[ORAL ARGUMENT NOT YET SCHEDULED]
No. 11-1102

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

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT WASHINGTON D.C.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,

Intervenor.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

***Case*:**

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* Authorities chiefly relied upon are marked with an asterisk

***Statutes*:**

***Regulations*:**

Glossary

Agency	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
Authority	Federal Labor Relations Authority
BPD	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
EPA	*Environmental Protection Agency*, 65 FLRA 113 (2010)
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
NAGE	*NAGE, Local R5-136 v. FLRA*, 363 F.3d 468 (D.C. Cir. 2004)
NTEU	National Treasury Employees Union
ULP	Unfair labor practice
Union	National Treasury Employees Union

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Introduction and Summary of Argument

A. 1. Under the "abrogation" standard, the *same* proposal submitted as an "appropriate arrangement" can be "contrary to law" when reviewed by an agency representative at the bargaining table but *not* "contrary to law" when reviewed by

the agency head pursuant to 5 U.S.C. 7114(c)(2). This simply makes no sense. A proposal is either "contrary to law" or not, and a proposal that does not qualify as an appropriate arrangement under 5 U.S.C. 7106(b)(3) is "contrary to law." Thus, if a proposal is unlawful at the bargaining table it is also unlawful — for the same reasons — when subject to agency head review.

The Authority contends that the "abrogation" standard is appropriate because of the need to defer to the parties' bargaining choices made at the bargaining table. But deference to the parties' choices at the bargaining table has nothing to do with whether a bargaining proposal is "contrary to law" or not. And, under the federal labor statute, agency head review exists precisely because the agency's bargaining agents sometimes mistakenly agree to provisions that are "contrary to law."

The Authority argues that *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983), supports its "abrogation" test. But *Local 2782* held that Section 7106(b)(3) requires a balancing of union and management rights such that "appropriate arrangements" cannot "impinge * * * *to an excessive degree*" on management's rights. 702 F.2d at 1188. "Abrogation" contains no such balancing; all proposals are lawful as long as they do not prevent management from acting at all.

"Abrogation" is also meaningless because, in the entire period when it was applied in the review of arbitral awards, no provision was ever declared unlawful under it. The Authority argues that the standard is not meaningless because then-Member Pope, in three concurring opinions, would have found that provisions that "excessively interfered" with management's Section 7106(a) rights actually "abrogated" those rights. But those cases involved the "excessive interference" test, so quite obviously, the Pope concurrences do not rebut the fact that "abrogation" has never been found when the "abrogation" standard was in play. Nor does the Authority's argument rebut the fact that the standard protects management's rights only in circumstances that have never arisen.

The Authority suggests that the reason it has never found "abrogation" to have been met is explained by the competence of agency negotiators at the bargaining table. Not only does that argument fail to disprove our point, it goes too far. It suggests that nothing "contrary to law" ever gets past agency's negotiators. But that theory is insupportable on its face because, *inter alia*, agency head review under Section 7114(c)(2) exists just because Congress expected negotiators to be fallible.

2. Assuming the Court rejects the "abrogation" standard, the Authority and the intervenor argue that the case should be remanded to the Authority to apply the

"excessive interference" test in the first instance. It is possible the Court will do so, but for the reasons stated in our opening brief, we believe the "excessive interference" test should change the outcome in this case.

B. The intervenor, but not the Authority, challenges the Court's jurisdiction to consider the petition for review. In the intervenor's view, because the agency did not seek reconsideration of the Authority's *sua sponte* decision to apply "abrogation" instead of the "excessive interference" test, 5 U.S.C. 7123(c) bars the agency from challenging the decision on appeal. But it is well established that Section 7123(c) does not bar an appeal where it would have been "patently futile" to urge the objection, and this is especially so where, as here, (a) the Authority had already made up its mind on the issue and (b) a dissent raised all of the issues the agency has raised. In any event, the agency has consistently argued that the proposals at issue are nonnegotiable as contrary to the provisions of the Federal Service Labor Management Relations Statute ("FSLMRS"), and Section 7123(c) does not bar it from continuing to take that position in this Court.

