IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, Plaintiff, v. JAMES R. MCHENRY III, Director of the Executive Office for Immigration Review, Defendant.	)	Case No. 1:20-cv-731 (LO/JFA)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Dated: July 20, 2020

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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. EXECUTIVE OFFICE OF IMMIGRATION REVIEW AND NAIJ 3

II. EOIR'S REVIEW OF PERSONNEL SPEAKING ENGAGEMENT REQUESTS 4

III. THIS LAWSUIT 6

STANDARD OF REVIEW 6

ARGUMENT 7

I. NAIJ IS UNLIKELY TO SUCCEED ON THE MERITS 7

A. This Court Lacks Subject-Matter Jurisdiction over NAIJ's Claims 7

i. NAIJ Cannot Bypass the Exclusive Review Schemes of the FSL-MRS or the CSRA 7

ii. NAIJ Does Not Have Standing to Challenge the Policy 10

B. The Policy Does Not Violate the First Amendment 11

i. NAIJ Lacks a First Amendment Claim to the Extent the Policy Applies to Speech Made Pursuant to an IJ's Official Duties 12

ii. The Policy Places Minimal Burdens on an IJ's Speech as a Private Citizen 14

1. The Policy Is a Review Process That Does Not Prohibit Speech 14

2. The Policy Places a Minimal Burden on Speech 16

3. The Policy Does Not Significantly Burden the Public's Ability to Hear IJ Speech Regarding Immigration and EOIR 16

iii. The Policy Furthers EOIR's Interests in Ensuring the Agency's Efficient Operation 17

1. The Policy Ensures Compliance with Ethics and Other Applicable Workplace Laws 18

2. The Policy Ensures That Speaking Engagements Do Not Interfere with EOIR's Work 19

3. The Policy Ensures That EOIR Is Able to Speak with a Consistent Voice to Avoid Confusion and Undermining Confidence in EOIR....20

4. The Policy Ensures That Speaking Engagements Do Not Damage the Judicial Integrity of IJs....22

iv. The Policy's Sweep is Reasonably Necessary to Protect EOIR's Effectiveness....23

v. The Policy Is Not Subject to a Heightened Standard of Review....24

C. The Policy Is Not Unconstitutionally Vague....25

i. The Policy's Standard of Review for Speaking Requests Is Reasonably Clear....25

ii. The Policy's Standard of Review Does Not Confer EOIR Unbridled Discretion....26

II. NAIJ HAS NOT SHOWN ACTUAL AND IMMINENT IRREPARABLE HARM....27

III. THE BALANCE OF EQUITIES WEIGHS AGAINST AN INJUNCTION....29

CONCLUSION....30

INTRODUCTION

The Executive Office for Immigration Review ("EOIR") bears responsibility for the fair, efficient, and uniform operation of the nation's immigration courts, which must adjudicate hundreds of thousands of cases each year. To accomplish that mission, EOIR employs approximately 500 Immigration Judges ("IJs")—each directly appointed by the Attorney General—to adjudicate its cases, participate in the development of EOIR policy, and represent EOIR to the public.

Recognizing that IJs' public speech can affect the agency's overall mission—whether IJs are representing EOIR in their official capacities or themselves in their personal capacities—EOIR has worked thoughtfully to develop and adjust policies governing outside speaking and writing, collaborating closely with the union that represents its non-supervisory IJs, the National Association of Immigration Judges ("NAIJ"). In 2011, EOIR and NAIJ jointly issued an Ethics Guide requiring IJs to seek EOIR review of whether speaking or writing engagements would comport with workplace ethics and personnel laws and policies. In 2017, EOIR created a standardized process to review such requests, which prompted NAIJ to initiate collective bargaining over the new process. Again, though, EOIR and NAIJ worked together to resolve any differences, resulting in a 2018 Memorandum of Understanding ("MOU") between the two that charted a joint course forward (the "Policy"). And in January of this year, EOIR made a few more modifications to the Policy, primarily to automate the request submission-and-approval process and to clarify certain issues.

Yet now—more than three years after the Policy was first set forth—NAIJ has brought suit, contending that the Policy it helped shape violates both the First Amendment and the Due Process Clause, and has moved for a preliminary injunction seeking to enjoin it. But its request for such extraordinary relief should be denied: NAIJ is unlikely to succeed on the merits of its challenge; its members face no likelihood of irreparable harm from the very Policy that NAIJ itself helped to develop; and the public interest would be disserved by the injunction NAIJ seeks.

First, NAIJ's claims are unlikely to succeed. They fall outside of district court jurisdiction under the exclusive statutory channeling scheme applicable to union claims against federal agencies, the Federal Service Labor-Management Relations Act; failing that, they would have to be administratively exhausted before proceeding in district court under the Civil Service Reform Act of 1978. And even if NAIJ could find a way into district court despite those exclusive statutory schemes, NAIJ would lack Article III standing; its alleged injuries are not redressible, and it has identified no member who has asserted an injury attributable to the Policy.

NAIJ would fare no better on the merits of its claims, either. The Policy satisfies the First Amendment, which gives the government-as-employer broader ability to regulate the speech of its personnel. As to "personal capacity" speech on matters of public concern (the only speech for which there is any claim), any burdens are minimal. The Policy prohibits no IJ speech outright; rather, it is a *process* by which EOIR reviews whether IJs' outside speech would violate underlying rules (some of which apply to all DOJ employees) that NAIJ does not challenge. It also uses short timelines, applies to relatively few personnel, and has resulted in approval of the vast majority of requests. At the same time, any minimal burdens are far outweighed by the Policy's value in helping EOIR further its mission: it enables EOIR to promote compliance with ethics, personnel, and confidentiality rules, ensure orderly operation of its courts, speak to the public on issues within its core mission with one voice, and protect the judicial integrity of IJs. The same goes for NAIJ's vagueness claim under the Due Process Clause: the Policy clearly describes the logistics of its review process, and it identifies the applicable substantive ethics and workplace laws and policies, which are available to IJs from other sources.

