ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1028

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.

Petition for Review of Order of the
Federal Labor Relations Authority,
71 FLRA 1046 (2020); 72 FLRA 622 (2022)

PETITIONER NATIONAL ASSOCIATION OF IMMIGRATION JUDGES' BRIEF IN SUPPORT OF PETITION FOR REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The following parties appeared before the Federal Labor Relations Authority: National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2.

The following are parties in this Court: National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2, and the Federal Labor Relations Authority.

B. Rulings Under Review

Petitioner seeks review of the following related orders: (1) the November 2, 2020 order of the Federal Labor Relations Authority ("FLRA") granting the U.S. Department of Justice, Executive Office of Immigration Review's September 4, 2020 application for review and determining that immigration judges were management officials and thus excluded from the bargaining unit, and (2) the January 21, 2022 order of the FLRA denying the Union's November 17, 2020 motion for reconsideration.

C. Related Cases

The case on review has not previously been before this Court or any other court. No related cases are pending in this Court or in any other court.

Dated: June 8, 2022

Respectfully submitted,

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/s/ Majed Dakak
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2, by and through their undersigned counsel, hereby certify that they are a non-profit trade association whose members consists of immigration judges around the country. It has no parent corporation and that no public held corporation owns 10% or more of their stock.

Dated: June 8, 2022

Respectfully submitted,

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STATEMENT OF JURISDICTION

The Authority's first order was entered on November 2, 2020 ("*EOIR 2020*"). *U.S. Dep't of Just. Exec. Off. For Immigr. Rev.,* 71 FLRA 1046 (2020). In *EOIR 2020*, the Authority directed the Regional Director to exclude immigration judges ("IJ") from the bargaining unit. The National Association of Immigration Judges, International Federation of Professional and Technical Engineers Judicial Council 2 (the "Union" or "Petitioner") filed a timely motion for reconsideration and on January 21, 2022, the Authority issued an order denying Petitioner's motion for reconsideration ("*EOIR 2022*"). The Petitioners assert jurisdiction in this Court pursuant to 5 U.S.C. § 7123(a) and this Court's holding in *Griffith v. FLRA*, 842 F.2d 487, 495 (D.C. Cir. 1988).

Under Section 7123, "any person aggrieved by any final order of the Authority . . . 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 for the District of Columbia." 5 U.S.C. § 7123. Section 7123(a)(2) , which otherwise bars the review of orders determining appropriate unit determinations under section 7112, is inapplicable because this Court has jurisdiction over constitutional claims against the Authority.

The Supreme Court has held that constitutional claims are entitled to judicial review even when a statute purports to strip federal courts of oversight. *Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (finding that the National Security Act did not contain clear evidence of Congress's intent to preclude review of "colorable constitutional claims"); *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012) (stating that *Webster's* clear evidence standard applies when "a statute purports to 'deny any judicial forum for a colorable constitutional claim'") (citations omitted). Likewise, the D.C. Circuit has held that this Court retains jurisdiction over constitutional due process claims even where judicial review is expressly precluded by statute. *Griffith*, 842 F.2d at 494-95 (D.C. Cir. 1988). In *Griffith*, the D.C. Circuit analyzed 5 U.S.C. § 7123(a)(1), one of the two jurisdiction-stripping provisions in the Federal Service Labor-Management Relations Statute. This petition involves the other—7123(a)(2), but the *Griffith* court's analysis applies with equal force in this case.

In *Griffith*, this Court held that it could review the constitutional challenge to an arbitrator's award of a retroactive pay increase. *Id.* at 494-95. The court reasoned that the statute did not clearly and convincingly preclude review of constitutional claims and that the legislative history was insufficient to support an inference of preclusion. *Id.*; *see also U.S. Dep't of Homeland Sec. v. FLRA*, 784

F.3d 821, 823 (D.C. Cir. 2015) (reaffirming *Griffith* and holding that the bar on judicial review of Authority decisions regarding arbitration awards did not apply to constitutional challenges). While this case involves a review of a unit determination rather than an arbitrator award, there is nothing in the legislative history, statutory text, or reasoning of *Griffith* that would make one subject to judicial review for constitutional due process violations but not the other. The legislative history of both sections is identical with respect to the review of constitutional claims. Although the *Griffith* court found that "Congress intended to cut off judicial review of FLRA decisions regarding arbitral awards of the sort involved in this case," 842 F.2d. at 492, the court specifically distinguished the review of constitutional claims and, in doing so, rejected arguments that the legislative history specifically forecloses constitutional review. *Id.* at 494. "This silent deletion is not enough, under our cases, to support an inference of intent to preclude constitutional claims." *Id.* at 495.

Moreover, in *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500 (D.C. Cir. 1984), the D.C. Circuit recognized that the legislative history contained language that restricted judicial review of Authority decisions, except when constitutional questions were raised. The underlying logic in *Griffith* and *Brewer* is supported by *Weinberger v. Salfi*, where the Supreme Court found that statutes

precluding constitutional challenges in their totality "would raise a serious constitutional question of the[ir] validity . . ." 422 U.S. 749, 762 (1979). The Supreme Court further held that such a limitation would be "extraordinary" and would also require clear and convincing evidence "before [the court] would ascribe such intent to Congress." *Id.; see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 n.20 (1994) (stating that the case does not present the "'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim").

1. There is no indirect path for review of the Union's constitutional claims, which have already been raised, and ruled upon, before the Authority.

The Union has no path to obtain judicial review by proceeding first before the Authority. The Authority has argued that the Union is free to obtain indirect judicial review of its constitutional claims by refusing to bargain, drawing an unfair labor practice charge, and appealing that charge to the Authority and then to a court of appeals. This argument fails for two reasons.[1] First, the Union has

[1] It is important to note that this statement is also irrational. The Authority's decision decertifying the Union negates any obligation under the statute on the part of the Agency to bargain with the Union. Thus, the Union has no basis to allege a valid unfair labor practice charge, and the Regional Director has no authority to issue a complaint against the Agency alleging an unfair labor practice. In the context of an unfair labor practice charge, the Union simply has no avenue to get the matter before the Authority or challenge *EOIR 2020*.

already brought these claims to the Authority, and the Authority has already rejected them in its April 12, 2022 order. *See* Order Dismissing In Part and Denying In Part Motion for Reconsideration and Denying Motion for Stay, 72 FLRA No. 146 (2022). Second, there is no conceivable way for the Union to file an unfair labor practice charge because it is no longer a certified union.