Argument

THE UNION PROPOSALS "EXCESSIVELY INTERFERE" WITH MANAGEMENT RIGHTS.

A. "Excessive Interference" Is The Correct Test.

1. The Authority held that the union proposals at issue are negotiable as "appropriate arrangements" because they do not "abrogate" management rights. JA 195-202, 203-205. As this Court stated in *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983), Section 7106(b)(3) requires that "appropriate arrangements" not "impinge upon management prerogatives *to an excessive degree*," *id*. at 1188, which means that Section 7106(b)(3) requires a balancing of union and management interests on a case-by-case basis. See also Opening Br. at 24-33. "Abrogation," in contrast, eschews the balancing envisioned by the concept of "excessive interference"; under it, all union proposals or provisions are valid unless they prevent management from acting at all, a result that is inconsistent with Section 7106(a)'s "nothing in this chapter" language that protects management rights. See *IRS v. FLRA*, 494 U.S. 922, 928-932 (1990).

2. a. The Authority defends the "abrogation" standard in the context of reviewing agency determinations of nonnegotiability by looking to the language of Sections 7117(c)(1) and 7114(c)(2), not Section 7106(b)(3). See JA 196-201, and

FLRA Br. at 19-23. But the term "appropriate arrangements" appears only in Section 7106(b)(3), so its meaning must derive from analyzing that section. See *Local 2782*, 702 F.2d at 1186-1188. See also Opening Br. at 28-32. The Authority's suggestion that the term can have multiple meanings — for example, one meaning when an agency representative reviews a proposal at the bargaining table and another when an agency head reviews the language — cannot be right for this reason. And further, it is flatly inconsistent with *Local 2782* as noted above.[1]

Along similar lines, the Authority says that the agency does not contend that the FSLMRS "expressly *prohibits* the use of different standards under different circumstances." FLRA Br. at 28. But the fact that the statute does not "expressly" prohibit multiple meanings does not get the Authority where it wants to go. The unavoidable fact is this: the term "appropriate arrangements" appears in only one section of the statute, which means it can have only one meaning, which means the statute *implicitly* prohibits multiple meanings.

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[1] We are not suggesting that Section 7106(b)(3) — or any other section of the FSLMRS — contains a definition of "appropriate arrangements." See FLRA Br. at 27 (the FSLMRS "does not define the standard to be used in determining whether an award is contrary to [Section] 7106(a) or is enforcing an appropriate arrangement"). Our point is simply that, because the term "appropriate arrangements" appears only in Section 7106(b)(3), its meaning must derive from that section. See also Opening Br. at 24-33.

b. Although the Authority's opinion did not contain a Section 7106(b)(3) analysis, the Authority now argues that "abrogation" is "permissible" under that section because *Local 2782* "recognized" that the statute was silent on the matter "and left it up to the Authority to formulate a standard." FLRA Br. at 27 (citing *Local 2782*, 702 F.2d at 1186-1188). But this argument ignores the one limitation *Local 2782* did recognize, namely, that union proposals are not "appropriate" if they "impinge" on managements' Section 7106(a) rights "*to an excessive degree*," 702 F.2d at 1188, which is *in*consistent with "abrogation" for the reasons stated above and in our opening brief at pp. 24-33.

"Abrogation" eschews the balancing of bargaining rights envisioned by the "excessive interference" test. For that reason, all union proposals or provisions are valid unless they prevent management from acting at all. See Opening Br. at 27 (citing *U.S. Department of Veterans Affairs Medical Center Kansas City, Missouri*, 65 FLRA 809, 814 (2011)). For example, union proposals affecting management rights often call upon the agency to exercise its rights in a prescribed way — *e.g.*, to assign particular work to particular people. Under "abrogation," such a proposal would be negotiable — even if it dictated all work assignments solely according to union wishes — because it would not preclude the agency from assigning work in the manner dictated by the union. Thus, under the

abrogation standard, such a severe limitation would be enforceable and would surely be inconsistent with the intent of the FSLMRS to preserve management's right to assign work under 7106(a).[2]