Next, NAIJ can show no irreparable harm simply on the basis of an alleged First Amendment violation, as it contends, and it fails to make a clear showing of any such harm. Indeed,

NAIJ's *years*-long delay in seeking relief against the Policy undermines any claim of irreparable harm—even ignoring that NAIJ asserts such harm stemming from the Policy it helped create.

Finally, the equities weigh against an injunction. The public's interest in hearing IJs speak about immigration cannot be at the expense of the effective operation of EOIR and the immigration courts, particularly when countless others—legal scholars, former IJs, and even current IJs like NAIJ's declarant—already frequently contribute to the public discourse.

For these reasons, the Court should deny the motion.

BACKGROUND

I. EXECUTIVE OFFICE OF IMMIGRATION REVIEW AND NAIJ

EOIR is the agency within the Department of Justice ("DOJ") with adjudicatory authority over immigration proceedings, as delegated by the Attorney General. The agency employs 509 immigration judges across the country who preside over removal proceedings to determine whether foreign-born individuals charged with violating immigration law should be ordered removed from the United States. *See* McHenry Decl. (DEX 1) ¶¶ 10-19, 31. Through their decisions, IJs may bind the agency, and thus, establish agency policy. *See id.* ¶ 27; *see also* 8 C.F.R. § 1003.1(e)(4)(ii). In recognition of this substantial authority, IJs are compensated according to a unique pay scale that is higher than the one governing the pay for most federal employees. *See* McHenry Decl. ¶ 26.

Although the IJs' most prominent duties involve adjudicating cases, they also perform other public-facing duties. For instance, IJs frequently engage in speaking activities related to their position and title, including "speaking to stakeholder organizations and conducting model hearings and pro bono trainings." *Id.* ¶ 28. In so doing, IJs are subject to, *inter alia*, ethics regulations that apply to all Executive Branch employees, *see,* 5 C.F.R. part 2635, supplemental ethics regulations applicable to DOJ employees, *see* 5 C.F.R. part 3801, and ethics guidelines specifically pertaining to IJs, *see* Ethics & Professionalism Guide for Immigration Judges ("Ethics Guide"). All of these

sources repeatedly emphasize the importance of avoiding the appearance of bias or partiality. *See, e.g.*, Ethics Guide at 1, 2; 5 C.F.R. §§ 2635.101(b)(14), 2635.501(a).

Plaintiff NAIJ is a labor organization that serves as the bargaining representative for approximately 470 non-supervisory IJs. McHenry Decl. ¶ 32. NAIJ's collective bargaining agreement ("CBA") with EOIR has been in place since 2006, and includes a grievance process for resolving workplace disputes. *Id.* ¶ 35. In addition to representing its members in labor negotiations, NAIJ also engages in media communications on their behalf and speaks to various organizations about EOIR, IJs, and immigration. *See id.* ¶ 36.

II. EOIR'S REVIEW OF PERSONNEL SPEAKING ENGAGEMENT REQUESTS

EOIR personnel—IJs in particular—often receive invitations to speak at events, particularly those related to immigration matters that implicate EOIR. *Id.* ¶ 39. While neither DOJ nor EOIR has any blanket prohibition on public speaking, EOIR personnel are subject to federal ethics and workplace laws and policies. *See id.* ¶¶ 39-40. Among those are the 2011 Ethics Guide jointly issued by EOIR and NAIJ, which provides that IJs "must seek prior supervisory and ethics approval for written work and speeches[,]" and memorializes certain ethical conduct standards. *See* Ethics Guide at 9.[1] But because the Ethics Guide set forth no formal review process for engagement requests, EOIR developed a formal, standardized review and approval process in 2017 (collectively with the 2017 memorandum, 2018 Memorandum of Understanding, and 2020 memorandum, the "Policy").

2017 Memorandum. On September 1, 2017, EOIR issued a memorandum creating a formal review and approval process for speaking requests, while also reminding personnel of existing ethics and professionalism duties. PEX B; *see* McHenry Decl. ¶ 50. Before then, EOIR had an informal practice of approving IJs to speak at an event as part of their official duties—speaking

[1] https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf. Throughout EOIR's existence, the agency has had, in practice, a review and pre-approval requirement for speaking engagements. McHenry Decl. ¶ 41.

on immigration and EOIR matters and using their IJ titles—but while in an ostensibly personal capacity. McHenry Decl. ¶ 49. Because that led to confusion over whether IJs were in fact representing the agency, *id.*, the 2017 memorandum eliminated the practice and stated that EOIR would determine if an IJ would be speaking in an official or personal capacity. PEX B at 1; *see* McHenry Decl. ¶¶ 52-53; Cox Decl. (DEX 2) ¶¶ 7, 8. Aside from these changes, previous EOIR guidance was not altered. McHenry Decl. ¶ 51.

