.) As described above and below, the Authority did not in the Decision "announce[] it would no longer follow *Steelworkers*." (Pet'r Br. 25.) Indeed, the Authority acknowledged that those cases guide its review of arbitration awards. (PA 205.) It merely stated that, to the extent that the Authority's past precedent could be read to require "blind adherence" to arbitrator's awards, the Authority would no longer follow that precedent. (PA 205.)

The Statute requires only that the Authority review arbitration decisions on grounds "similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a). The Authority did so in this case when it determined that the Arbitrator's Award failed to draw its essence from Article 18, the meaning of which this Court has twice determined. (PA 204.) By failing to heed *this Court's* interpretation of the Master Agreement and instead relying solely on "past practice" that had supposedly become an "unwritten contractual right," the Arbitrator

did not "arguably construe" the meaning of the contract. *NWSEO*, 966 F.3d at 881. Thus, the Authority correctly set aside the Award for failing to draw its essence from the parties' Master Agreement. (PA 205.) Contrary to the Union's assertions (Pet'r Br. 31), that conclusion is buttressed by decisions in other Circuits vacating arbitration awards where arbitrators failed to arguably construe the parties' contracts. *See, e.g., Marrowbone Dev.*, 232 F.3d at 389; *Penn. Power*, 276 F.3d at 178-80. The Union cannot, therefore, establish that the Authority violated a clear and mandatory provision of the Statute, much less that it committed an error "so extreme that one may view it as jurisdictional or nearly so." *Nyunt*, 589 F.3d at 449.

D. The Union's attempt to assert jurisdiction under *Customs* is unavailing because this case does not involve law outside of the Authority's area of responsibility.

The exceptional circumstances that gave rise to this Court's jurisdiction in *Customs* are not present in this case. *Customs* involved this Court's review of an Authority decision that hinged on the Authority's interpretation of a law related to import tariffs, not working conditions. 43 F.3d at 689. *Id.* This Court found that it had jurisdiction in the case because a "'grievance' predicated on a claim of violation of a law that is *not* directed toward employee working conditions is outside both the arbitrator's and the [Authority]'s jurisdiction." *Id.* (emphasis in original).

Here, the Authority's Decision involved only the interpretation of the parties' contract and the rules applicable to labor-management arbitration in the federal sector. (PA 201-05.) Neither the Authority's Decision nor the Award interpreted any

law unrelated to working conditions. (*Compare* PA 13-36, 201-05, *with Customs*, 43 F.3d at 689-91.) Instead, the question the Authority and Arbitrator decided was whether the Agency had an obligation to bargain about changes to employees' work assignments made in accordance with the parties' Master Agreement. (PA 201-03.) Resolving that question is at the heart of the Authority's function and expertise. 5 U.S.C. §§ 7101, 7122. The narrow exception that allowed for jurisdiction in *Customs* thus does not apply in this case.

II. If the Court reaches the merits, it should deny the Petition because the Authority's Decision is neither arbitrary nor capricious.

A. The Authority set aside the Award because it was in direct conflict with this Court's precedent interpreting the parties' Master Agreement.

If it had jurisdiction, the Court would review the Authority's Decision to determine it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *BOP I*, 654 F.3d at 94. Even if this Court had jurisdiction (and it does not), this Court should find that the Authority's Decision was not arbitrary or capricious.

In *BOP II*, the Court criticized a series of Authority decisions that—after *BOP I*—upheld arbitration awards requiring the Agency to bargain anew over staffing assignments and roster creation, because those awards failed to give full effect to the plain language of Article 18. (*See* PA 204; *see also BOP II*, 875 F.3d at 673.) The Authority attempted to correct that mistake in this case by following this Court's

interpretation of Article 18. The Authority's adherence to this Court's interpretation of Article 18 can hardly be considered arbitrary or capricious—indeed, it is the Union's attempt to have this Court ignore *BOP I* and *BOP II*'s clear interpretation of the Master Agreement that would result in arbitrary and capricious decision-making.

