Nos. 15-1293 & 15-1351

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

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF
THE FEDERAL LABOR RELATIONS AUTHORITY

RESPONSE TO PETITION FOR REHEARING OR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below in the administrative proceedings before the Federal Labor Relations Authority ("the Authority") were the U.S. Department of Homeland Security, U.S. Customs and Border Protection ("the Agency") and the National Treasury Employees Union ("the Union"). In this Court proceeding, the Agency is the petitioner and the Authority is the respondent. The Union was an intervenor for the Authority in both Nos. 15-1293 and 15-1351.

B. Rulings Under Review

In No. 15-1293, the Union seeks review of the Authority's order in *United States Department of Homeland Security, Customs and Border Protection and National Treasury Employees Union*, 68 FLRA 157 (2015), and its subsequent decision denying the Agency's motion for reconsideration, published at 68 FLRA 722 (2015).

In No. 15-1351, the Union seeks review of the Authority's order in *United States Department of Homeland Security, U.S. Customs and Border Protection and National Treasury Employees Union*, 68 FLRA 253 (2015), and its subsequent decision denying the Agency's motion for reconsideration, published at 68 FLRA 829 (2015).

As discussed below, the Court correctly found that it did not possess subject matter jurisdiction to review the Authority's decisions in these cases.

C. Related Cases

These cases were not previously before this Court or any other court. A related case is pending before the U.S. Court of Appeals for the Fourth Circuit: *United States Department of Homeland Security, U.S. Customs and Border Protection and National Treasury Employees Union*, 68 FLRA 829 (2015), *petition pending*, *United States Department of Homeland Security v. FLRA*, No. 15-2502 (4th Cir.).

/s/ Fred B. Jacob
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INTRODUCTION

On March 9, 2016, a panel of this Court (Circuit Judges Tatel, Brown, and Griffith) ("the Panel") granted the Federal Labor Relations Authority's ("the Authority") motions to dismiss the U.S. Department of Homeland Security's ("the Agency") petitions for review in these two cases for lack of jurisdiction. On May 9, 2016, the Agency filed a petition for rehearing or rehearing en banc, asserting that the Court's orders conflict with controlling precedent and involve an exceptionally important issue. The Court subsequently ordered the Authority to file a response.

For the reasons discussed below, the Agency's petition for rehearing or rehearing en banc should be denied. The Court correctly held in *U.S. Department of Homeland Security, U.S. Customs & Border Protection, Scobey, Montana v. FLRA* that the Authority's routine interpretation of the Back Pay Act raises no sovereign immunity or constitutional issue. 784 F.3d 821, 823-24 (D.C. Cir. 2015) ("*Scobey*"). In the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("the Statute"), Congress explicitly waived the Government's sovereign immunity against back pay awards in arbitration cases, 5 U.S.C. §§ 7122(b), 5596(b), empowered arbitrators and the Authority to interpret and apply the Back Pay Act in making those awards, 5 U.S.C. §§ 7121, 7122, 5596, *and* simultaneously prohibited judicial review of the Authority's decisions in those cases, 5 U.S.C. § 7123(a). Thus, *Scobey* properly concluded, as did the Panel in granting the Authority's motions to dismiss, that precluding judicial review over arbitration awards like the ones at issue here "is exactly

what Congress intended," implicating neither constitutional nor jurisdictional issues that might justify review under this Court's precedent. 784 F.3d at 824 (citing *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988) ("*Griffith*"); *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994) ("*Treasury*")). As *Scobey* recognized, 784 F.3d at 823, accepting the Agency's argument would open the courthouse doors without limitation to any case involving a monetary award against the Government, contrary to Congress's plain intent.

The Court should deny the Agency's petition for rehearing because: (1) the Agency has failed to show that the decision in *Scobey* conflicts with Supreme Court or in-circuit precedent, in light of the Statute's broad waiver of sovereign immunity in arbitration cases and preclusion of judicial review; and (2) the Agency has failed to identify any exceptional issue justifying rehearing, as this Court has recognized that the Authority enjoys the power to interpret statutes that involve federal employees' working conditions, *see Treasury*, 43 F.3d at 689. Accordingly, the Court should leave intact the judgments of six of the Court's active judges – in *Scobey*, the two underlying decisions here, and a third case, *U.S. Department of Health & Human Services, mot. to dismiss for lack of jurisdiction granted*, No. 15-1068 (D.C. Cir. Sept. 10, 2015) – who have granted the Authority's motions to dismiss under almost identical circumstances.