First, the Union has already exhausted its administrative remedies and any further attempt by the Union to proceed before the Authority would be futile because the Authority has already rejected the Union's constitutional claims. On February 7, 2022, the Union filed its Second Motion for Reconsideration and for Stay with the Authority, specifically asking for a reconsideration of *EOIR 2022* or in the alternative, a stay pending this petition for review. Resp't's February 7, 2022 Mot. for Recons. and for Stay. In it, the Union specifically raised its due process claims, citing to the Authority's arbitrary decision-making, its decision to enforce previously undisclosed rules, its decision to issue an arbitrary order, and other issues. *Id.* at 1-2, 20-21. On April 12, 2022, the Authority issued an order dismissing in part and denying in part the Union's motion for reconsideration and for a stay. *U.S. Dep't of Justc. Exec. Off. For Immigr. Rev.*, 71 FLRA No. 146 (2022). In its order, the Authority addresses the Union's due process claims regarding its procedures and violations of its own regulations. *Id.* at 734-36. The

Authority found that the "Union's assertion is not based in the law" and that it did not demonstrate extraordinary circumstances. *Id.* at 735. Thus, the Authority has ruled on the Union's constitutional claims, and the Union has therefore exhausted its administrative remedies. In fact, the Union has repeatedly and meticulously engaged with the Authority since 2019 in its futile attempts to get the Authority to provide some reasoned basis for its decision and has been working through each step of the statutory framework.

Second, the Union no longer has any viable alternative path to judicial review by proceeding before the Authority because it has been decertified. This decertification order cuts off any path the Union could take to seek redress before the FLRA. As stated in footnote 1, *supra*, there is no avenue by which the Union can use an unfair labor practice charge to bring this case back (for the fourth time) to the FLRA. The Agency's refusal to bargain after the Union's certification has been revoked simply does not constitute an unfair labor practice. Any such allegation would be dismissed by the Regional Director, and an appeal of that dismissal would end with the General Counsel (not the Authority). *See* 5 C.F.R. § 2423.11(b)-(g).

2. *EOIR 2022* is not an appropriate unit determination but an order denying a motion to reconsider.

Additionally, even if judicial review of the constitutional defects in *EOIR 2020* were somehow foreclosed despite *Griffith*, this court still has jurisdiction to review the Authority's decision in *EOIR 2022* because *EOIR 2022* is an order denying reconsideration of *EOIR 2020* and does not involve an appropriate unit determination. Because *EOIR 2022* is not "an order under . . . section 7112 of this title," 5 U.S.C. § 7123(a)(2), it could not be subject to any jurisdictional bars imposed by Section 7123.[2]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Federal Labor Relations Authority ("Authority" or "FLRA") violated Petitioner's procedural due process rights by preventing Petitioner from raising the collateral attack bar defense, issuing an advisory opinion after the case was moot, and enforcing previously unknown Authority procedural rules?

[2] To the extent the Authority attempts to argue the petition for review is premature, the argument must fail since the Union's Motion to Reconsider that was pending at the time of filing this petition for review was a motion to reconsider *EOIR 2022* and not *EOIR 2020*. So, the Authority's argument could not apply to *EOIR 2020*. To the extent the Court deems it necessary, the Union can immediately file a new petition for review with respect to *EOIR 2022*.

2. Whether the Authority violated Petitioner's substantive due process rights by failing to provide any reasoned analysis for its November 2, 2020, and January 21, 2022 decisions?

STATEMENT OF THE CASE

This is a federal employment labor relations case. Petitioner claims that the Authority's *EOIR 2020* and *EOIR 2022* decisions, which overturn over 20 years of precedent and find that immigration judges cannot be part of a collective bargaining unit, violate their procedural and substantive due process rights due to: (1) the Authority's various violations of their own precedent, regulations, and procedures, and (2) the decisions' arbitrary conclusions and lack any meaningful analysis or support. The petition for review follows repeated unsuccessful attempts by the Union to have the Authority explain its own reasoning and follow its own rules.

STATEMENT OF FACTS

The Union represents a national coalition of immigration judges. The Union was first certified in 1979. In 1999, the United States Department of Justice, Executive Office of Immigration Review (the "Agency") sought to decertify it. After a hearing, the then-Regional Director dismissed the Agency's petition, finding that immigration judges are not management officials under the federal

labor relations statute. *See U.S. Dep't of Just., Exec. Off. For Immigr. Rev.,* ("*EOIR 2000*"), 56 FLRA 616, 622 (2000). The Agency appealed to the full Authority, which unanimously affirmed the Regional Director's decision. *Id.* In that 2000 decision, the Authority carefully distinguished between the role of BIA members (whose ineligibility to participate in a union was decided in a 1993 case, *U.S. Dep't of Justc., Bd. Of Immigr. Appeals*, 47 FLRA 505 (1993) ("*BIA*")) from that of immigration judges. *Id.* A fundamental distinction—equally true today—was that BIA members can establish precedent while immigration judges cannot. *Id.*

A. Petition, Hearing, and Briefing

Almost twenty years later, the Agency filed the current petition to clarify the bargaining unit on August 13, 2019, asserting that certain "factual and legal developments" since 2000 indicated that immigration judges should be "excluded from forming or joining a labor organization." EOIR Representation Pet., ("Petition") at 4. Specifically, the Agency alleged that "IJs should be precluded from forming or joining a labor organization. . . based on recent developments in the nature of the IJ position." Pet., at 1. The Regional Director's Notice of Representation Hearing was issued on November 5, 2019.

Four days before the hearing, the Agency submitted a 45-page pre-hearing brief, arguing for the first time that the Authority's 2000 decision was "wrongly

decided" because it failed to recognize the similarities between immigration judges and members of the Board of Immigration Appeals (the "Board"). Agency Pre-Hr'g Br., at 5-6. With respect to the purported "legal changes" since 2000, its arguments centered on two regulations adopted by the Department of Justice in 1999 and 2002 as part of its effort to "streamline" appellate review of immigration judge decisions. *See id.* at 9.

In its pre-hearing brief, the Agency maintained that these regulations represented a substantial change in the law regarding the significance of immigration judge decisions because, when the Board declines to write a separate opinion (and instead adopts the decision of an immigration judge), it is the decision of the immigration judge that is reviewed on appeal before a federal court. *Id.* at 25. The Union also submitted a pre-hearing brief, explaining that changes in these regulations did not transform immigration judges into policymakers. Union Pre-Hr'g Br. at 4.

The representation hearing was held at FLRA headquarters on January 7-8, 2020, before Hearing Officer William D. Kirsner. Six witnesses testified, and numerous exhibits were entered into the record. After the hearing, the Agency and Union both submitted post-hearing briefs, and the Union requested permission to file a reply brief, which it did on March 30, 2020. *See* Agency Post-Hr'g Br.;

Union Post-Hr'g Br.; Union Post-Hr'g Reply Br. All told, the Regional Director had hundreds of pages of briefing, exhibits, and testimony before her.

