UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with International Federation of Professional and Technical Engineers,

Plaintiff,

v.

JAMES R. MCHENRY III, in his official capacity as Director of the Executive Office for Immigration Review,

Defendant.

Civil Action No. 20-cv-731

DECLARATION OF A. ASHLEY TABADDOR

I, A. Ashley Tabaddor, hereby declare and state as follows:

1. I am the current President of the National Association of Immigration Judges ("NAIJ"), a role I have served in since 2017. I have served as an officer of NAIJ for the past eight years and as a local representative prior to that. I am over the age of eighteen. I have personal knowledge of the facts stated in this declaration and, if called to testify, I could and would competently do so under oath.

2. I have worked in immigration enforcement and adjudication throughout my legal career. I served as a summer legal extern for the Immigration Court in Lost Angeles in 1996. I graduated from the University of California, Hastings College of the Law in 1997. From 1997 to 2000, I worked in the Office of the Chief Immigration Judge. In 2000, I became a trial attorney for the Office of Immigration Litigation within the Department of Justice. I stayed in that role until 2002, when I became an Assistant U.S. Attorney for the Central District of California in Los

Angeles. In 2005, I became an immigration judge, and have served in that role for almost fifteen years.

NAIJ

3. Immigration judges are employed by the Executive Office for Immigration Review ("EOIR"), a component of the Department of Justice ("DOJ"). Under delegated authority from the Attorney General, immigration judges adjudicate immigration cases according to the nation's immigration laws. There are approximately 460 immigration judges working in the United States.

4. NAIJ is a non-partisan, non-profit voluntary association of immigration judges. Founded in 1971, NAIJ's mission is to promote the independence of immigration judges and to enhance the professionalism, dignity, and efficiency of the immigration courts. In 1979, NAIJ was designated as the recognized representative for collective bargaining for all non-managerial immigration judges. In 2000, NAIJ affiliated with the International Federation of Professional and Technical Engineers (IFPTE) and accordingly is also known as "IFPTE Judicial Council 2."

5. NAIJ officers further the interests of immigration judges by negotiating on their behalf with EOIR, by representing them in disciplinary hearings, by filing formal and informal grievances with EOIR, by speaking to members of the press about working conditions for immigration judges, and by testifying before Congress. NAIJ officers are permitted to do these things without seeking EOIR's prior approval because NAIJ is a union and federal labor relations law protects a union's right to present its views publicly and to appropriate authorities, including Congress and the press.

6. In January 2018, I received a memorandum from EOIR confirming the longstanding understanding and agreement between EOIR and NAIJ that NAIJ representatives are not required to seek preapproval for press interviews or public speaking when speaking on behalf of the union. A true and correct copy of that memorandum is attached hereto as **Exhibit A**.

7. In August 2019, DOJ filed a petition to decertify NAIJ. If the petition is successful, NAIJ officers will no longer be able to speak in our representative capacities without EOIR's prior approval.

EOIR's Speaking Engagement Policies Prior to 2017

8. Prior to 2017, immigration judges often participated in speaking engagements in their personal capacities. While approval was required, immigration judges routinely received that approval. Judges would submit a request to their supervising Assistant Chief Immigration Judge ("ACIJ"). If the ACIJ approved the request, they would forward it to EOIR's Ethics office, which would then offer ethics guidance. Judges were generally permitted to use their official titles to identify themselves in connection with their public speaking, so long as they also included a disclaimer that they were speaking in their personal capacities and not as employees of EOIR. EOIR described this kind of speech as "personal capacity with use of title and disclaimer" or "PTD."

9. During this time, immigration judges regularly spoke at local and national conferences, guest lectured at universities and law schools, participated in immigration-law trainings, and spoke to local community groups, all in their personal capacities. For example, before assuming my current role as NAIJ President, I spoke in my personal capacity at over fifty events hosted by organizations such as the Coalition of Iranian Entrepreneurs, the Los Angeles County Bar Association, the Iranian American Bar Association, the Public Affairs Alliance of Iranian Americans, the Iranian American Women's Leadership Conference, the Orange County Bar Association, Kids in Need of Defense, the Pacific Council on International Policy, and academic institutions including the University of California at Los Angeles, Southwestern Law School, and the University of California, Hastings School of Law. In 2012, I participated in a White House Roundtable with Iranian-American Community Leaders. To the best of my

recollection, prior to 2017, all of my requests to participate in personal-capacity speaking engagements were approved.

10. To my knowledge, the participation of immigration judges in personal-capacity speaking engagements during this time did not cause any harm to EOIR's operations, nor did the agency assert that it did. To the contrary, it promoted public understanding of and confidence in the immigration courts system.