STATEMENT OF THE FACTS

These cases arise out of grievances filed by the National Treasury Employees Union ("the Union") alleging that the Agency violated the employee scheduling

requirements set forth in 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) when it failed to ensure that employees' schedules included: (1) consistent start and stop times for each regular workday in a basic workweek; and (2) two consecutive days off outside the basic workweek. When the parties were unable to resolve the grievances, they submitted each dispute to an arbitrator of their choosing. Both arbitrators concluded that the Agency violated § 6101 and § 610.121, and awarded affected employees back pay under the Back Pay Act, 5 U.S.C. § 5596, pursuant to the power Congress granted under the Statute, 5 U.S.C. § 7122(b) ("The [arbitration] award may include the payment of backpay (as provided in section 5596 of this title.")).

The Agency filed exceptions to the arbitrators' awards under § 7122 of the Statute. The Authority found, in relevant part, that the awards were consistent with the Back Pay Act and § 6101, and, thus, with the principle of sovereign immunity. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot. and Nat'l Treasury Emps. Union*, 68 FLRA 253 (Jan. 28, 2015), *mot. for recons. denied in* 68 FLRA 829 (Aug. 17, 2015); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot. and Nat'l Treasury Emps. Union*, 68 FLRA 157 (Jan. 7, 2015), *mot. for recons. denied in* 68 FLRA 722 (June 30, 2015).

The Agency petitioned this Court to review the Authority's decisions, arguing that the Authority "egregiously misinterpreted 5 U.S.C. § 6101(a)(3)" and "relied on this misinterpretation" to uphold the arbitrator's award of back pay, in violation of sovereign immunity. *U.S. Dep't of Homeland Sec. v. FLRA*, No. 15-1293, Petitioner's Opp. to Mot. to Dismiss, at 2-3; *U.S. Dep't of Homeland Sec. v. FLRA*, No. 15-1351,

Petitioner's Opp. to Mot. to Dismiss, at 3-4 (raising similar arguments). The Authority moved to dismiss the petitions for review because the Statute unambiguously prohibits judicial review of the Authority's decisions on exceptions to arbitration awards unless they involve an unfair labor practice, which was not the case here. 5 U.S.C. § 7123(a) (allowing review of the Authority's final orders except "an order . . . involving an award by an arbitrator").

In one-paragraph orders relying on the Court's decision in *Scobey*, the Panel granted the Authority's motion, holding that the Agency "has not shown that the case falls within an exception to the statutory bar on judicial review of a decision of the Federal Labor Relations Authority involving an arbitrator's award." Orders, *U.S. Dep't of Homeland Sec. v. FLRA*, Nos. 15-1293, 15-1351 (Mar. 9, 2016) (Pet. Add. 1-2.).

ARGUMENT

The Agency's petition identifies no conflict or important issue justifying full court review. Rather, the Court's decision in *Scobey*, which the Panel applied to dismiss the Agency's petitions for review, adhered to Congress's framework for federal-sector grievance arbitration, properly applied *Treasury*'s holding that the Authority enjoys the discretion to interpret statutes affecting federal employee working conditions, and affirmed Congress's preclusion of judicial review to promote speedy and final resolution of federal-sector grievances and an efficient workforce. The petition for rehearing or rehearing en banc should be denied.

1. The Court's decision in *Scobey* respected Congress's explicit denial of judicial review of Authority decisions involving federal-sector arbitration awards in the Statute. It is axiomatic that Congress confers federal court jurisdiction and that Congress may limit or foreclose review as it sees fit. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 411-12 (1940); *Scobey*, 784 F.3d at 824 (quoting *City of Arlington, Texas v. FCC*, -- U.S. --, 133 S. Ct. 1863, 1868 (2013)). When it enacted the Statute, Congress exercised that prerogative with an "'unusually clear congressional intent . . . to foreclose review'" of virtually all Authority decisions in arbitration cases under the Statute, including the underlying arbitration decisions here. *Scobey*, 784 F.3d at 823 (quoting *Griffith*, 842 F.2d at 490).