B. Regional Director Decision

On July 31, 2020, the Regional Director issued her decision, denying the Agency's petition and concluding that pursuant to Authority precedent, and based on the full record before her, immigration judges are not management officials within the meaning of the federal labor relations statute. Regional Director Decision ("RD"), at 24. In a 25-page decision, she considered—and ultimately rejected—the Agency's arguments that purported "legal changes" had rendered immigration judges "management officials."

The decision first addressed the threshold question of whether "substantial changes" had occurred since 2000 to allow her to review the Agency's petition, finding that review was warranted owing to the regulatory change related to the standard of review of immigration judge factual findings from *de novo* to clear error. *Id.* at 16.

The "substantial change" threshold satisfied, the Regional Director turned to the merits, ultimately concluding that the deference granted to immigration judges' factual findings does "not turn judges into management officials." *Id.* at 21. This is so, she explained, because "IJs made factual findings both before and after [this]

change…and the BIA continues to review and to remand cases as necessary." *Id.* at 20. Further, in "following the law, regulations and precedential [BIA] decisions," the Regional Director reasoned, immigration judges "implement immigration policies, they do not create or influence EOIR policies." *Id.* at 23. The "fact that the IJs level of deference to factual findings has been increased does not impact the IJs' status as the deference granted continues to be subject to review by the BIA, is subject to remand if it is inadequate, and is subject to being reversed by the BIA when warranted." *Id.* at 23.

She also rejected the Agency's broader argument that immigration judges are management officials because they "make policy" through their decisions because, just as in 2000, immigration judge's opinions are neither published nor do they create precedent—and "the vast majority of IJ decisions continue to be subject to review by the BIA . . . support[ing] the conclusions that the IJs are not managers." *Id.* at 19 (citing *U.S. Dep't of Agric. Food & Nutrition Serv. Alexandria, Virginia & Nat'l Treasury Employees Union*, 34 FLRA 143, 147 (1990)).

C. Authority's Decision in *EOIR 2020*

On September 4, 2020, the Agency submitted an Application for Review, asking for review under every single prong found in 2422.31(c) of the Authority's

regulations. *See* Agency. App. at 15-16. The Union filed its opposition on September 23, 2020. *See* Union Opp. at 7-8. The Association of Administrative Law Judges filed its amicus brief in support of the Union's opposition on October 2, 2020. *See* Brief for The Association of Administrative Law Judges as Amicus Curiae in Support of National Association of Immigration Law Judges' Opposition to Application for Review, at 5.

On November 2, 2020, the Authority issued its decision, granting the Agency's application for review but without allowing the supplemental briefing the Union had requested under 5 C.F.R. § 2422.31(g). *EOIR 2020*, at 1046; Union Opp. at 36. In its three-and-a-half-page decision, the Authority agreed that a substantial change had occurred but did not identify the substantial change. *Id.* at 1047. The Authority then turned to the Agency's argument that *EOIR 2000* must be reconsidered because it conflicted with the Authority's decision in *BIA*. In two short paragraphs, it decided that its own precedent was wrongly decided and thus warranted reconsideration. The only case it discussed was *EOIR 2000*, maintaining that *EOIR 2000* "failed to recognize the significance of immigration judge decisions and how those decisions influence Agency policy." *Id.* at 1048. Overturning its precedent, the Authority found that immigration judges "influence" the policy of the Agency just as Board Members do "by interpreting immigration

laws when they apply the law and existing precedent to the unique facts of each case." *Id.* It suggested that an argument that immigration judges' decisions do not influence policy but Board Members' do "is akin to arguing that district court decisions do not shape the law while appellate decisions do." *Id.* at 1049. It found this "distinction" to be "nonsensical." *Id.* The Authority then vacated the Regional Director's decision and found that immigration judges are management officials and thus excluded from the bargaining unit. *Id.*

Member DuBester dissented, sharply disagreeing with the Authority's decision. *Id.* He opened by citing to a recent case from the D.C. Circuit reminding the Authority that a "fundamental norm of administrative procedure requires an agency to treat like cases alike" and that, if an agency neglects to do so, it "acts arbitrarily and capriciously." *Id.* (citing *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 883 (D.C. Cir. 2020)) (internal quotations omitted). Rejecting the "sophistry" of the majority's decision, he then pointed out that the majority did not base its reconsideration of *EOIR 2020* "upon any change found by the RD . . . [n]or does [the majority] find that the RD erred by applying *EOIR* [*2000*] to dismiss the Agency's petition, or. . . that the RD erred in any other respect." *Id.* at 1050. Rather, the Authority incorrectly decided that *EOIR 2000* was "in conflict" with *BIA*. *Id*. Member DuBester explained how there was no such conflict. *Id.*

Specifically, *BIA* found that Board Members were management officials because they "have the 'power to issue the final administrative ruling in a case, and to bind the [IJs], District Directors of the INS, as well as the State Department' through their issuance of rulings in cases," unlike immigration judges. *Id.* at 1051 (citing *EOIR 2000*, 56 FLRA at 622). Member DuBester also pointed to the Regional Director's "extensive" factual findings regarding the differences between the duties and responsibilities of immigration judges and Board Members and noted that the majority takes no issue with the Regional Director's factual findings. *Id.* at 1051. He highlighted the fact that the majority did not even discuss, never mind distinguish, the "litany" of cases upon which the Regional Director made her decision. *Id.* at 1050. He also explained how the Authority was well aware of the 1993 *BIA* decision when it decided *EOIR 2000* and discussed it in detail in the latter decision. *Id.* at 1051. Member DuBester concluded by noting that "the majority does not even attempt to reconcile its conclusion with long-standing Authority precedent" or with the Regional Director's "careful" distinctions and that the majority's decision was driven by the majority's desired result rather than any legal reasoning:

> Based upon on the conclusory nature of the majority's analysis, along with the facetious manner in which it reconciles its decision with Authority precedent precluding collateral attacks on unit certifications, it is abundantly

> clear that the majority's sole objective is to divest the IJs of their statutory rights.

Id. at 1052 (DuBester, dissenting).

D. Union's Motion to Reconsider, Motion to Remand, and Agency's Motion to Withdraw Representation Petition

On November 17, 2020, the Union filed its first Motion for Reconsideration and Stay, explaining that the Authority had made erroneous findings of fact and conclusions of law, failed to apply precedent, and failed to adequately explain its decision. The Agency attempted to file an Opposition to the Motion, but the Authority apparently never received it. *See EOIR 2022*, at 623 n.15. Regardless, the Agency affirmatively withdrew its Opposition to the Union's Motion for Reconsideration on June 25, 2021. *See id.* (granting Agency's Motion to Withdraw Opposition to the Union's Motion for Reconsideration).