The 2017 Speaking Engagement Policy

11. On September 1, 2017, the Director of EOIR issued a memorandum titled "Speaking Engagement Policy for EOIR Employees" (the "2017 Policy"). I received a copy of the memorandum along with EOIR's other employees. Attached hereto as **Exhibit B** is a true and correct copy of the 2017 Policy.

12. The 2017 Policy required immigration judges to receive EOIR approval before participating in a speaking engagement. Under the policy, immigration judges who wished to speak in their personal capacity were required to submit a request to their ACIJ, who decided whether a speaking engagement would be undertaken in the judge's personal capacity (as defined by the policy) and whether to approve the request. Immigration judges who planned to speak on immigration-related topics or whose requests were reclassified as official capacity then had to seek approval from the Office of General Counsel and the Office of Communications and Legislative Affairs through a centralized "speaking engagement team" known as the "SET."

13. On September 13, 2017, EOIR's Director sent an email to all EOIR employees addressing what qualifies as a speaking engagement. The email stated, among other things, that "any phone calls, emails, or visits from the news media or Congress should be directed to [the Office of Communications and Legislation Affairs]." Attached hereto as **Exhibit C** is a true and correct copy of that email.

14. Subsequent EOIR communications confirmed the agency's position that the 2017 Policy applied to any contact with the press.

NAIJ's Negotiations with EOIR and the 2018 Memorandum of Understanding

15. After the 2017 Policy was issued, NAIJ entered into negotiations with EOIR to clarify the specific procedures and considerations that would apply to immigration judges seeking preapproval to speak publicly. At no point during the course of these negotiations did EOIR assert that speech by immigration judges had interfered with EOIR's operations.

16. In May 2018, NAIJ and EOIR executed a Memorandum of Understanding (the "2018 MOU"), which remains in effect. The 2018 MOU was intended to offer immigration judges greater certainty regarding the preapproval process, but has failed to do so. Attached hereto as **Exhibit D** is a true and correct copy of the 2018 MOU.

17. Although the 2018 MOU sets aspirational time limits for some steps in the preapproval process, these time limits are frequently not met. For example, the 2018 MOU requires the SET to "strive to" respond to speaking-engagement requests within five days, but I have learned that many immigration judges have not received a response within that time frame. In some instances, judges have had to wait months for a response, and many have received a response only after repeated and persistent follow-up.

18. The 2018 MOU also requires that EOIR provide reasons for any denial of a speaking-engagement request. However, I have learned of many instances in which immigration judges did not receive formal denials of their requests and only learned informally through their supervising ACIJs that the SET had denied or planned to deny the requests. These immigration judges did not receive reasons for the denials of their requests.

19. The 2018 MOU requires EOIR to provide NAIJ with "a summary of Immigration Judge speaking engagement requests received by the SET" every six months. NAIJ has received these biannual summaries. The summaries, however, offer limited insight into preapproval process. For example, the summaries do not track the time taken to review requests, whether the requests were reclassified from personal capacity to official capacity, or EOIR's reasons for denying requests. Attached hereto as **Exhibit E** are true and correct copies of the summaries NAIJ has received, spanning May 1, 2018 to April 29, 2020.

20. The 2018 MOU also stated that, by June 30, 2018, EOIR would provide NAIJ with "a list of factors that [EOIR] considers in assessing Immigration Judge speaking engagement requests and/or representative examples of types of speaking engagement requests that fall into each speaking capacity." By email dated June 28, 2018, EOIR sent NAIJ a draft "Guide to Speaking Engagement Requests," which included a list of questions for ACIJs and the SET to consider when reviewing speaking-engagement requests by EOIR employees generally. The email stated that EOIR intended to publish the guide on the agency's intranet once it was finalized. To my knowledge, neither the draft nor a final version of the document is available on the intranet. Attached hereto as **Exhibit F** is a true and correct copy of the email.

The 2020 Policy

21. On January 17, 2020, the Director of EOIR issued a memorandum titled "Submission and Processing of Requests for Speaking Engagements" (the "2020 Policy"). I received a copy of the memorandum along with EOIR's other employees. Attached hereto as **Exhibit G** is a true and correct copy of the 2020 Policy.

22. The 2020 Policy applies whenever an immigration judge wishes to speak or write publicly. The policy categorically prohibits immigration judges speaking or writing publicly in their personal capacities about immigration or EOIR. The policy also subjects all requests—

regardless of speaking capacity or content—to four levels of review. Judges must initially seek approval from their ACIJs. If the ACIJ approves the request, the ACIJ forwards the request to the SET. While that review is ongoing, the request is also reviewed by the EOIR's Ethics Program, which neither approves nor denies requests but instead offers ethics guidance. If the SET approves the request, its recommendation—along with any advice from the Ethics Program—is sent back to the supervisor, who makes the final decision about whether the judge can speak or write. In cases involving speeches, written pieces, or other prepared material, the supervisor may condition approval on making certain changes.