Section 7123(a) of the Statute precludes judicial review of Authority decisions in arbitration cases. This section states, in relevant part, that "[a]ny person aggrieved by a final order of the Authority *other than an order under . . . section 7122 of this title (involving an award by an arbitrator)*, unless the order involves an unfair labor practice" may file a petition for review. 5 U.S.C. § 7123(a) (emphasis added). Thus, as this Court has recognized, the plain language of § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricts the courts' jurisdiction to review an Authority arbitration decision to those instances that "involve[] [an unfair labor practice]" under the Statute. *See, e.g., Broad. Bd. of Governors Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 456 (D.C. Cir. 2014); *Overseas Educ. Ass'n*

v. FLRA, 824 F.2d 61, 63 (D.C. Cir. 1987) ("*OEA*"). This broad jurisdictional bar has been recognized by all of the courts of appeals that have considered the issue.[1]

The legislative history of § 7123(a)'s provisions for limited judicial review underscores Congress's intentional decision to restrict appellate scrutiny of Authority decisions involving an arbitration award. As this Court has observed, "[t]he rationale for circumscribed judicial review of such cases is not hard to divine." *OEA*, 824 F.2d at 63. Congress strongly favored arbitrating executive branch labor disputes and sought to create a scheme characterized by finality, speed, and economy. *Scobey*, 784 F.3d at 823; *OEA*, 824 F.2d at 63. To this end, the conferees discussed judicial review in the following terms:

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

H.R. REP. NO. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (emphasis added). The conference

[1] *See, e.g., Begay v. Dep't of the Interior*, 145 F.3d 1313, 1315-16 (Fed. Cir. 1998); *NTEU v. FLRA*, 112 F.3d 402, 405 (9th Cir. 1997); *U.S. Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region v. FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Phila. Metal Trades Council v. FLRA*, 963 F.2d 38, 40 (3d Cir. 1992) (collecting cases).

committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any* . . . *authority* or administrative body" other than the Authority. *Id.* at 826 (emphasis added). The Agency does not seriously contend that the unambiguous language of § 7123(a) permits its petitions for review.

2. *Scobey* recognized that Congress intended this statutory framework to preclude review in cases like the ones at bar, and it rejected the Agency's arguments that one of the Court's two limited exceptions to § 7123(a) apply. That decision was consistent with this Court's precedent and presents no issues of exceptional importance requiring the full Court's examination.

In *Scobey*, the Court dismissed the petition for review for lack of jurisdiction under § 7123(a). As it does now, the Agency contended in *Scobey* that the Court's decisions in *Treasury* and *Griffith* allow review of a claim that an Authority decision improperly awarded monetary relief against the Government. In *Treasury* and *Griffith*, the Court created exceptions to the statutory bar on judicial review – one where the Authority purportedly misconstrued its own subject matter jurisdiction under one of the Statute's definitions of "grievance," 5 U.S.C. § 7103(a)(9)(C)(ii), *Treasury*, 43 F.3d at 691, and one for collateral constitutional challenges to the Authority's arbitration decisions, *Griffith*, 842 F.2d at 490.

But the Court in *Scobey* properly found neither exception applicable. *Treasury*, the Court recognized, only applies where the Authority interprets laws not involving employee working conditions; the Back Pay Act, however, was plainly "within the

Authority's purview" as a law "'undisputedly . . . designed to deal directly with employee working conditions.'" 784 F.3d at 823 (quoting *Treasury*, 43 F.3d at 689). Similarly, *Griffith*'s exception to review collateral constitutional claims also provided no jurisdiction, because "the case presents no constitutional question, as [the Back Pay Act] waives sovereign immunity." *Scobey*, 784 F.3d at 823. The Court explained that, "[r]outine statutory and regulatory questions," such as the proper interpretation of subsection (b)(4) of the Back Pay Act, "are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity." *Id.*; *see also Treasury*, 43 F.3d at 689 (citing *Griffith*, 842 F.2d at 494).