On June 21, 2021, the Union filed its Motion for Remand and Stay, citing changes in job duties that had occurred in the nearly 18 months since the closing of the record in the matter before the Regional Director and the date of filing. The Agency subsequently indicated that it did not oppose the Motion for Remand together with its withdrawal of its Opposition to the Union's Motion for Reconsideration. On July 19, 2021, the Agency filed its Motion to Withdraw its Representation Petition, which the Union did not oppose. On January 6, 2022, the

Union filed a Motion to Join the Agency's Motion to Withdraw its Representation Petition, directed toward the Regional Director and a separate Motion to Vacate and Dismiss, or Remand with respect to the Authority's decision in *EOIR 2020*. In the latter motion, the Union explained that the dispute pending before the Authority was moot and, alternatively, that additional fact-finding was necessary because of the changes in job duties of immigration judges in the two years since the record before the Regional Director had closed. The Agency did not oppose either motion.

E. Authority's Decision in *EOIR 2022*

On January 21, 2022, the Authority issued its decision in *EOIR 2022* denying the Union's unopposed Motion for Reconsideration. The Authority (1) granted the Agency's Motion to Withdraw its opposition to the Union's Motion for Reconsideration (despite never having received it); (2) deemed the Agency's Motion to Withdraw as a "Motion for Reconsideration" and dismissed it as untimely on that basis; (3) denied the Union's unopposed June 21, 2021 Motion for Remand without considering the merits; and (4) failed to acknowledge either the Union's January 6, 2022 Motion to Vacate and Dismiss, or Remand or its Motion to Join the Agency's Motion to Withdraw its representation before the Regional Director.

With respect to the merits of the motion to reconsider, the Authority determined that the Agency's 2019 representation petition—which the Agency had moved to withdraw—had asked for a reconsideration of the Authority's 2000 decision in *EOIR 2000*.[3] It then found that, even though such a claim would amount to a collateral attack on the certification, the Authority itself could reconsider the Union's certification on that basis. The Authority made this determination without discussion of the Authority's precedent barring such collateral attacks.

The Authority then rejected the Union's claims that it had erred in its findings of fact and application of the law without consideration of any cases other than *EOIR 2020*. It cited an increase in immigration judge decisions in credible fear and reasonable fear cases but failed to explain why an increase in such cases are relevant in calculating whether they are management officials. As a result, the Authority rejected the Union's motion to reconsider.

[3] The Authority's statement is incorrect. The representation petition did not ask for a reconsideration of *EOIR 2000*. The first time the reconsideration of *EOIR 2000* was mentioned was in the Agency's pre-hearing briefing, which it filed hours before the trial.

SUMMARY OF ARGUMENT

For the past three years, the Authority has been on a mission to deny the Union, and immigration judges across the country, their statutory right to organize and unionize. This right is essential to maintaining the efficient and fair operation of one of the United States' fundamental institutions, the immigration court system. After the Agency filed its reconsideration petition in 2019 and lost at the Regional Director level, the Authority issued two orders, *EOIR 2020* and *EOIR 2022*, that demonstrate the Authority's willingness to arbitrarily decertify the Union.

EOIR 2020 is a three-and-a-half-page opinion that lacks any meaningful analysis and ultimately ends with the Authority directing the Regional Director to decertify the Union. The opinion fails to grapple or engage with the majority of the Regional Director's forty-plus page decision, which determined that the Union was properly certified. After the Union filed a motion to reconsider, the Authority issued *EOIR 2022*, which further revealed the extent to which the Authority would go to decertify the Union. Together, *EOIR 2020* and *EOIR 2022* are evidence of a host of due process violations—procedural and substantive—suffered by the Union.

The Authority's actions throughout the entire administrative process violate the Union and its immigration judge members' due process rights with respect to its protected liberty interest in joining a labor union. With respect to the violation of the Union's procedural due process rights, the Authority prevented the Union from raising a key defense that would have dismissed the Agency's attack on the Union's certified status. In doing so, the Authority denied the Union a meaningful opportunity to be heard. This action alone constitutes a violation of procedural due process. The Authority's further actions in creating new rules regarding cross-appeal requirements, violating its own regulations by issuing an advisory opinion, and invoking previously unknown rules regarding internal procedures further reinforce the violations of the Union's procedural due process rights.

The Union's substantive due process rights were also violated. *EOIR 2020* and *EOIR 2022* lack any meaningful analysis and show that the Authority is acting in an arbitrary manner. Substantive due process is meant to protect against arbitrary government action, requiring the Authority to explain its actions and provide support for the same. Beyond the arbitrary actions taken by the Authority, the dissents in each opinion suggest that the Authority had previously adjudicated the facts of the case before they were presented to the Authority members. Reviewing *EOIR 2020* and *EOIR 2022*, along with the procedural record of the

administrative case, supports vacating both orders due to a violation of the Union's due process rights and remanding the case back to the Authority for further fact finding and ultimately, a reasoned opinion grounded in analysis and case law.

ARGUMENT

Violating the basic tenets of due process law, the Authority has failed to provide the Union with an opportunity to be meaningfully heard and has acted in an arbitrary and unfound manner. *Propert v. Dist. Of Columbia*, 948 F.2d 1327, 1331-32 (D.C. Cir. 1991) (stating that to not be dismissed, a complaint containing a procedural due process claim must allege it was denied an opportunity to be heard at a meaningful time and in a meaningful nature); *Butera v. Dist. Of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001) (stating that substantive due process "is intended only to protect against arbitrary government action"); *see also Fed. Educ. Assoc. v. FLRA*, Case No. 19-284 (RJL), 2020 WL 1509329, at *1, *4 (D.D.C. Mar. 30, 2020) (citing to *Butera* as the standard "to survive a motion to dismiss a substantive due process claim").

The Authority violated the Union's due process rights when it failed to provide any meaningful analysis in *EOIR 2020* and *EOIR 2022* and through its unwillingness to follow its own procedural rules. The Fifth Amendment implements a constitutional limitation "to dismiss an action without affording a

party the opportunity for a hearing" and prohibits the denial of "a property interest without first giving the putative owner an opportunity to present his claim." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429, 434 (1982). It also protects persons, such as the Union and its members, from "arbitrary government action" that causes a deprivation of a property interest. *Butera,* 235 F.3d at 651 (citing to *County of Sacramento v. Lewis*, 523 U.S. 833, 845-846, 848-849 (1998)). By failing to follow its own internal procedures and provide meaningful factual or legal analysis in ordering the Regional Director to decertify the Union's certification, the Authority failed to provide the Union with a meaningful opportunity to be heard and acted in an arbitrary manner.

I. The Authority's decisions in *EOIR 2020* and *EOIR 2022* violated the Union's procedural due process rights and deprived the Union of a protected interest without an adequate process to be meaningfully heard.

The Authority violated the Union's procedural due process rights by barring the Union from raising all of its defenses, violating its own precedents, issuing an advisory opinion, and applying undisclosed procedural rules to force the issuance of an opinion. To have a viable claim, the Union must have (i) been deprived of a protected interest in life, liberty, or property, (ii) without constitutionally adequate process. *See, e.g., Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (*per curiam*); *Logan*, 455 U.S. at 428.