3. In any event, the Authority's analysis of Sections 7117(c)(1) and 7114(c)(2), see JA 197 and FLRA Br. at 19-26, does not withstand scrutiny. See Opening Br. 28-33.

a. The Authority agrees that "a proposal that is contrary to law is also outside the duty to bargain," FLRA Br. at 20, which is the very point we made in our opening brief (at pp. 29-33). Section 7114(c)(2) expressly permits the agency head to disapprove contract language that is contrary to law (*i.e.*, language "[not] in accordance with the provisions of the [FSLMRS] [or] any other applicable law, rule or regulation," 5 U.S.C. 7114(c)(2)), and a proposal that is contrary to Section 7106(b)(3) is, at once, both contrary to law and outside the duty to bargain. Accordingly, with respect to purported "appropriate arrangements" in response to the exercise of Section 7106(a) management rights, the agency head's statutory

[2] The Authority argues that Section 7114(b)(2) obliges agencies "to be represented at the bargaining table by representatives who are able to adequately represent management's interests before any agreement is reached." FLRA Br. at 30. See also Intervenor Br. at 12. Applying the same logic, union negotiators should be competent enough to avoid advancing proposals that constitute waivers of management rights. Thus, it can be expected that *every* union proposal will be deemed negotiable under "abrogation."

authority to declare a proposal nonnegotiable is the same as the agency representative's at the bargaining table.

Much of the Authority's faulty analysis stems from its failure to correctly distinguish between the concepts of "duty to bargain" and "contrary to law," which is reflected in its failure to correctly distinguish between Section 7106(a) and Section 7106(b)(1) bargaining. See, *e.g.*, FLRA Br. at 20 ("proposals, such as those negotiated under §7106(b)(1) of the Statute or those not involving conditions of employment, are outside the duty to bargain but not contrary to law" and that "this distinction also applies to proposals that affect a management right under §7106(a) * * *.") (citing JA 198).[3] Section 7106(b)(1) bargaining involves permissive subjects as to which management has no duty to bargain but may. See Opening Br. at 32-33. Section 7106(a) bargaining involves management rights, and while there *is* a duty to bargain over the impact and implementation of management rights, that duty is limited: management is not required to bargain over proposals that are contrary to law. Thus, proposals inconsistent with Section 7106(b)(3) are nonnegotiable as contrary to law. See Opening Br. at 29-30. And agency representatives cannot convert an illegal proposal into a legal one simply

[3] See also FLRA Br. at 20 ("proposals, such as those negotiated under §7106(b)(1) of the Statute or those not involving conditions of employment, are outside the duty to bargain but not contrary to law") (citing JA 197-98).

by (mistakenly) agreeing to it at the bargaining table. See FLRA Br. at 21 ("an agency representative *may*, during collective bargaining, opt to bargain over a proposal not within the duty to bargain"). The very purpose of agency head review is to catch such mistakes. See *AFGE v. FLRA*, 778 F.2d 850, 860 n.16 (D.C. Cir. 1985) (the purpose of agency head review under Section 7114(c) is "to allow the head of an agency an extra 30 days to do that which his subordinates could have done earlier"). See also FLRA Br. at 22-24 (discussing legislative history of agency head provision which makes this point). Furthermore, any proposal that was contrary to law at the bargaining table is "void and unenforceable." *AFGE v. FLRA*, 778 F.2d at 854.[4]

b. There is no indication that the legislative history drew any distinction between an agency's assertion of nonnegotiability at the table or the agency head's similar determination. See FLRA Br. at 22-23; Intervenor Br. at 13-14. In fact, there is no separate proceeding under the FSLMRS for Authority review of the agency head's assertion of nonnegotiability under Section 7114(c). See *AFGE v. FLRA*, 778 F.2d at 853-854, 858-861. Indeed, by providing only one procedure for review, the FSLMRS clearly considers the agency head's assertion under

[4] The intervenor argues that the issue of the negotiability of a proposal "should be moot" once the parties have reached agreement at the bargaining table. Intervenor Br. at 13. *AFGE v. FLRA* is clearly to the contrary.