The Court recognized that, if it accepted the Agency's argument, "Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the Back Pay Act authorizes would be reviewable." *Scobey*, 784 F.3d at 823. Moreover, that evisceration would be distinctly asymmetrical: the Government could seek judicial review when the Authority awards back pay, but when the Authority denies back pay, the employee would have no recourse because only decisions adverse to the Government could implicate sovereign immunity. *Id.* at 823-24. Accordingly, the Court found the interpretation of § 7123 that the Agency advances again here "to be a labored, even silly, construction of the statute." *Id.* at 824.

3. The Agency contends that rehearing en banc is necessary because *Scobey* is "inconsistent with *Griffith* and *Treasury* in failing to address the *scope* of the

constitutional and sovereign immunity questions presented" and, specifically, "the limits of any waiver of sovereign immunity" in the Back Pay Act. (Pet. at 7, 9 (emphasis added).) But determining the *scope* of the Back Pay Act's sovereign-immunity waiver in arbitration cases – evaluating, as this Court has twice remarked, a "marginal nuance of the Back Pay Act," *Scobey*, 784 F.3d at 824; *Griffith*, 842 F.2d at 494 – is exactly what Congress delegated when it empowered arbitrators and the Authority to apply the Back Pay Act and award monetary relief *without judicial review*. The Agency's argument to the contrary makes no sense: the Authority could not exercise the power to award back pay under the Back Pay Act without the power *to interpret and apply it*, and Congress gave that power exclusively to the Authority in arbitration cases to encourage swift resolution of federal labor disputes. That decision was well-within Congress's discretion.

This is why *Scobey* properly held that *Griffith*'s creation of an exception to review "collateral constitutional claims," as *Treasury* characterized it, 43 F.3d at 688, is not at all comparable to the exception the Agency seeks here to review any monetary award against the Government. The plaintiff in *Griffith* sought a ruling on whether the Due Process Clause guaranteed her a property interest in an annual within-grade pay increase, and the Court exercised jurisdiction to address that question, as the Statute "does not specifically preclude review of constitutional claims." 842 F.2d at 498-99. But it *does* specifically preclude review of Back Pay Act challenges like the ones the Agency advances here, as discussed above. *See* pp. 7-8, *supra*. Accordingly, even in

Griffith, the Court refused to wade into the plaintiff's Back Pay Act challenges. *Treasury*, 43 F.3d at 689; *Griffith*, 842 F.2d at 494.

As the Supreme Court has recognized, "the scope of Congress' [sovereign immunity] waiver [must] be clearly discernable from the statutory text in light of traditional interpretive tools." *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Given that the Civil Service Reform Act of 1978 specifically waived sovereign immunity in arbitration cases, empowered arbitrators and the Authority to apply the Back Pay Act to remedy federal employees' grievances, *and* explicitly stated that the Authority's decisions in arbitration cases would not be subject to judicial review, Pub. L. No. 95-454, 92 Stat. 1111, 1211-13, 1216 (codified at 5 U.S.C. §§ 7121-7123(a), 5596), the scope of Congress's waiver in the Statute could not be clearer.

To the extent the Agency asserts that the arbitrators' decisions here require the expenditure of money without Congressional appropriation, the Agency acknowledges that Congress has appropriated funds for the payment of back pay to Agency employees. (*See* Pet. 8 n.3.)[2] It is well settled that federal law contemplates payment of any back pay award out of the Agency's regular appropriations. If no money remains to pay, then the Agency may request that Congress allocate a deficiency appropriation. *See* III Government Accounting Office, *Principles of Federal*

[2] Thus, cases where Congress failed to authorize funding for specific expenditures are inapposite. *E.g.*, *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1342 (D.C. Cir. 2012); *U.S. Dep't of the Air Force v. FLRA* 648 F.3d 841, 844-45 (D.C. Cir. 2011).