The Union and its members have a protected interest in forming, joining, or assisting any labor organization, including the right to engage in collective bargaining. The members of the Union, and by extension, the Union itself, have a liberty interest in unionization. The Due Process Clause protects not just interests in life, liberty, and property that flow from the Constitution itself, but also those created by statute. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding that prisoners had a protectable liberty interest in "a statutory right to good time" credit); *see also Kerry v. Din*, 576 U.S. 86, 97-98 (2015) (plurality opinion of Scalia, J.) (observing that due process rights may attach to liberty interests that are "created by nonconstitutional law, such as a statute"). In the latter scenario, the Due Process Clause is meant to ensure that a "state-created right is not arbitrarily abrogated." *Wolff*, 418 U.S. at 557.

Immigration judges have a protected liberty interest in joining a labor organization. Section 7102 provides: "Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102. The provision further specifies that, "[e]xcept as otherwise provided under this chapter," "such right includes the right . . . to act for a labor organization" and "to engage in collective bargaining." *Id.* In other words, federal

employees have the right to unionize, except as provided by law—which is the sort of "present and legally recognized substantive entitlement" to which due process rights attach. *Din*, 576 U.S. at 98 (plurality opinion); *see also id.* at 109 (Breyer, J., dissenting) (asserting that even something less than "an unequivocal statutory right" like the one here can trigger due process protections).

The Authority's decision deprived the Union and its members of this protected liberty interest. By concluding, in *EOIR 2020* and *EOIR 2022*, that immigration judges are "management officials" under the statute, the decisions ordered the dissolution of their existing union and precluded them from forming a new one in the future. *See* 5 U.S.C. 7112(b)(1) (providing that no "unit [may] be determined appropriate if it includes . . . any management official or supervisor"). The decisions, in short, deprive the Union and its members of their statutory right and protected interest to unionize.

The Authority's actions in preventing the Union from appropriately raising the collateral attack defense bar, issuing what is essentially an advisory opinion, and implementing at least two new internal rules without previous notice, deprived the Union of a meaningful opportunity to be heard. Each action is a material defect that individually prevents the Union from participating in a fair hearing. The

combined effect of each procedural defect ensures that the Union did not have a fair and meaningful opportunity to be heard.

A. The Authority, without reason or support, announced a previously undisclosed requirement that the prevailing party file a prophylactic cross appeal and, in doing so, precluded the Union from asserting a crucial defense and violated its own precedent.

The Authority barred the Union from raising a critical defense by stating a previously undisclosed rule requiring the prevailing party below to file a cross appeal. The Union was prevented from arguing that *EOIR 2020* and *EOIR 2022* are impermissible collateral attacks on the Union's certification. Under established law, a party is forbidden from collaterally attacking a previous unit certification. *See EOIR 2020*, at 1047 (recognizing the ban on collateral attacks); *U.S. Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base*, 70 FLRA 327, 328 (2017) ("*Wright-Patterson AFB* I"). For a party to challenge a properly certified union, it must show "substantial changes" that "have altered the scope and character of the unit since the last certification." *EOIR 2020*, at 1047; *Wright-Patterson AFB*, 70 FLRA at 327.

1. The Authority invented a new rule requiring the prevailing party Union to file a cross appeal with no notice and without any supporting legal authority

In *EOIR 2022*, the Authority suggests that because the Union did not seek to appeal one of the Regional Director's findings—that a single "substantial change"

had occurred that allowed her to entertain the Agency's Petition rather than rejecting it outright—the Union was foreclosed in raising the collateral attack bar. *EOIR 2022*, at 625 n.25. This new Authority rule has no basis in law or precedent whatsoever, and the Union had no warning that it would be subjected to this arbitrary bar.

The Authority cites just one case for its position that the Union had to file a prophylactic cross appeal, *NTEU, Chapter 231,* 66 FLRA 1024, 1026, but the case is entirely irrelevant and does not in any way hint that the Union would be barred from raising the collateral attack bar. And the Union has failed to find any Authority precedent, rules, or support that a prevailing party must bring a prophylactic cross-appeal to preserve a single legal issue in a case it has otherwise won.[4]

[4] Similarly, the Authority rejected the Union's June 21, 2021 motion to remand, in part, on the basis that two of the three changes to immigration judge job duties had occurred prior to the Authority's decision in *EOIR 2020* and, therefore, were untimely. *EOIR 2022*, at fn 5. But, of course, prior to *EOIR 2020*, the prevailing decision was the Regional Director's finding that immigration judges were not management officials, so there would have been no reason to bring these new changes to the attention of the Regional Director or the Authority.

2. The Authority ignored its own collateral attack bar precedent.

The collateral attack bar is a crucial issue in this case because the Agency's Petition was exactly the type of collateral attack that is not permitted under long-standing Authority precedent. The instant challenge was initiated nearly two and a half years ago, when the Agency launched a do-over of its 1999 loss. Its August 2019 petition listed a handful of marginal changes that had occurred to the job responsibilities of immigration judges since 2000 to justify another run at decertifying the Union. Pet., at 4. Notwithstanding the Authority's false assertion to the contrary,[5] the Petition did not cite a disagreement with the 1993 *BIA* decision nor any argument about the import of precedent, as "issues raised by the petition." *Id.* Quite to the contrary, the Petition stated that immigration judges should be precluded from joining a labor organization because of "recent developments in the nature of the IJ position." Agency Petition, at 2.

The Agency did, however, submit a pre-hearing brief in which it, for the first time, directly attacked the certification by claiming *EOIR 2000* was "wrongly decided." Agency Pre-hr'g Br., at 5-6. The Regional Director took care to note that she need not consider the Agency's argument that "the Authority's 2000 decision

[5] *EOIR 2022*, at 625 & n.26.

was incorrect at the time it was issued." Regional Director Decision ("RD"), at 16. This is so, the Regional Director explained, because "the issue for consideration [was], whether, based on the record, the IJs are management officials under the Statute requiring their exclusion from the Statute under 7112(b)(l)." *Id.* As part of this analysis, the Regional Director "thoroughly reassess[ed] the IJs' status considering the totality of the facts and circumstances presented at the hearing." *Id.*

The Regional Director went on to find that, though there had been a substantial change, nothing had altered the character or scope of the bargaining unit. *Id.* at 15-16. In fact, the Agency conceded at the time that no changes to actual day-to-day job duties—the gravamen of a unit certification challenge—had occurred since at least 1996 (the date of the current immigration judge job description, and the very same one considered in the Agency's unsuccessful previous decertification effort). *Id.* That concession was affirmed in testimony at the hearing from Agency Director James McHenry and Judge Sirce Owen. Hearing Tr. at 108-109, 171. And it was also noted by the Regional Director in her decision and is not challenged. *See EOIR 2020,* at 1046 (noting Regional Director's conclusion that "IJs' duties remain largely unchanged since the Authority's decision in EOIR 2000."). The inquiry should have ended there, and the Agency's petition dismissed for what it was: a collateral attack. Instead, having been turned

away by the Regional Director, the Agency brought its collateral attack to the Authority.