2018 Memorandum of Understanding. In 2018, NAIJ formally initiated collective bargaining with EOIR regarding the 2017 memorandum. McHenry Decl. ¶ 58; Swanwick Decl. (DEX 3) ¶¶ 7-15. The bargaining resulted in a 2018 MOU between EOIR and NAIJ, *see* DEX 3-A, which settled issues over the 2017 memorandum's application to bargaining-unit IJs, including setting timelines governing EOIR's review of IJ speaking requests. *See* McHenry Decl. ¶ 59.

2020 Memorandum. On January 17, 2020, EOIR issued a memorandum that launched an automated process for reviewing personnel speaking engagement requests and otherwise "reissue[ed] the September 1, 2017 memorandum outlining the speaking engagement process." PEX G at 1. The 2020 memorandum also provided three clarifications on prior EOIR guidance. *Id.*; McHenry Decl. ¶¶ 67-69. First, given that the Ethics Guide states that the review requirement applies to speeches and written work, the memorandum clarified that a "speaking engagement" includes "written pieces intended for publication," PEX G at 1-2 & n.2; McHenry Decl. ¶ 68. Second, the memorandum clarified the various steps of the review process. PEX G at 2-3; *see* Alder Reid Decl. (DEX 4) ¶¶ 28-44. Third, the memorandum clarified that EOIR's determination of whether an engagement requires personnel to appear in an official capacity depends not on the "label given by either the inviter or invitee" but on the "nature of the engagement." PEX G at 2. It provided examples of "official capacity" versus "personal capacity" engagements. *Id.* at 4.

Finally, the 2020 memorandum clarified that all requests, "regardless of capacity, must comply with applicable law and agency polices," including, *inter alia*, "all ethics laws," DOJ regulations, and "any applicable ethics and professionalism guides." *Id.* at 2. It further stated that requests for "genuinely personal capacity engagements" raising no ethics concerns and occurring off-duty "will ordinarily be approved." *Id.*

III. THIS LAWSUIT

Six months after the 2020 memorandum, NAIJ filed suit on July 1, 2020, alleging that EOIR's Policy imposes an unconstitutional prior restraint on IJ's speech, Compl. ¶¶ 55-56, and is further void for vagueness under the First and Fifth Amendments, *id.* ¶¶ 56-57. That same day—nearly three years after the Policy first came into effect—NAIJ also moved for a preliminary injunction against its continued enforcement. *See* Mot. (Dkt. No. 9, 10).

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary remed[y] . . . to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001). A movant bears the heavy burden of establishing four requirements by a "clear showing": likely success on the merits, irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that the relief is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008); *Real Truth About Obama, Inc. v. FEC.*, 575 F.3d 342, 346-47 (4th Cir. 2009), *adhered to in relevant part*, 607 F.3d 355 (4th Cir. 2010). The requirement to clearly show likely success on the merits "is far stricter than . . . demonstrat[ing] only a grave or serious *question* for litigation." *Id.* at 347 (emphasis in original).

ARGUMENT

I. NAIJ IS UNLIKELY TO SUCCEED ON THE MERITS

A. This Court Lacks Subject-Matter Jurisdiction over NAIJ's Claims

NAIJ cannot demonstrate a "substantial likelihood" that this Court has subject-matter jurisdiction over its claims, a threshold requirement for showing likelihood of success on the merits. *See Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Two jurisdictional defects are fatal to NAIJ's motion: statutory channeling and lack of standing.

i. NAIJ Cannot Bypass the Exclusive Review Schemes of the FSL-MRS or the CSRA

As the certified bargaining representative for EOIR's non-supervisory IJs, NAIJ has only one proper route to challenge the Policy: through the scheme set forth by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* ("FSL-MRS"), which proceeds exclusively through the Federal Labor Relations Authority ("FLRA"), and from there (if necessary) to a federal court of appeals, bypassing district court review entirely. *AFGE v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019); *AFGE v. Sec'y of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013); *NAAE v. Trump*, 2020 WL 2571105, at *4-9 (D. Md. May 21, 2020). Yet at each conceivable opportunity to invoke the review mechanisms of the FSL-MRS, NAIJ opted not to do so. Indeed, after initiating collective bargaining over the 2017 memorandum in early 2018, NAIJ quickly reached an MOU with EOIR as to the Policy. Only now, more than two years after executing that MOU, has NAIJ evidently decided to turn its back on the agreement and bring suit in district court. That strategy is jurisdictionally unavailing: district court review is simply not provided under the FSL-MRS. And even if NAIJ could somehow evade the exclusive FSL-MRS scheme, its members would still have to satisfy the jurisdictional exhaustion requirements of the broader Civil Service Reform Act of 1978, 5 U.S.C. § 1101 *et seq.* ("CSRA"). Neither NAIJ nor any of its members have evidently done so.

The FSL-MRS comprehensively governs federal labor-management relations and provides the exclusive means of seeking administrative and judicial review of union claims. *AFGE v. Trump*, 929 F.3d at 754; *NAAE*, 2020 WL 2571105, at *4-9. The statute's review scheme applies to constitutional as well as statutory claims. *AFGE v. Trump*, 929 F.3d at 759. Under that scheme, a union generally must pursue one of three potential routes to administrative review before the FLRA and eventual direct judicial review before a court of appeals: a negotiability dispute, 5 U.S.C. §§ 7105(a)(2)(E), 7117(c)(1); a grievance under applicable collective bargaining agreement grievance and arbitration procedures, *id.* § 7121; or an unfair labor practice charge, *id.* §§ 7105(a)(2)(G), 7116(a), 7118. The statute provides no mechanism for a union to seek district court review, unless its claims fall entirely outside the statutory scheme under the analysis set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See AFGE v. Trump*, 929 F.3d at 755.