Appropriations Law 14-47, 2008 WL 6969343, at *14 (3rd ed. 2008). Accordingly, while the Authority respects the constitutional implications and import of only drawing funds from the public treasury as Congress has directed (Pet. 7-8), *Scobey* is consistent with Congress's vision for the federal-sector grievance-arbitration process, its waiver through the Statute and the Back Pay Act of sovereign immunity in Authority arbitration cases, and its appropriation of funding to the Agency for salaries and overtime.[3]

Finally, as noted above, the Court in *Scobey* also wisely observed that the Agency's argument would open every monetary award against the Government to judicial review, "eviscerat[ing]" the statutory scheme. 784 F.3d at 823. While the Agency contends that observation was "misplaced," the only argument against it that the Agency can muster rewrites the Statute *sub silentio*. Specifically, the Agency suggests that, in contrast to arbitration-award exceptions based on traditional

[3] The Agency's reliance on sovereign immunity cases involving the Authority is no help. (Pet. 8-9, 13.) In those cases, the agencies presented their sovereign immunity challenges pursuant to the Statute's specific investiture of appellate jurisdiction to review unfair labor practice orders. *See, e.g., Soc. Sec. Admin.*, 201 F.3d 465, 467 (D.C. Cir. 2000) (noting unfair labor practice findings); *Dep't of the Army*, 56 F.3d 273, 274-75 (D.C. Cir. 1994) (same); *see also* 5 U.S.C. § 7123. Thus, those cases did not address – and therefore provide no guidance on – whether this Court has jurisdiction over an Authority order on exceptions to an arbitration award that does not involve an unfair labor practice. That an agency may raise a novel sovereign immunity claim in a case properly presented before the court of appeals is of no significance. To the contrary, it means that the Agency's sovereign-immunity concerns may not indefinitely evade review, as they could arise in the unfair-labor-practice context, where speed and finality were of less concern to Congress.

private-sector grounds under § 7122(a)(2) of the Statute, Authority decisions reviewing arbitration awards for consistency with "law, rule, or regulation" under § 7122(a)(1) should be subject to judicial review. (Pet. 13.) The Agency contends that "there is no indication in the statutory text or legislative history that Congress intended the FLRA to have final and unreviewable authority to construe federal statutes simply because such laws were put into issue during an arbitration." (Pet. 13.) But the Agency is wrong. Congress's "indication" that the Authority enjoys discretion to construe federal statutes in resolving exceptions to executive-branch labor arbitration awards could not have been plainer: Congress excluded from judicial review *any arbitration decision* arising "under . . . section 7122 of this title (involving an award by an arbitrator)." 5 U.S.C. § 7123(a); *accord NTEU v. FLRA*, 112 F.3d 402, 405 (9th Cir. 1997). If Congress intended the Statute to differentiate between § 7122(a)(1) and § 7122(a)(2), it knew how to draft language to make it so. Notably, regardless of whether the Authority reviews an arbitration award under § 7122(a)(1) or (a)(2), the policies favoring expeditious resolution of labor disputes that Congress had in mind when it enacted the Statute are the same. In sum, *Scobey*'s holding that the Agency's dramatic expansion of judicial review would fatally undermine the statutory machinery is spot-on.[4] No further review is required.

[4] The Agency makes a puzzling assertion that "the Appropriations Clause constitutional question could likewise be presented by denial of a back pay award," allowing a disappointed private party to seek judicial review. (Pet. 14.) It fails to explain how a private party would have standing to challenge the propriety of an

4. Far from an issue of constitutional import requiring the Court's eyes, the Agency's discussion of the merits of its underlying claims (Pet. 9-11) demonstrates exactly why the Panel's dismissal of the petitions for review is consistent with *Griffith* and *Treasury*. The Agency complains that the Back Pay Act requires a "money-mandating" statute, but this Court previously dismissed in *Griffith* and *Scobey* this kind of statutory interpretation challenge as "marginal nuance[s] of the Back Pay Act" beyond the Court's jurisdiction. *Compare* Pet. 10-11, *with Scobey*, 784 F.3d at 822 (dismissing the Agency's challenge to the Authority's interpretation of subsection (b)(4) of the Back Pay Act); *Griffith*, 842 F.2d at 494 (dismissing employee's challenge to the Authority's test for receiving back pay under the Back Pay Act). In *Treasury,* the Court similarly acknowledged that the Authority enjoyed the power to apply, without judicial review, "the interstices of a federal statute [the Back Pay Act] that undisputably was designed to deal with employee working conditions." 43 F.3d at 689. As in *Griffith, Treasury,* and *Scobey,* the Agency's Back Pay Act argument is exactly the kind of arbitration dispute that Congress intended the Authority to settle.