In *EOIR 2020*, the Authority explicitly acknowledges that it was granting review on the basis of the "substantial change" finding by the Regional Director. *EOIR 2020,* at 1047. It then acknowledges that the Regional Director was correct—no change (substantial or not) altered the scope or character of the bargaining unit. *Id.* Having used "substantial change" to grant review, however, the Authority then granted the collateral attack that was impermissible from the outset. Put another way, the basis on which the Authority decided to hold that immigration judges are "management officials"—premised on a false equivalency to precedent-making BIA members —was not related in any way to the "substantial change" the Regional Director considered. So, the Authority's decision was divorced both from the record and its own precedent.

In *EOIR 2022*, the Authority writes that the Union is merely attempting to "relitigate" its November 2, 2020 decision. *EOIR 2022*, at 624. On the contrary, the Union has identified serious legal and factual errors which are appropriate grounds for reconsideration, and the Authority has thus far simply refused to address them. *See EOIR 2022*, at 631 (DuBester, dissenting) ("*In my view, EOIR*

2020's disregard of the Authority's collateral attack doctrine, standing alone, warrants reconsideration of this decision.") (emphasis added).

In sum, the Authority's conclusion that it "may evaluate the merits of the Agency's arguments" "without running afoul of the bar on collaterally attacking a previous unit certification" is wrong on the law and on the facts. And by preventing the Union from raising the collateral-bar defense, the Authority fails to provide the Union with a fair hearing and opportunity to be heard.

B. Violating its own regulations, the Authority issued *EOIR 2022* in a case that was moot for months before its issuance.

The Authority should have not issued *EOIR 2022* because the petitioning party had withdrawn its petition, thereby mooting the case. On July 19, 2021, the Agency moved the Authority to withdraw its representation petition—six months prior to issuing *EOIR 2022*. Agency's July 19, 2021 Withdrawal of Representation Petition. On January 6, 2022, the Union filed a motion, in which it joined the Agency in its withdrawal of the petition, and requested that the Authority vacate *EOIR 2020*, or remand back to the Regional Director for additional fact finding. Neither motion was ever addressed by the Authority. Instead, the Authority issued, on January 21, 2022, an order (*EOIR 2022*) that tried to supplement/explain its three-and-a-half page 2020 order (*EOIR 2020*). While *EOIR 2022* was labeled as a response to the Union's November 17, 2020, motion to reconsider, upon a review

of *EOIR 2022*, the decision clearly is an attempt to supplement the Authority's deficient *EOIR 2020* order and constitutes an advisory opinion, which violates the Authority's own rules.

Case law is clear that a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Services Employees*, 567 U.S. 298, 307 (2012) (internal quotations omitted); *see also Chafin v. Chafin*, 568 U.S. 165, 172 (2013). As Justice Roberts stated in his *Uzuegbunam* dissent, when it is impossible for a court to grant any effectual relief, "the case is moot, and the court has no power to decide it." *Uzuegbunam et al., v. Preczewski, et al.*, 141 S.Ct. 792, 803 (2021) (Roberts, J., dissenting) (citing to *Spencer v. Kenna*, 523 U.S. 1, 18 (1998)). Thus, by July 19, 2021 when the Agency withdrew its representation petition, and at the latest by January 6, 2022 when the Union made abundantly clear that it joined in the motion, there was no justiciable controversy left, the case was moot, as there was no relief that could be granted.[6] *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (stating that mootness requires that "the requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its

[6] The Agency and the Union additionally entered into a settlement agreement on December 7, 2021, whereby the Agency agreed to recognize the Union. This settlement agreement was also filed with the Authority.

existence (mootness)") (*citing* Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)). When a case becomes moot during an appeal, "[t]he established practice …in the federal system …is to reverse or vacate the judgment below and remand with a direction to dismiss."[7] *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Yet, the Authority moved forward with issuing an additional order over the objection of both the Union and Agency. But because there was no case or controversy in front of the Authority, the *EOIR 2022* decision constitutes an advisory opinion. Justice Roberts explained in *Uzuegbunam* that "to decide a moot case would be to give an advisory opinion, in violation of 'the oldest and most consistent thread in federal law of justiciability.'" *Uzuegbunam*, 141 S. Ct. at 803 (Roberts, J., dissenting) (citing *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

Not only did the Authority violate one of the oldest principles in federal law, but it also violated one of its own regulations, which states that the "Authority and the General Counsel will not issue advisory opinions." 5 C.F.R. § 2429.10; *see also United States Department of Homeland Security v. U.S. Customs and Border*

[7] That consequence is because a moot case does not qualify as a "case or controversy" under Article III; due to the lack of jurisdiction, federal courts have no power to consider the merits of a constitutionally moot case. *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969).

Protection El Paso, Texas, et al., 72 FLRA 7, *14 (2021) (Member DuBester dissenting in part stating that the opinion at issue constituted the type of "advisory opinion" that "the Authority is explicitly prohibited from rendering" and that it was "entirely improper for the majority to address any issue in what can only be described as an advocacy role."). There was no reason for the Authority to issue *EOIR 2022*[8] as it had no case or controversy before it and in doing so, the Authority expressly disregarded the will of both parties, denying the Union its right without adhering to the procedures put in place.

C. The Authority invoked a previously undisclosed internal protocol to mandate a premature issuance of *EOIR 2022*.

The Authority selectively invoked an undisclosed 2018 internal protocol to force Chairman DuBester's participation in the issuance of a premature and flawed decision or be denied participation in *EOIR 2022*. *EOIR 2022,* at 630. Dissenting, Chairman DuBester stated, "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

[8] The Authority also cites to the Petition in *EOIR 2022* even though the Agency had moved to withdraw the petition months before it was issued. *See EOIR 2022*, at 625. ("The Agency asserted, in its petition, that the Authority should reconsider *EOIR 2000*."). This is improper as the Agency, along with the Union, moved to withdraw the petition before the issuance of *EOIR 2022*.

issue their majority opinion without my participation." *Id.* He explains further that "[t]*o support their ultimatum, my colleagues cite a protocol that they first devised in 2018, but never invoked*." *Id.* (emphasis added). The Authority has not released the policy which, in this case, would have been applied to exclude Chairman DuBester from participation in *EOIR 2022*, in spite of the fact that the decision-writing process was still on-going. *Id.* The selective application of an undisclosed internal policy in *EOIR 2022* is arbitrary and capricious and violates due process.