Section 7114(c)(2) identical to the agency representative's assertion at the bargaining table under 7117(c)(1).[5]

4. a. As one rationale for its "abrogation" standard, the Authority insists that, once the parties have agreed at the bargaining table, it is proper to "defer[] to the[ir] choices * * *." FLRA Br. at 29.[6] But deferring to the bargaining choices of the parties has nothing to do with whether a proposal is, at the outset, "contrary to law." As just noted, agency head review exists for the very purpose of picking up

[5] Moreover, there is no reason to refer to "duty to bargain in good faith" in Section 7114(c) because the act of bargaining is finished, and the agency head is merely exercising his or her statutory right to conduct a high level review of the signed agreement and approve the agreement if it is in accordance with the provisions of the FSLMRS and any other applicable law, rule, or regulation. See *AFGE v. FLRA*, 778 F.2d at 859 (Section 7114(c)(2) "permit[s] the head of the agency who usually has the broadest knowledge of * * * procedures, rules and concerns to decide if the term is in fact 'in accordance with the provisions of this chapter and any other applicable law, rule, or regulation'").

[6] See also FLRA Br. at 29 ("The abrogation standard furthers the goal of certainty in the collective bargaining process by ensuring parties that the deals they have struck will be honored, *unless* they are contrary to law.") (emphasis added). This is the same rational the Authority now employs in applying the "abrogation" standard to the review of arbitral awards. See *United States Department of Commerce, Patent and Trademark Office v. FLRA*, No. 11-1019 (D.C. Cir.) (set for oral argument concurrently with this case).

the illegality of proposals that the agency's bargaining agents miss.[7] Thus, as just noted, a proposal that is illegal at the bargaining table is illegal when subject to agency head review; it is simply "void and unenforceable." *AFGE v. FLRA*, 778 F.2d at 853-854.

b. There is likewise no merit to the Authority's concern that the agency's reading of Section 7106(b)(3) allows the agency head to "pull[] the rug" out from bargaining completed at the bargaining table. FLRA Br. at 29-30. Section 7114(c)(2) authorizes the agency head to disapprove proposals *only* if they are contrary to law, *not* because he or she thinks the bargaining agents made a poor bargain. And that is, and has been, our position.[8] Agency head review exists to

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[7] The legislative history cited by the Authority makes this point. See FLRA Br. at 22-24. See also Intervenor Br. at 13-15 (discussing similar legislative history). Representative Ford's statements, cited by the intervenor, are entirely consistent with our position. See Intervenor Br. at 14. In any event, Representative Ford's statements were made a day after the FSLMRS was enacted, and "statements * * * of * * * individual legislators, made *after* the bill in question has become law" are "give[n] little weight * * *." *Barber v. Thomas*, 130 S. Ct. 2499, 2507 (2010). Moreover, "Representative Ford [was] a strong advocate of employee rights," *NTEU v. FLRA*, 691 F.2d 553, 560 (D.C. Cir. 1982), whose own bill was not adopted, see *Dep't of Defense, Army-Air Force Exchange Service v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981); therefore, his views should be given little, if any, weight if they purport to limit the scope of management rights.

[8] Thus, we are not suggesting that agency heads have authority to "undo the lawful choices of bargaining parties" (FLRA Br. at 17), "'to prune collective bargaining agreements where local negotiators have come to legally viable arrangements,'" *id*. at 22 (quoting *Ass'n of Civilian Technicians, Montana Air Chapter 29 v. FLRA*,

ensure that agency bargaining representatives agree to "legally viable" or "lawful" "arrangements." If not, the agency head can disapprove them.

c. To the extent the Authority argues that the FSLMRS does not allow it to undo the "lawful" choices of the bargaining parties, its argument begs the question of what is "lawful." FLRA Br. at 17. As our argument makes clear, what is "lawful" at the bargaining table is no different from what is "lawful" when the agency head reviews the same language. And the Authority's argument that, "if a contract provision * * * is not contrary to § 7106 of the Statute, then it cannot be disapproved by an agency head on the basis of § 7106," FLRA Br. at 25 (citing JA 199), is simply a tautology that in no way supports its view that "contrary to law" means one thing at the bargaining table and another during agency head review. Indeed, it only repeats the undisputed proposition that the agency head can only disapprove proposals if they are contrary to law, which includes the provisions of the FSLMRS.