NAIJ's claims, however, are precisely the sort that Congress intended to be channeled through the FSL-MRS review scheme. In *AFGE v. Trump*, the union plaintiffs asserted statutory and constitutional claims, including First Amendment claims. 929 F.3d at 753-54. The D.C. Circuit concluded that *all* of the unions' claims were channeled away from district court review because they were "of the type that is regularly adjudicated through the [FSL-MRS] scheme," and sought the same relief that could be obtained through the statutory scheme. *Id.* at 760. So too here: NAIJ's constitutional challenge to the Policy is of the sort that can plainly be addressed by the FLRA (and certainly can be addressed by a court of appeals on direct review from the FLRA's decision), and the FLRA could provide the same relief that NAIJ seeks from this Court. *Id.* at 755-61; *AFGE v. Sec'y of the Air Force*, 716 F.3d at 636-38 (challenge to Air Force regulation requiring certain civilian employees to wear military uniform channeled exclusively through FLRA); *AFGE v. Loy*, 367 F.3d 932, 934-36 (D.C. Cir. 2004) (statutory and constitutional challenge to agency directive prohibiting collective bargaining by airport security screeners must be pursued through FSL-MRS scheme).

In fact, NAIJ took the first step toward invoking one of those FSL-MRS review mechanisms in 2018, when it initiated collective bargaining against EOIR in response to the 2017 memorandum. *See* Swanwick Decl. ¶ 7. Had NAIJ not resolved its concerns through bargaining at that juncture, it could have invoked the CBA's grievance procedures, and from there proceeded to the FLRA and the Fourth Circuit. Of course, the dispute never got that far. Having resolved its concerns through the MOU in 2018, NAIJ has no reasonable basis now to challenge the Policy as it existed then. Nor does the January 2020 memorandum change the options for review (even if it modified the Policy as alleged by NAIJ): the FSL-MRS offers NAIJ no route to district court review in any event. *See, e.g.*, *AFGE v. Trump*, 929 F.3d at 755-61; *AFGE v. Sec'y of the Air Force*, 716 F.3d at 636-38; *Loy*, 367 F.3d at 934-36; *NAAE*, 2020 WL 2571105, at *4-9.

Finding no access to district court review under the FSL-MRS, NAIJ might argue that it can still seek relief in this Court under some other jurisdictional theory. But the CSRA (of which the FSL-MRS is one part) would also foreclose any such attempt. NAIJ seems to contend that the Policy imposes a significant change in its members' working conditions (by supposedly restricting their speech), at least by comparison to some unspecified time prior to 2017. Under the CSRA, any such change in working conditions constitutes a "personnel action." 5 U.S.C. § 2302(a)(2)(A)(xii). In turn, NAIJ's contention that such a personnel action violates the Constitution represents an allegation of a statutorily defined "prohibited personnel practice." *Id.* §§ 2301(b)(2), 2302(b)(12).

But federal personnel such as NAIJ's members cannot make such contentions in federal district court—or have them made on their behalf—without first exhausting their jurisdictionally required administrative remedies under the CSRA. *Fleming v. Spencer*, 718 F. App'x 185, 188-89 (4th Cir. 2018) (affirming dismissal of claims, including First Amendment claims, where plaintiff had not exhausted any of them); *see also Irizarry v. United States*, 427 F.3d 76 (1st Cir. 2005); *Ferry v. Hayden*, 954 F.2d 658, 660-61 (11th Cir. 1992); *AALJ v. Colvin*, 777 F.3d 402, 403-04 (7th Cir. 2015). Here,

NAIJ has not alleged that any of its members attempted to exhaust those required administrative remedies. The failure to do so means that even if the FSL-MRS were somehow inapplicable, this Court would still lack jurisdiction over NAIJ's claims. *See Fleming*, 718 F. App'x at 188-89.

ii. NAIJ Does Not Have Standing to Challenge the Policy

Because NAIJ appears to be suing on behalf of its members, *see* Compl. ¶ 12, it must demonstrate that they "would otherwise have standing to sue in their own right" to establish that is has "associational" standing. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). This requires NAIJ to show that at least one member satisfies the "irreducible constitutional minimum of standing": (1) "injury in fact," (2) "a causal connection between the injury and the conduct complained of," and (3) "likel[ihood] . . . that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Here, NAIJ cannot satisfy the third element of standing: redressability. An injunction against the Policy would not remedy any of the alleged burdens on NAIJ's members' speech because all IJs would still be required to "seek prior supervisory ethics approval for written work and speeches" pursuant to the Ethics Guide, which was *jointly* issued by NAIJ and EOIR in 2011, and presently binds all IJs, *see* McHenry Decl. ¶¶ 46, 63. Thus, NAIJ's requested relief would neither eliminate the pre-clearance requirement nor prevent EOIR from enforcing any of the underlying substantive laws and regulations governing employee speech. On the contrary, it would solely prevent EOIR from implementing the guidelines set forth in the Policy streamlining the review process. In short, like the plaintiffs in *Lujan*, NAIJ lacks standing because "redress of the only injury in fact it complains of requires action" (here, the termination of the pre-approval requirement); and any relief the Court could provide in this suit is "not likely to produce that action." 504 U.S. at 571.