23. Since issuing the 2020 Policy, EOIR has continued to require immigration judges to seek approval before communicating with the press.

The Effect of EOIR's Policies on Speech by Immigration Judges

24. Many immigration judges have contacted NAIJ to complain about their experiences with EOIR's speaking-engagement policies.

25. I have learned from these contacts that, after the 2017 Policy was issued, requests by immigration judges to speak publicly in their personal capacities about immigration were frequently denied. Immigration judges were told by EOIR that speaking engagements related to immigration were, by definition, "official capacity" and should be handled by "management officials" to ensure consistency in the agency's messaging. This included speaking engagements that immigration judges had undertaken for years without issue.

26. I also learned that many immigration judges were not receiving decisions approving or denying their speaking engagement requests within a reasonable period of time. In some instances, immigration judges did not receive a formal decision at all. NAIJ has occasionally

intervened on an immigration judge's behalf in order to press for the resolution of a pending request.

27. Attached hereto as **Exhibit H** is a true and correct copy of a series of emails from March 2018 denying an immigration judge's request to speak to students participating in a law school clinic.

28. Attached hereto as **Exhibit I** is a true and correct copy of a series of emails from March 2018 denying an immigration judge's request to speak at a law school class about asylum claims and children.

29. Attached hereto as **Exhibit J** is a true and correct copy of a series of emails from April through July 2018 denying an immigration judge's request to participate in a Practicing Law Institute continuing legal education seminar.

30. Attached hereto as **Exhibit K** is a true and correct copy of a series of emails from September 2018 denying an immigration judge's request to speak to an immigration class at a law school.

31. Attached hereto as **Exhibit L** is a true and correct copy of a series of emails from February through May 2019 informally denying an immigration judge's request to speak to a seventh-grade class.

32. Over time, many immigration judges came to believe that it was futile to submit requests to speak about immigration in their personal capacities, and submitted fewer speaking-engagement requests. The 2020 Policy has succeeded in discouraging immigration judges even further. As noted above, this policy categorically prohibits immigration judges from speaking or writing publicly in their personal capacities about immigration or EOIR.

33. Accordingly, immigration judges who wish to speak about these topics fear facing retaliation should they do so. EOIR has warned immigration judges that failure to comply with its speaking-engagement policies may result in disciplinary action, including reprimand, suspension, and even removal from the federal service. In trainings, including the initial ethics trainings all judges must attend, EOIR has emphasized the requirement to seek preapproval before publicly speaking or writing regardless of topic or forum. I am aware that EOIR tracks compliance with this requirement, for example, by trolling the web. For example, one judge was emailed by an EOIR official after the official found a conference schedule that announced the judge's participation in a panel; the official told the judge that she was required to submit a request for preapproval. Attached hereto as **Exhibit M** is a true and correct copy of this email.

34. I know of many immigration judges who wish to educate the public about the immigration legal system and their position within it. For example, many judges wish to speak at local and national conferences, guest lecture at universities and law schools, and contribute to legal trainings about these topics. These judges believe that seeking approval to engage in this speech would be futile, and fear that if they speak without approval, they will be disciplined for violating the 2020 Policy.

35. I also know of many immigration judges who wish to offer their own opinions—including critiques—of EOIR's policies and practices. For example, many immigration judges have contacted NAIJ to express concern about EOIR's decision to keep immigration courts open in the midst of the current COVID-19 pandemic. Some of these judges wish to share their concerns publicly but declined to so for fear of retaliation. For instance, some judges have declined requests to conduct press interviews regarding the agency's response to the pandemic. Another judge

agreed to offer a statement for inclusion in a press release issued by NAIJ, but insisted that they be quoted anonymously.

36. I know of many immigration judges who wish to write publicly about issues relating to immigration and about EOIR. Under the 2020 Policy, however, EOIR has the authority to prevent them from publishing, or to condition approval on making changes to the content of their work. Many immigration judges have chosen not to seek out writing opportunities because the 2020 Policy gives EOIR complete control over whether, and what, immigration judges can write.

37. Finally, I know of immigration judges who wish to speak or write about issues unrelated to immigration law or policy. For example, some judges have been asked to speak about their own professional histories and career paths before students or civic groups. Some of these judges have declined invitations to speak at these events because of the difficulties inherent in seeking the agency's preapproval.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 30th day of June 2020.

Judge A. Ashley Tabaddor