* * *

Each one of the listed procedural defects above denies the Union a meaningful opportunity to be heard. Whether considered separately or in the aggregate, these procedural defects deny the Union's procedural due process rights.

II. *EOIR 2020* and *EOIR 2022* reveal the Authority's actions as arbitrary and wrongful, solely aimed at denying the Union's statutory rights without any reasonable support or basis in violation of substantive due process.

The Authority violated the Union's substantive due process rights when it issued decisions that were devoid of any meaningful legal or factual analysis of the issues presented to it. The decisions were so poorly reasoned and flawed that the only conclusion that can be drawn is that the Authority majority wrote the decisions with a particular result in mind and cared little for the spurious reasoning

it used to get to its desired outcome. This is the very definition of arbitrary government action and violates the Union's due process rights.

Due process "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The touchstone of due process is protection of the individual against arbitrary action of government in its exercise of power without any reasonable justification in the service of legitimate governmental objective. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citing *Daniels v. Williams*, 474 U.S. at 331).

To survive a motion to dismiss a substantive due process claim, a plaintiff must allege facts sufficient to show a deprivation of an interest in circumstances "so egregious" as to "shock the contemporary conscience." *Butera v. Dist. Of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001); *see also Federal Education Association v. Federal Labor Relations Authority*, Case No. 19-284 (RJL), 2020 WL 1509329, at *1, *4 (D.D.C. March 30, 2020). The Authority's lack of any meaningful factual or legal analysis or examination of prior precedent in *EOIR 2020* and *EOIR 2022* demonstrate an egregious action that deprived the Union of its statutory interest.[9]

[9] The Union's interest is described in detail above at Section I.

A. *EOIR 2020* is lacking meaningful factual analysis.

The three-and-a-half-page opinion mostly repeats arguments from the Agency and fails to provide reasoned examination of the Regional Director's decision or the issues presented by the Union. For example, the Authority states the rule that a party may not make a collateral attack on a previous unit certification. *EOIR 2020*, at 1047. Then, rather than discuss the Regional Director's findings of "substantial change" and how the Regional Director found the changes to not alter any scope for an IJ, the Authority concludes there is no collateral attack by the Agency because the Union did not file an application for review of the "substantial change" finding in the RD. *Id.* The order cites no rule or regulation that requires a prevailing party to cross-appeal an order when it was the prevailing party. In a different footnote, the Authority cites to one page of *U.S. Dep't of the Air Force, Air Force Material Command, Wright-Patterson Air Force Base, Ohio*, 70 FLRA 327, 328 (2017), but fails to provide a parenthetical explanation, or any explanation, as to its application. The page cited simply restates the rule that a party may not make a collateral attack on a previous unit.[10] This cited case does not in any way support the idea that the Union was required to file some sort of

[10] The only mention of the collateral attack bar on page 328 states the following: "Further, the Authority has recognized that a party may not collaterally attack a previous unit certification." *Wright-Patterson Air Force Base*, 70 FLRA at 328.

prophylactic cross-appeal, and the Authority's citation to the case serves only to create a façade that the Authority opinion is actually grounded in legal precedent when no such precedent exists.

The Authority's lack of logic and reasoning in *EOIR 2020* is likewise apparent when it describes as "nonsensical" the analysis in *EOIR 2000* that distinguishes BIA members from immigration judges on the basis that BIA members make precedential decisions, and therefore set agency policy, but immigration judges' decisions do not. *EOIR 2020*, at 1049. The Authority's use of the word "nonsensical" is not, in fact, reasoned analysis, but it's essentially the only analysis the Authority uses to distinguish *EOIR 2020*. The Authority decision in *EOIR 2020* fails to go into detail about immigration judge job responsibilities, how immigration judges decide individual cases, or how immigration judges' decisions, which do not set precedent, are akin to BIA decisions, which do set precedent. *Id.* at 1048. In fact, the only substantive discussion about immigration judges' responsibilities can be found in footnote 27, which discusses an increase in reasonable fear and credible fear reviews. *Id.* at 1049 n.27. But again, the Authority merely states that these types of reviews exist and then concludes that, because of this fact, immigration judges are similar to Board Members. *Id.* at 1049. This is not reasoned analysis, and the Authority's logic is, in fact, entirely spurious.

There are more examples, but the two above are at the heart of the Agency's now-withdrawn Petition and are key to the central questions that were in front of the Regional Director and the Authority. Lacking any coherent explanation or legal reasoning, the Authority is simply making arbitrary conclusions with the goal of denying the Union and its members their statutory rights.

B. *EOIR 2022* similarly lacks an in-depth factual analysis and fails to provide any additional light on the Authority's *EOIR 2020* decision.

EOIR 2022 attempts to rehabilitate *EOIR 2020* by expanding on *EOIR 2020's* conclusions but still fails to provide any meaningful factual or legal analysis. On page 624 of *EOIR 2022*, the Authority concludes the Union is attempting to relitigate the conclusions reached in *EOIR 2020*, but it still does not provide any additional analysis as to how the Authority reached its conclusion. *EOIR 2022,* at 624-25. The associated footnote cites to conclusions made by the Authority in *EOIR 2020*, but as explained above, those conclusions also lack any supporting rationale. *Id.* at 624 n.24. Similarly, footnote 25, which claims to further expound on *EOIR 2020's* revelation that the Union was required to cross-appeal a singular finding in a case in which it ultimately prevailed, fails to explain how the cited regulations and case law apply to the Union's situation, given that it prevailed at the Regional Director level. *Id*. at 625 n. 25. This type of incoherent

reasoning is invoked repeatedly throughout *EOIR 2022*, and as with *EOIR 2020*, the citation to irrelevant authority only serves to create a false appearance that the decision is grounded in law and precedent when no such legal foundation exists.

In yet another example of the opinion's lack of coherent reasoning and citation to irrelevant authority, the Authority declares that its regulations allow it to review an application based on any substantial change, rather than the specific changes found by the Regional Director. The Authority cites to 5 C.F.R. § 2422.31(c) as the basis of this conclusion. *EOIR 2022*, at 625 n. 27. But the regulation does not state that the Authority is allowed to fully review a unit consideration based on grounds that the Regional Director did not address or consider. In fact, it seems that the Authority's entire *EOIR 2020* opinion identified no issue with the Regional Director's factual findings or application of either *EOIR 2000* or *BIA*. *EOIR 2020*, at 1048 n.18.

In another example, the Authority again asserts that the "the number of 'reasonable fear' and 'credible fear' cases has risen astronomically" but fails to explain how these increases change the nature of an IJ's role, especially since immigration judges presiding over reasonable and credible fear reviews apply BIA policy, precedent, and law to various factual scenarios. *EOIR 2022*, at 626. The

reasonable and credible fear decisions have no precedential effect or influence over immigration policy.