Redressability aside, nor can NAIJ establish standing to challenge the Policy on vagueness grounds (Counts III and IV) because it has failed to identify a single *specific* member whose speech

was chilled by the Policy's alleged ambiguity. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (requiring "specific allegations establishing that at least one *identified member* had suffered or would suffer harm" (emphasis added)). At most, the complaint generally avers that unnamed members "have been chilled from even submitting requests," Compl. ¶ 8, and NAIJ's declarant attests that "many immigration judges" wish to speak, but fear that seeking approval would be "futile," Tabaddor Decl. ¶ 34 (Dkt. No 12). That is insufficient. *See S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013).

B. The Policy Does Not Violate the First Amendment

The Supreme Court has recognized that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 465 (1995) ("*NTEU*"). Under the *Pickering* framework, when considering a challenge to a government restriction on its employees' speech, a court must first ascertain whether the employee "'spoke as a [private] citizen on a matter of public concern.'"[2] *Andrew v. Clark*, 561 F.3d 261, 268 (4th Cir. 2009) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). "If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Garcetti*, 547 U.S. at 418.

If the answer is yes, "then the possibility of a First Amendment claim arises." *Id.* To evaluate that possible claim, *Pickering* requires a court to balance (1) "the interests of the [employee], as a citizen, in commenting upon matters of public concern" and (2) "the interest of the [government], as an employer," *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), including its "interest in governmental effectiveness, efficiency, order, and the avoidance of disruption," *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998).

[2] *Pickering* "provides the framework for analyzing whether the employee's interest or the government's interest should prevail in cases where the government seeks to curtail the speech of its employees." *Lane v. Franks*, 573 U.S. 228, 236 (2014).

Here, the *de minimis* burdens that the Policy places on the speech interests of IJs and potential audiences are far "outweighed by that expression's necessary impact on the actual operation of the Government," *NTEU*, 513 U.S. at 455, which includes the potential for non-compliance with ethics and workplace rules, IJ absences from the bench during the busiest period in EOIR history, inconsistent messaging from high-level personnel, and harm to IJ judicial integrity.

i. NAIJ Lacks a First Amendment Claim to the Extent the Policy Applies to Speech Made Pursuant to an IJ's Official Duties

Even on matters of public concern, when government personnel speak "pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421; *see also Crouse v. Town of Moncks Corner*, 848 F.3d 576, 584 (4th Cir. 2017). Instead, such speech "owes its existence to a public employee's professional responsibilities," and any restriction therefore "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-22. The test of whether speech was "made in the course of an employee's job requires courts 'to engage in a practical inquiry into the employee's daily professional activities.'" *Crouse*, 848 F.3d at 584; *see also Garcetti*, 547 U.S. at 425 (instructing courts to look to "the duties an employee actually is expected to perform"). Formalities such as where the speech took place or whether the speech can be found within "a given task in the employee's written job description" are not dispositive. *Crouse*, 848 F.3d at 584.[3]

[3] For example, in *Crouse*, the Fourth Circuit held that two police officers had spoken pursuant to their official duties when they encouraged a recent arrestee to file a complaint against the arresting officer, even though they were on their unpaid lunch hour, wearing plain clothes, in an unmarked car, and not following their supervisor's orders. 848 F.3d at 584-85. The speech was official because the officers could be "easily identified" as police due to their badges and guns and because police often interact with citizens as part of their jobs. *Id.*; *see also Mpoy v. Rhee*, 758 F.3d 285, 293-94 (D.C. Cir. 2014) (holding that a teacher's letter reporting workplace misconduct was pursuant to official duties in part because the teacher "identified himself by his job title" in the letter).

Here, IJs' speech made pursuant to their job duties is altogether removed from First Amendment scrutiny. An "accepted and understood" part of IJs' duties is speaking at engagements about immigration law and courts. McHenry Decl. ¶ 28. In fact, IJs often receive invitations to speak, particularly at events related to immigration matters that implicate EOIR. *Id.* ¶ 39. And certain public speaking aspects of IJs' work, such as conducting naturalization ceremonies, presiding over model hearings, and conducting *pro bono* trainings, are explicitly part of their duties. *Id.* ¶ 75. Even NAIJ has acknowledged that "[p]art of the job of an immigration judge is to educate the public about the immigration courts and the role they play in society."[4]

The Policy reasonably captures "official capacity" speech made pursuant to an IJ's job duties, explaining that the "label given by either the inviter or the invitee is not dispositive," and instead "[i]t is the nature of the engagement, based on the totality of the circumstances that determines the appropriate capacity." PEX G at 2; *see also* McHenry Decl. ¶ 53. The Policy sensibly considers IJs to be speaking in their official capacities (and thus pursuant to official duties) when they are *invited* to or *assigned* to speak at engagements or write for publication relating to immigration law or policy, their "official EOIR duties or position," or EOIR's programs and policies. PEX G at 2. In such cases, it is likely that the IJ was "invited because of [his or her] official duties or position," which is an important factor in the Policy's official-capacity determination. *Id.*; *see also* McHenry Decl. ¶¶ 74-78. In fact, organizations often invite IJs to speak because their positions and titles add an imprimatur of official recognition or authority to engagements. McHenry Decl. ¶ 77. Accordingly, the Policy requires review of speaking requests that an IJ has labeled as personal capacity to determine if it is "genuinely" a "personal capacity event[]." PEX G at 2; *see also* Owen Decl. (DEX 5) ¶¶ 8, 9.

[4] *See* https://knight columbia.org/content/immigration-judges-challenge-justice-department-speech-policy.