In any event, not only is the Agency's argument insufficient to justify jurisdiction – much less rehearing en banc – it is also meritless. The Agency's cases all arise under the Tucker Act in the Court of Federal Claims or the Federal Circuit. (*See* Pet. 10-11 (citing, *e.g.*, *Spagnola v. Stockman*, 732 F.2d 908 (Fed. Cir. 1984).) Those two

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Authority decision by alleging that the Appropriations Clause *required* money to be spent.

courts of limited jurisdiction are dependent on a "federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained" to provide jurisdiction under the Tucker Act. *Struck v. United States*, Nos. 15-788, 15-822, 15-831, 2015 WL 4722623, at *2 (Fed. Cl. Aug. 7, 2015); *see United States v. Testan*, 424 U.S. 392, 397-99 (1976). The Authority is not so constrained under the Back Pay Act, as it suggested below. *Dep't of Homeland Sec.*, 68 FLRA 157, 163 (2015). Nor are the federal courts of general jurisdiction.[5] For example, though the Back Pay Act explicitly provides that an award may be based on violation of a collective-bargaining agreement, the Court of Federal Claims lacks jurisdiction over a Back Pay Act claim grounded in the breach of a collective-bargaining agreement because such an agreement is not a "contract" for Tucker Act purposes. 5 U.S.C. § 5596(b)(1); *Zacardelli v. United States*, 68 Fed. Cl. 426, 433 (2005). Neither this Court's jurisdiction nor that of the Authority is governed by the Tucker Act.

5. Ultimately, the Agency's case for rehearing is an emotional one, emanating from its repeated allegations that substantial money is at stake. (*See, e.g.,* Pet. 1, 2, 14.)

[5] *See Adam v. Norton*, 636 F.3d 1190, 1195 (9th Cir. 2011); *compare Woolf v. Bowles*, 57 F.3d 407, 411 (4th Cir. 1995) (suggesting that Title VII may be source of Back Pay Act award in noncompetitive, mandatory failure-to-promote cases), *with Bussie v. United States*, 96 Fed. Cl. 89, 96-97 (Fed. Cl. 2011), *aff'd*, 443 F. App'x 542 (Fed. Cir. 2011) (unpublished) (holding that Title VII is not a money-mandating statute conferring Tucker Act jurisdiction because Title VII claims are within the exclusive jurisdiction of the federal district courts); *compare Adam*, 636 F.3d at 119, *with Struck v. United States*, Nos. 15-788, 15-822, 15-831, 2015 WL 4722623, at *2 (Fed. Cl. Aug. 7, 2015) (holding that the ADEA is not a money-mandating statute for Tucker Act purposes).

But, even if that allegation had support in the record, it would not create jurisdiction. The Agency does not – and cannot – cite any authority holding that the scope of this Court's jurisdiction to review an Authority order on an arbitration award depends upon the amount of back pay at issue. *Scobey*, 784 F.3d at 824. It would make no sense for the Court to create an amount-in-controversy requirement where Congress did not. If Congress wants to create a monetary threshold for jurisdiction over Authority arbitration decisions, it knows how to do so. *See, e.g.,* 28 U.S.C. § 1332 (allowing federal court jurisdiction over diversity cases when the amount in controversy exceeds $75,000).

CONCLUSION

For all of the foregoing reasons, the Authority respectfully requests the Court to deny the Agency's petitions for rehearing and rehearing en banc.

Respectfully submitted,

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August 10, 2016

Certificate of Service

I hereby certify that on this 10th day of August, 2016, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Nineteen paper copies will be filed with the Court within two business days. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Stephanie J. Fouse
STEPHANIE J. FOUSE