5. a. As noted in our opening brief, the "abrogation" standard is meaningless because, in the years during which the Authority previously employed the standard in reviewing arbitral awards, no provision was ever held

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22 F.3d 1150, 1153 (D.C. Cir. 1994)), or to "second-guess[]" (*id.* at 30) or "reweigh[] benefits and burdens" (*ibid*.) of proposals submitted for agency head review.

unlawful under it. See Opening Br. at 35-36. The Authority argues that the reason it has never found the standard to have been met is explained by the competence of agency negotiators at the bargaining table, who are "sufficiently aware of the statutory management rights so as to not inadvertently agree to contract provisions that waive them." FLRA Br. at 31 (citing JA 200 n.8). See also *ibid*. ("The lack * * * of decisions finding that agreed-upon provisions abrogate management rights merely reflects that negotiating parties know better than to agree to contract provisions that waive management rights."). This response, however, does not rebut the fact that no provision has ever been struck down under the "abrogation" standard.

Furthermore, the Authority's response goes too far. Under the Authority's theory, nothing "contrary to law" ever gets past agency negotiators. But that theory is insupportable on its face because, *inter alia*, agency head review under Section 7114(c)(2) exists just because Congress expected negotiators to be

fallible.[9] Therefore, it makes no sense to argue that the competence of agency negotiators offers sufficient protection for agencies.

b. The Authority argues that in three cases in which a provision was found contrary to law based on the "excessive interference" test, then-Member Pope, in concurrence, would have found that provisions that "excessively interfered" with management's Section 7106(a) rights actually "abrogated" those rights. FLRA Br. at 32-33. This point, in the Authority's view, proves that "abrogation" is not meaningless. Quite obviously, this argument does not rebut the fact that "abrogation" has never been found when the "abrogation" standard was in play. Nor does it respond to the fundamental problem that "abrogation" protects management's rights only in circumstances that apparently have never arisen.

[9] The Authority observes that there were only two Authority decisions involving agency head declarations of nonnegotiability in the last two years while there were a "plethora" of decisions involving agency representative declarations of nonnegotiability, and it suggests that this fact proves the competency of agency representatives is sufficient to protect management's rights. FLRA Br. at 31 (citing Section 7114(b)(2)). See also n.2, *supra*. But this statistical disparity could also be said to prove, instead, that unions tend not to challenge agency head determinations of nonnegotiability. Or, it is possible (or likely) that the Authority's Collaboration and Alternative Dispute Resolution Program under 5 C.F.R. 2424.10 would have disposed of a number of union challenges to agency head determinations without the need for an Authority decision. Accordingly, the statistics cited by the Authority simply do not support its point.

6. The Authority downplays the concern that its decision will force agency heads to become directly involved in the collective bargaining process at an early stage to protect management rights and, thereby, impede the process. See FLRA Br. at 33-34, citing Opening Br. at 38-39. The Authority says the agency's concern is "pure speculation." FLRA Br. at 33. But, early in its argument, the Authority expressly agreed that the point of agency head review is to "[avoid] impos[ing] a continuous burden on the head of the agency to review each and every proposal as it [arises] in the course of day-to-day bargaining." FLRA Br. at 24 (quoting *AFGE*, 778 F.2d at 858). See also Opening Br. at 38-39. And, it further conceded that "Congress did not anticipate that an agency head would act like an agency representative at the bargaining table and conduct his or her own analysis of the burdens and benefits of each proposal that could possibly affect the exercise of a management right." FLRA Br. at 24. Thus, the agency's concern is not "pure speculation." And, ultimately, if the Authority is going to apply a standard to agency head review that cannot be met, it is virtually axiomatic that the agency head will become involved early enough to protect its statutory rights.