NAIJ incorrectly elevates form over function to claim that the Policy "categorically prohibits [IJs] from speaking publicly *in their personal capacities* about immigration law or policy or about EOIR." Mot. at 1 (emphasis added). But whether IJs are speaking pursuant to their official duties depends not on whether IJs "wish" to speak in a personal capacity, *id.* at 7, or the speech takes place "in their personal time," *id.* at 12. *See Crouse*, 848 F.3 at 584. Case in point, the agency used to allow IJs to say they were not speaking for EOIR, while still using their official titles at immigration- or EOIR-related speaking engagements. McHenry Decl. ¶ 49. But EOIR abandoned that practice due to the confusion it caused, *id.* ¶ 52, and that confusion demonstrates why simply labeling employee speech personal-capacity speech does not make it so.[5] If employees could transform official speech into private speech so easily, "government offices could not function" because "every employment decision [would] be[come] a constitutional matter." *Connick v. Meyers*, 461 U.S. 138, 143 (1983).

ii. The Policy Places Minimal Burdens on an IJ's Speech as a Private Citizen

Nor does the Policy's application to IJs' speech as *private citizens* on matters of public concern violate the First Amendment. Rather, the Policy places minimal burdens on the First Amendment "interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression[.]" *NTEU*, 513 U.S. at 455.

1. The Policy Is a Review Process That Does Not Prohibit Speech

Contrary to NAIJ's repeated claims, the Policy does not *prohibit* any speech. Instead, the Policy sets forth a formal review *process*, which advises personnel whether their proposed speaking engagements would comply with other longstanding laws and DOJ and agency policies.

[5] For example, while NAIJ would like to label IJ speech about immigration policies that affect "their ability to do their jobs" as "personal capacity" speech, *see* Mot. at 13, courts have recognized that a public employee speaks pursuant to his official duties and thus "without First Amendment protection, when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command," *Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009).

The Policy is substantially similar to an agency prepublication review process that the D.C. Circuit upheld, in part because that process did not constitute an "actual prohibition of speech." *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439, 1443 (D.C. Cir. 1996). There, the agency's regulation stated that "[n]o employee shall publish any material of official concern . . . until it has been cleared" by the agency after review. *Id.* at 1435. The court held that this process did not constitute a speech prohibition because it "d[id] not . . . authorize any form of punishment for publication of material disapproved by the agency, so long as it was submitted for review beforehand." *Id.* Rather, the agency's authority to "punish" the publication of disapproved material "stem[med] from some other source," including a "statutory prohibition on disclosure of classified information." *Id.* at 1436. In other words, the clearance process merely ensured that "the agency judgment c[ould] be *expressed* to the employee," putting him or her "fully on notice" of a potential violation. *Id.* at 1437.[6]

Here, the Policy does not prohibit speech, but instead establishes a consistent process for reviewing speaking engagement requests consistent with ethical and professional obligations. *See* McHenry Decl. ¶¶ 51, 62, 66, 87; Alder-Reid Decl. ¶¶ 7, 10; PEX G at 1. The 2020 memorandum, for instance, requires the use of a "new speaking engagement request form" and a new "request portal," and assigns review responsibilities to supervisors, the Speaking Engagement Team ("SET"), and the Ethics Program. PEX G at 2. Although the agency determines whether requests "comply with applicable law and agency policies," those laws and policies (summarized in the Ethics Guide) are distinct from the Policy itself, which contains no content-based restriction on speech. *Id.* Thus, the Policy is distinguishable from the substantive prior restraints at issue in the cases on which NAIJ primarily relies. *See NTEU*, 513 U.S. at 467 (striking down statute that banned a "broad category of

[6] While *Weaver* applied the constitutional avoidance cannon to find that the prepublication review process there did not prohibit speech, 87 F.3d at 1439, other courts have upheld similar preclearance processes even where the review scheme was interpreted to contain a substantive prior restriction. *See, e.g.*, *Snepp v. United States*, 444 U.S. 507 (1980); *Zook v. Brown*, 865 F.2d 887 (7th Cir. 1989).

expression"); *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016) (invalidating "a virtual blanket prohibition on all speech critical of the government employer").

2. The Policy Places a Minimal Burden on Speech

Under the Policy, any burdens on speech are minimal. To start, it applies only to a relatively small number of personnel. EOIR employs approximately 2,000 personnel, only 509 of whom are IJs; of those, about 470 are bargaining-unit IJs. McHenry Decl. ¶¶ 31-32; *cf. NTEU*, 513 U.S. at 473 & 475 n.21 (applying heightened scrutiny to a law burdening an "immense class of workers").

The Policy's process also provides short approval timelines. An IJ's supervisor must strive to notify the IJ one business day after sending the request to the SET, which in turn must strive to respond within five business days. PEX D at 1. The SET must also strive to respond to any request for reconsideration within 10 business days. *Id.* NAIJ specifically negotiated and agreed to the 2018 MOU that sets these short timelines. *See* Mot. at 5; McHenry Decl. ¶¶ 58-60; Swanwick Decl. ¶ 15. Yet it now objects that the timelines it negotiated are merely "aspirational," while claiming systemic delays on the basis of just two examples (which both *pre-date* the 2020 memorandum), Mot. at 22, out of the 356 total requests EOIR has received since November 2017, *see* Alder-Reid Decl. ¶ 47.

Importantly, approximately 80% of all engagement requests by EOIR personnel have been approved under the Policy. *Id.* ¶ 47. In particular, IJ requests to attend genuinely personal capacity engagements are routinely granted, so long as there are no ethics concerns or disruption to EOIR operations due to the IJ's absence from court. PEX G at 2; *see also* McHenry Decl. ¶¶ 69, 82, 85; Alder-Reid Decl. ¶ 47 (noting that from November 2017 to July 20, 2020, EOIR denied just 16 IJ personal capacity requests, while granting 59).