Finally, in footnote 36, the Authority states that it "found it unnecessary to redundantly recite every finding in the RD's twenty-four-page decision" and that regardless, the Authority did consider those findings. *Id.* at 626 n.36. The Authority's claim here is perplexing given that the Authority's two orders fail to grapple with essentially *any* of the RD's factual findings and seemingly endorse those findings in *EOIR 2020*. *EOIR 2020,* at 1048 n.18, 1051 (Dissenting Opinion of Member DuBester) (noting the majority takes no issue with the Regional Director's factual findings or application of *EOIR 2000* or *BIA*).

C. *EOIR 2020* and *EOIR 2022* demonstrate the arbitrary will of the Authority and constitute the exact government actions the Due Process Clause aims to limit.

The Authority's actions establish a consistent pattern of denying the Union its statutory right, regardless of the factual record or FLRA regulations or precedent.[11] The Authority made decisions that deprived the Union of due process

[11] Courts reviewing petitions for review in other 7123(a) contexts have stated that for the Authority to have legitimately overridden *EOIR 2000* and "change its interpretation and implementation of the law," the Authority must have ensured that the departure from its past precedent (*EOIR 2000*) was sensibly explained and reasonable. *AFGE, AFL-CIO, Loc. 1929 v. FLRA*, 961 F.3d 452, 457 (D.C. Cir. 2020) (noting that the Authority can change its "interpretation and implementation of the law if doing so is reasonable, within the scope of the statutory delegation,

by their arbitrary and unreasonable nature of its decisions. For instance, it was unnecessary for the Authority to issue *EOIR 2022*, given that the Agency, with agreement by the Union, had already withdrawn the representation petition, and the parties had moved to vacate the case, and had entered into a settlement agreement whereby the Agency agreed to recognize the Union—all well before the issuance of *EOIR 2022*. There was simply no valid basis to expend judicial resources, especially when doing so was in contravention of law, unless there were extrajudicial motivations behind issuing *EOIR 2022*. Instead, *EOIR 2022* devotes a substantial part of the decision to chastising the Regional Director for not following *EOIR 2020*, even while there remained a pending motion to join the Agency's Motion to Withdraw or Remand before the Authority.[12]

As icing on the arbitrary cake, the Authority makes several decisions without explanation, support, or citation. First, instead of ruling on the Agency's July 19, 2021 motion to withdraw its petition, the Authority simply recharacterizes it as a motion to reconsider. It fails to provide any explanation as to how the two

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and departure from past precedent is sensibly explained") (quoting *FedEx Home Deliver v. NLRB*, 849 F.3d 1123, 1127 (D.C. 2017)).

[12] At the time of issuing *EOIR 2022*, the Authority had failed to rule on the Union's January 6, 2022, motion, which joined the Agency's motion to withdraw its representation petition, and asked the Authority to vacate the case, or in the alternative, remand back to the Regional Director, as new facts had occurred in the 18 months since the Union's motion to reconsider.

are equivalent requests and cites no case or regulation that would explain its action. It appears that the only reason for the Authority to mis-characterize the Agency's motion in this way was so it could deem the motion to be untimely. And in another aberration, the Authority cites to hearsay statements regarding a conversation between a regional-office representative and an Agency representative with respect to the Regional Director's plan to revoke the Union's certification. *EOIR 2022*, at 627 fn. 52 (stating that the "Agency recounted these communications in a motion filed with the Authority" and that the "motion was not a sworn statement"). The statements had nothing to do with the Union's motion and were unnecessary to decide the Union's motion.[13]

D. The dissents in *EOIR 2020* and *EOIR 2022* reveal that members of the Authority may have adjudged the facts as well as the law without regard to the record or case law.

The combined analytical deficiencies mentioned above, coupled with the dissents in *EOIR 2020* and *EOIR 2022,* raise an inference of bias against the Union. One way to establish a violation of substantive due process, aside from egregious and arbitrary actions, is to demonstrate a probability of actual bias on the part of the decisionmaker. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). As

[13] These hearsay statements comprise a substantial part of *EOIR 2022* and are both irrelevant and unseemly as they allow an inter-agency squabble between the Regional Director and Authority to bleed into the case pending before it.

articulated by Justice Black, "[a] fair trial in a fair tribunal is a basic requirement of due process" and the U.S. has "always endeavored to prevent even the probability of unfairness." *In re Murchison*., 349 U.S. 133, 136 (1955). While administrative officers are presumed objective, "an agency official should be disqualified only where 'a disinterested observer may conclude' that the official 'has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Nuclear Info. And Res. Service v. Nuclear Regulatory Com'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) (citation omitted).

Chairman DuBester's dissenting opinions in both orders thoroughly examine and undermine the arbitrary and unreasoned positions taken by the Authority. In *EOIR 2020*, Chairman DuBester explicitly calls out the bias, stating that "it is abundantly clear that the majority's sole objective is to divest the IJs of their statutory rights." *EOIR 2020,* at 1052. In *EOIR 2022*, not only does Chairman DuBester state that the majority of the Authority issued an ultimatum to him regarding his participation, he also points to several issues that cause concern even to the casual observer: (1) the majority's fixation on the case even as the Authority had a backlog of longer-pending, presumably higher in priority, matters; (2) the issuing of *EOIR 2022* after the Agency withdrew the "very petition that provided the vehicle for the majority to issue its underlying decision;" (3) the majority's

pattern of "tak[ing] action without regard for – or, indeed, even contrary to – the parties' positions or arguments;" (4) the majority's rush to decision, despite still unresolved motions pending before it; (5) the majority's issuance of both *EOIR 2020* and *EOIR 2022* without a consideration of the underlying factual record or "the Agency's own regulations." *EOIR 2022*, at 630-33. The sum of all the facts together, including the arbitrary reasoning within the majority's opinion, point towards at least a probability of unfairness. Due to this probability of unfairness, the Union's substantive due process rights were also violated.

* * *

Both *EOIR 2020* and *EOIR 2022* are egregiously lacking in substantive analysis, fail to grapple with key facts raised by the Regional Director, and are rife with unsupported legal conclusions and irrelevant dicta that reflect not only biased and arbitrary decision-making, but are wasteful of government resources. By denying the Union the right to continue as a collective bargaining unit, the Authority denies them a statutory right through arbitrary action.

CONCLUSION

For all the foregoing reasons, this Court should take jurisdiction of this appeal under 5 U.S.C. 7123(a), vacate both *EOIR 2020* and *EOIR 2022*, and

remand to the Authority for reconsideration, additional fact finding, and ultimately, a reasoned order.

Dated: June 8, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,119 (13,000 max) words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point font in Times New Roman.

Dated: June 8, 2022

/s/ Abiel Garcia
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. 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/ Abiel Garcia
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