The Authority's reliance on bargaining over Section 7106(b)(1) permissive subjects does not support its "pure speculation" contention either. FLRA Br. at

33. No doubt agency heads give significant direction on these matters prior to negotiation.[10]

7. The Authority's decision is inconsistent with its regulation at 5 C.F.R. 2424.24(a) because, under that regulation, the agency must make the same showing whether it has declared a proposal nonnegotiable at the bargaining table or as the result of agency head review. See Opening Br. at 39-40. In response, the Authority argues that its regulations make distinctions between: (1) an agency representative's declaration that a proposal is "outside the duty to bargain" and an agency head's declaration that a proposal is "contrary to law"; and (2) a "proposal," which is submitted at the bargaining table, and a "provision," which is submitted for agency head review. FLRA Br. at 33-34 (citing 5 C.F.R. 2424.2(c), (e), & (f)). But neither distinction is relevant to our argument, which is that 5 C.F.R. 2424.24(a) itself calls for the agency to make the same substantive submission whether it is the agency representative or the agency head that has declared a proposal nonnegotiable.

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[10] And, the longevity of provisions pertaining to permissive subjects is different from required subjects. When the term of a collective bargaining agreement expires, the agency head can terminate provisions relating to permissive subjects immediately though the contract remains in effect as to all other provisions. See, *e.g.*, *NTEU v. FLRA*, 414 F.3d 50, 53-55 (D.C. Cir. 2005).

B. The Proposals Are Nonnegotiable.

Assuming the Court rejects the "abrogation" standard, the Authority and the intervenor argue that the Court should remand the matter to the Authority to determine in the first instance whether the proposals at issue are negotiable or not under the "excessive interference" test. See FLRA Br. at 35; Intervenor Br. at 15-16. We recognize that the Court may remand this matter to the Authority if it strikes down the "abrogation" standard, so we merely emphasize that our opening brief demonstrated why the "excessive interference" test should change the outcome in this case. See Opening Br. at 40-44.

II.

THE COURT HAS JURISDICTION OVER THE PETITION FOR REVIEW.

1. The intervenor, but not the Authority, challenges the Court's jurisdiction to consider the petition for review. See Intervenor Br. at 4-10. In the intervenor's view, because the agency did not seek reconsideration of the Authority's *sua sponte* decision to apply "abrogation" instead of the "excessive interference" test, Section 7123(c) bars the agency from pursuing an appeal on that issue. *Ibid*. But it is well established that Section 7123(c) does not bar an appeal where it would have been "patently futile" to urge the objection, such as where — as here — the Authority has clearly made up its mind on the contested issue. See, *e.g.*, *NAGE,*

Local R5-136 v. FLRA, 363 F.3d 468, 479 (D.C. Cir. 2004). Indeed, the Authority's decision not to challenge the Court's jurisdiction essentially confirms the futility of a motion for reconsideration.

In *Environmental Protection Agency*, 65 FLRA 113 (2010) ("*EPA*"), decided only a few months before the decision here, the Authority decided to return to the "abrogation" standard, which had been used from 1990 to 2002, to decide cases involving the review of arbitration decisions under Section 7122(a). *Id*. at 115-116. But the Authority went out of its way to state that its "analysis [in this arbitration case] calls into question whether abrogation also should be the standard applied in negotiability cases involving [agency head review]." *Id*. at 116 n.11. Because "the [agency head review] issue [wa]s not raised" in *EPA*, the Authority "l[eft] it for another day," and that day came very quickly in the form of the instant case — apparently, the very first case in which the Authority could extend its *EPA* analysis as it openly signaled it would. Thus, the point the intervenor fails to grasp is that in *EPA* the Authority had already made up its mind that it would apply "abrogation" in the agency head review context, and no motion for reconsideration would have budged the Authority from that position.

The intervenor says that "[a]pplication of the 'abrogation' standard to appeals from § 7114(c) agency head reviews was not addressed in *EPA*."

Intervenor Br. at 6. That statement unfairly minimizes the Authority's clear statement that, for consistency in analysis, "abrogation" would be the proper standard in agency head review cases. Moreover, given its statement in *EPA* and the fact that both parties argued the negotiability appeal in this case under the "excessive interference" test (see Intervenor Br. at pp. 4-5), the Authority's failure to request supplemental briefing on the "abrogation" issue underscores how firmly the Authority's mind was made up.