The Arbitrator's reliance on an "unwritten contractual right," created out of whole cloth from the Agency's alleged past practice, directly contradicted the parties' written agreement embodied in Article 18 and compelled the Authority to set aside the Award. The Authority may find arbitration awards deficient "on other grounds similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a)(2). Thus, the Authority will set aside an arbitration ward if it "[f]ails to draw its essence from the parties . . . agreement." 5 C.F.R. § 2425.6(b)(2)(i). An award fails to draw its essence from a CBA when "the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement." *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 70 FLRA 783, 785 n.31 (2018) (Member DuBester dissenting) (citing *U.S. Dep't of Labor*, 34 FLRA 573, 575 (1990)). "[A]rbitrators may consider parties' past practices when interpreting an ambiguous contract provision, but they may not rely on past practices to *modify* the

terms of a contract." *U.S. Dep't of the Navy Puget Sound Naval Shipyard*, 70 FLRA 754, 755 (2018) (Member DuBester dissenting) (emphasis in original).

The Arbitrator found that the Agency had an obligation to bargain because he found that the Agency's past practice had created a new, unwritten, contractual term. (PA 22-23.) The Arbitrator determined that the Agency could not deviate from this "unwritten contractual right" without bargaining. *Id.* The Arbitrator's discovery of this "unwritten contractual right" was in direct conflict with the Master Agreement, specifically Article 18, Section o, that permits the Agency to reassign employees, without notice, to different posts in the same shift. (PA 141.) The Authority could not uphold the Award because it had no basis in the parties' written agreement, but instead flouted the plain terms of the Master Agreement. (PA 201-03). That is, the Arbitrator added a new contract term that was in direct conflict with the parties' written agreement. (*Id.*) The Authority's Decision granting the Agency's exceptions was thus neither arbitrary nor capricious—instead, it was compelled both by the Authority's and this Court's precedent.

The Union fails in its attempt to distinguish this case from *BOP I* and *BOP II*. (Pet's Br. 40-42.) This Court's strong language in *BOP II* dictates that no contractual bargaining obligation may arise from the specific outcomes of staffing assignments made in accordance with Article 18. 875 F.3d at 674-76. The Authority thus acted reasonably when it enforced the plain language of Article 18, and set aside an Award premised on the Arbitrator's finding of a conflicting, unwritten contractual term.

The Union argues that the Authority abused its discretion when it set aside the Award because in doing so it upheld a ULP. (Pet'r Br. 42.) The Union, however, did not argue that this case involved a ULP either in proceedings before the Arbitrator (PA 1-36) or the Authority (PA 155-56). The Authority considered only the issues and arguments presented to it, as it was required by its regulations to do. *See* 5 C.F.R. § 2429.5. Thus, the Authority's Decision to set aside the Award because it did not draw its essence from the parties' agreement did not involve a statutory ULP.

B. The Authority's application of the *Steelworkers* trilogy to this case did not represent a break with the Authority's past precedent.

The Union incorrectly argues that the Authority's Decision represents an unjustified departure from its past precedent. In its Decision, the Authority clarified that the *Steelworkers* trilogy does not require the Authority to "ignore erroneous arbitral awards that run counter to the plain language, or judicial interpretations, of contractual provisions." (PA 204-05.) The Authority's Decision did not repudiate past precedent requiring a high level of deference to arbitrators' findings. Instead, the Authority affirmed that *Steelworkers* will continue to guide its decisions. (PA 205.)

To the limited extent that the Decision questions how much deference the *Steelworkers* trilogy requires the Authority to afford to arbitrators' findings, those questions were justified by the facts of this case. (PA 204.) The Arbitrator did not resolve an isolated or novel dispute over the parties' agreement. (*Id.*) Instead, the Arbitrator resolved a dispute over a contractual provision (Article 18) which has been

interpreted numerous times by courts and the Authority itself, including two decisions from this Court that explicitly state that Article 18 represented the completion of the parties' bargaining over the process (and impact and implementation) of the Agency's staffing decisions. *BOP I*, 654 F.3d at 95.