3. The Policy Does Not Significantly Burden the Public's Access to IJ Speech Regarding Immigration and EOIR

Likewise, the Policy imposes no substantial burdens on the public's interest in hearing IJ speech as private citizens on matters of public concern. Most IJ speaking requests (including

personal capacity requests) are approved. *See supra* Part I.B.ii.2. Moreover, there are many speakers not subject to the Policy who are also uniquely positioned to express views about immigration and EOIR. For instance, the Policy does not apply to IJs who are union representatives. *See* Tabaddor Decl. ¶ 6. Nor does it impose any restrictions on NAIJ, which frequently speaks through the media on behalf of its members about EOIR, IJs, and immigration law and policy. McHenry Decl ¶ 36; *see also* Compl. ¶ 18.[7] Finally, as NAIJ's own motion illustrates, a robust public dialogue over immigration law and policy occurs on a near-everyday basis regardless of the Policy, with input from law professors, Mot. at 15 n.6, advocates, *id.* at 10 n.2, 15 n.7, immigration experts, citizens, *id.* at 16 n.8, and even IJ Tabaddor, *id.* at 10 n.2. Thus, the Policy does not deprive the public of discussion on these topics.

iii. The Policy Furthers EOIR's Interests in Ensuring the Agency's Efficient Operation

The minimal burdens the Policy places on First Amendment interests are outweighed by "the government's interest in governmental effectiveness, efficiency, order, and the avoidance of disruption." *McVey*, 157 F.3d at 277. Pursuant to this interest, the government "must have wide discretion and control over the management of its personnel" and "is entitled to maintain discipline and ensure harmony as necessary to the operation and mission of its agencies." *Id.*

The government's interest in effectiveness is particularly strong when applied to its personnel with a "confidential, policymaking, or public contact role," due to the potential that such high-level personnel could "speak[] out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence." *Id.* at 278. Circuit courts have thus "generally denied" "high-ranking agency personnel First Amendment protection." *Id.* at 279. "[T]he higher

[7] *E.g.*, https://www.naij-usa.org/images/uploads/publications/ NAIJ-position-paper-May-2016-classification-of-IJs_2.pdf.

the level the employee occupies, the less stringent the government's burden of proving interference with its interest." *Hall v. Ford*, 856 F.2d 255, 261 (D.C. Cir. 1988).

Here, IJs are high-level, public-facing officials that may bind the agency through their decision-making and arguably make agency policy as a result. *See supra* p. 3; *see also Kidd Commc'ns v. F.C.C.*, 427 F.3d 1, 5 (D.C. Cir. 2005) (federal agencies can "make legal-policy through rulemaking or by adjudication"). Accordingly, an IJ's expression, even as a private citizen on matters of public concern, can have a "'necessary impact on the actual operation' of the Government," *NTEU*, 513 U.S. at 468, leading to a series of harms that "are real, not merely conjectural," *Id.* at 475. For the reasons that follow, the Policy "in fact alleviate[s] these harms in a direct and material way." *Id.*[8]

1. The Policy Ensures Compliance with Ethics and Other Applicable Workplace Laws

Like all government employers, EOIR has a significant interest in ensuring its personnel's compliance with the ethics and professionalism laws that govern federal personnel. *See McVey*, 157 F.3d at 278. Those rules and regulations are listed in the Ethics Guide and various public sources. *See, e.g.*, McHenry Decl. ¶¶ 47, 88-90, 100-111, 113, 120-121.

Review under the Policy is warranted because many speaking engagement invitations extended to IJs implicate potential ethics concerns, especially when related to an IJ's involvement in immigration matters. *Id.* ¶ 92. For example, invitations often raise issues of whether an engagement

[8] While EOIR satisfies *NTEU*'s heightened standard, NAIJ's contention that the Policy must meet that standard is built on its faulty assumption that the Policy prohibits expression, *see* Mot. at 9, which it does not, *see supra* Part I.B.ii.1. In any event, EOIR also should not be held to a heightened standard for two other reasons. First, the Policy has been effective since 2017, PEX B at 1, and EOIR has had a memorialized policy requiring prior approval of certain employee speech at least since 2008, McHenry Decl. ¶ 44. As a result, to the extent specific examples of harms are lacking, it is likely an indication that the Policy works. *See Burson v. Freeman*, 504 U.S. 191, 208 (1992) (noting difficulty of finding evidence to support long-enforced statutes). Second, *NTEU*'s standard should give way where, as here, the government asserts an interest in protecting the "public trust in judicial impartiality," to which courts defer because it "does not lend itself to proof by documentary record." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 447 (2015).

might risk an IJ using his or her public office for private gain in violation of 5 C.F.R. § 2635.702(b). Invitations frequently ask IJs to use their title to give the appearance of official government sanction or endorsement of the IJ's proposed remarks. *Id.* ¶ 93. Many IJs have developed friendships with individuals who run the organizations who invite them to speak, including attorneys who appear before them in cases. *Id.* ¶ 95. And because many speaking invitations are for events requiring payment to the organization hosting the event, the IJ's interest in speaking will raise issues regarding the use of an official position to provide preferential treatment or to affect the financial interests of a friend. *Id.* Requests for an IJ to speak made by a friend who also appears as an attorney before the IJ will raise similar issues. *Id.*

The Policy's review process makes it possible for EOIR to provide consistent advice to IJs that prevents ethics or other violations before they occur. *See id.* ¶ 139; *see Weaver*, 87 F. 3d at 1441 (upholding prepublication review process that "permits the government to take corrective action before the unauthorized disclosure of classified information occurs"). Absent the Policy, IJs would remain subject to these various ethics and professionalism rules, but the lack of review would result in a greater chance of violations. McHenry Decl. ¶ 139; *cf. U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 580 (1973) (an agency's advisory procedure for Hatch Act questions can "remove[] any doubt" for an employee unclear on "the validity of a proposed course of conduct").