2. Closely related to the last point, the Authority rendered its decision here over the vigorous dissent of Member Beck, in which *all* of the arguments the agency would have made in a motion for reconsideration were raised by Member Beck. Indeed, those arguments are the same as those advanced in this petition for review. Clearly, the agency's reiteration of Member Beck's analysis would not have budged the Authority any more than Member Beck's dissent did. That is why a motion for reconsideration would have been "patently futile." *NAGE*, 363 F.3d at 479.[11]

[11] In *NAGE*, this Court made the point that a dissenting opinion does not automatically satisfy Section 7123(c)'s requirements because a party must make clear to the Authority what *its* own arguments are. 363 F.3d at 479-80. Here, the dissent raised *all* of the issues that the agency could have raised, so there is no inconsistency with *NAGE*'s guidance.

The cases the intervenor cites at pp. 8-10 of its brief are unhelpful to its argument that a motion for reconsideration would not have been futile. "Futility" is a case-by-case matter. And, here, the facts demonstrate beyond question (as apparently confirmed by the Authority's decision not to object to jurisdiction) that the Authority had already made up its mind on the "abrogation" issue and that nothing, not even Member Beck's thorough analysis, was going to budge the Authority from that position.[12]

3. The intervenor argues that the Authority's decision not to challenge the Court's jurisdiction is not controlling because the Authority cannot waive jurisdiction. Intervenor Br. at 7-8 (citing *EEOC v. FLRA*, 476 U.S. 19 (1986)). This argument misses the point. The Authority's failure to challenge the Court's jurisdiction here reflects the Authority's apparent agreement with the agency that a motion for reconsideration would have been futile. For that reason, *EEOC v. FLRA*, is inapposite.

EEOC is inapposite for another reason. There, the Court acknowledged that "the FLRA's *sua sponte* * * * injection of the * * * issue * * * *might excuse*" the

[12] For example, the intervenor relies on *W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341 (D.C. Cir. 2008). See Intervenor Br. at 9. But here, unlike there, the arguments raised in the petition for review were, in fact, before the Authority in the form of Member Beck's dissent *and* the Authority in this case was not swayed by them.

failure to raise the issue before the Authority, but did not excuse the failure to press the claim before the court of appeals. 476 U.S. at 24 (second italics added). It was the "latter failure" that led the Court to reject consideration of the issues argued for the first time in the Supreme Court. *Ibid*. ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals."). This principle does not apply here.

4. In any event, the agency argued before the Authority that the provisions at issue were nonnegotiable because they are contrary to the provisions of the FSLMRS. Section 7123(c) does not bar it from continuing to take that position here.

5. Finally, Section 7123(c) grants the the Court authority to consider issues not raised before the Authority in "extraordinary circumstances." 5 U.S.C. 7123(c). Here, two interrelated factors amount to "extraordinary circumstances." One, avoiding consideration of the "abrogation" issue now merely postpones a decision to the very next agency head review case because the question of the proper standard is central to all such cases. Two, because the standard the Authority applies to the review of agency head determinations of nonnegotiability is central to the agency head review process, delay in resolving the issue will only cause confusion and uncertainty.

Conclusion

For the foregoing reasons and the reasons stated in our opening brief, the petition for review should be granted and the Authority's decision reversed.

Respectfully submitted,

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SEPTEMBER 2011

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7)(c) and D.C. Circuit Rule 32(a)(3)(B), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Time New Roman font, 14 point type. Based on a word count of my word processing system, Corel Wordperfect X4, this brief contains fewer than 7,000 words. It contains **5,209** words excluding exempt material.

/s/ *Howard S. Scher*
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Certificate of Service

I hereby certify that on this **16th day of September, 2011**, I caused the foregoing Reply Brief for the Petitioner to be filed by way of the ECF filing system. In addition, I caused eight (8) copies of the foregoing Reply Brief for the Petitioner to be filed in hard copy with the Court. I also caused the Reply Brief to be served on counsel for the Federal Labor Relations Authority and the Union by way of the Court's ECF notification system and by hard copy as follows:

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