It was in this context that the Authority concluded that even though the *Steelworkers* trilogy requires reviewing bodies to afford arbitrators a high level of deference, that does not mean that the Authority must approve an arbitration award that invents a new contractual term from whole cloth and is "'directly at odds with th[e] court's [interpretations of Article 18] in *BOP I*." (PA 204.) That conclusion is similar to the conclusion reached by courts in private sector proceedings. *See Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union Local No. 2-991*, 385 F.3d 809, 816-17 (3d Cir. 2004) ("Although our review of an arbitration award is 'highly deferential[,]' we do not 'simply . . . rubber stamp [arbitrators'] interpretations and decisions.'"); *see also Marrowbone Dev.*, 232 F.3d at 389; *Penn. Power*, 276 F.3d at 178-80.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court dismiss the Petition for Review for lack of jurisdiction, or in the alternative deny it in its entirety.

Respectfully submitted,

/s/Noah Peters
NOAH PETERS
Solicitor
REBECCA J. OSBORNE
Deputy Solicitor
SARAH C. BLACKADAR
Attorney
Federal Labor Relations Authority
1400 K Street, NW
Washington, DC 20424
(202) 218-7908

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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 Garamond font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 10,675 words excluding exempt material.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2021, I electronically filed the foregoing with the Clerk of the Court for the U.S. 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/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

ADDENDUM

Relevant Statutes and Regulations

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5 U.S.C. § 7101

Findings and purpose

(a) The Congress finds that--

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7122

Exceptions to arbitral awards

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

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

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

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

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

5 U.S.C. § 7123(a), (c)
Judicial review; enforcement.

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

> 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
>
> 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.

. . . .

(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.

5 C.F.R. § 2425.4(c)
Content and format of exceptions.

(c) What is prohibited. Consistent with 5 CFR 2429.5, an exception may not rely on any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented to the arbitrator.

5 C.F.R. § 2425.6

Grounds for review; potential dismissal or denial for failure to raise or support grounds.

(a) The Authority will review an arbitrator's award to which an exception has been filed to determine whether the award is deficient—

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

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

(b) If a party argues that an award is deficient on private-sector grounds under paragraph (a)(2) of this section, then the excepting party must explain how, under standards set forth in the decisional law of the Authority or Federal courts:

(1) The arbitrator:

(i) Exceeded his or her authority; or

(ii) Was biased; or

(iii) Denied the excepting party a fair hearing; or

(2) The award:

(i) Fails to draw its essence from the parties' collective bargaining agreement; or

(ii) Is based on a nonfact; or

(iii) Is incomplete, ambiguous, or contradictory as to make implementation of the award impossible; or

(iv) Is contrary to public policy; or

(v) Is deficient on the basis of a private-sector ground not listed in paragraphs (b)(1)(i) through (b)(2)(iv) of this section.

(c) If a party argues that the award is deficient on a private-sector ground raised under paragraph (b)(2)(v) of this section, the party must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions.

(d) The Authority does not have jurisdiction over an award relating to:

(1) An action based on unacceptable performance covered under 5 U.S.C. 4303;

(2) A removal, suspension for more than fourteen (14) days, reduction in grade, reduction in pay, or furlough of thirty (30) days or less covered under 5 U.S.C. 7512; or

(3) Matters similar to those covered under 5 U.S.C. 4303 and 5 U.S.C. 7512 which arise under other personnel systems.

(e) An exception may be subject to dismissal or denial if:

(1) The excepting party fails to raise and support a ground as required in paragraphs (a) through (c) of this section, or otherwise fails to demonstrate a legally recognized basis for setting aside the award; or

(2) The exception concerns an award described in paragraph (d) of this section.

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.