2. The Policy Ensures That Speaking Engagements Do Not Interfere with EOIR's Work

The Policy also ensures that speaking engagements (and in particular, personal capacity engagements) that require an IJ to take time away from adjudicating cases will not harm the agency's ability to fulfill its mission. PEX G at 2; Alder-Reid Decl. ¶¶ 43-44; *see McVey*, 157 F.3d at 278. As a practical matter, IJ speaking engagements typically involve time away from the bench, which may require them to use leave and require the agency to reallocate work to other personnel. McHenry Decl. ¶ 42. While requests for genuinely personal capacity speaking engagements are normally

approved, *see* PEX G at 2, if an employee's absence at a particular time is not operationally feasible due to deadlines, the agency's workload, or leave requests by other personnel, a request may be denied. McHenry Decl. ¶ 82. The Policy's review process therefore allows the agency to manage the speaking engagement's effect on its operations. *Id.*; Alder-Reid Decl. ¶¶ 43, 44. This ability is particularly critical now, when immigration courts face unprecedented workloads, *see, e.g.*, Compl. ¶ 16, with more than one million cases pending—double the backlog that existed even as recently as 2017, *see* Alder-Reid Decl. ¶ 45.

3. The Policy Ensures That EOIR Is Able to Speak with a Consistent Voice to Avoid Confusion and Undermining Confidence in EOIR

The Policy's review process also serves EOIR's interest in ensuring that its "messaging is consistent across official engagements." PEX B at 2; PEX G at 3. The Fourth Circuit has explained that a high-level government personnel's interest in engaging in publicly contradictory, "disrupting," and "confidence-destroying speech . . . must be subservient to the agency's interests" in "providing effective and efficient government through its employees." *McVey*, 157 F.3d at 278-79.

The Policy's review process promotes this interest in part by reviewing all requests to speak in a personal capacity to ensure that the event in question is a *genuinely* personal capacity event. PEX G at 2. For events where, due to their nature, the speaker will be acting in their official duties and representing EOIR, the agency's interest in ensuring consistent messaging that actually conveys the viewpoint of the agency is at its apex. *See supra* Part I.B.iii.1.

By promoting that interest, the Policy helps avoid the public confusion that would result if conflicting voices were speaking on behalf of EOIR. *See* Alder-Reid Decl. ¶ 10. An audience listening to an IJ speaking on issues relating to immigration and EOIR could reasonably expect the speaker to be knowledgeable about the agency's official position on topics relating to its mission. *See* Owen Decl. ¶ 10. The Policy's review process allows EOIR to ensure, before the event, that the speaker is prepared to answer questions on behalf of the agency, or to choose another speaker who

is able to present a consistent, nationwide message to the public. PEX H at 2. The agency's need to ensure consistent messaging is particularly important when it comes to IJ-speakers due to the need to avoid giving the misimpression that there are "local" interpretations, particular to certain IJs, instead of ensuring that policies are consistent across the immigration court system nationwide. *Id.*

Moreover, the Policy allows EOIR to exercise some of the "wide discretion and control" over its high-level personnel that is necessary to prevent "disrupting" and "confidence-destroying speech" that undermine public confidence in the agency. *McVey*, 157 F.3d at 277-79. NAIJ concedes EOIR's "legitimate" interest in "promoting the efficiency of the services it performs through its employees," yet demands that IJs should be free to use their official titles while potentially airing public grievances about EOIR and the laws and policies it applies. Mot. at 2, 3, 13, 15.

IJs are not members of the general public, however, and could do real harm to the agency by making representations about immigration policy and EOIR, as demonstrated by the activities of some former IJs. For instance, several former IJs run websites dedicated to critiquing EOIR, IJs, federal judges handling immigration cases, and the immigration courts using vituperative language.[9] Others frequently speak to the media. Dozens others have filed *amicus curiae* briefs asking federal courts to reject EOIR's legal positions on immigration law.[10] If similar views were expressed by *current* IJs, it would do significant damage to the reputation of EOIR, the immigration courts, and IJs

[9] For example, one former IJ's blog accuses immigration judges of being "enforcement agents in robes" beholden to the President and Attorney General; accuses U.S. Immigration and Customs Enforcement of spreading Covid-19 "Throughout The U.S. & The World"; and criticizes federal judges' handling of immigration cases. *See generally* https://immigrationcourtside.com. Former IJs have also made critical statements in the national news media. One recent article featured three former IJs, including one who called the EOIR hiring process "a fraud and a joke," and a "coverup for 'expedited,' predetermined, ideologically-based, 'insider' hiring."' *See* https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration/.

[10] *See, e.g.*, Br. For Former EOIR Judges as *Amici Curiae*, *Nasrallah v. Barr, et al.*, No. 18-1432 (Dec 16, 2019); Br. For Former Immigration Judges and Former Members of the Board of Immigration Appeals as *Amici Curiae*, *Lopez v. Decker, et al.*, No. 19-2284 (2d Cir. Feb. 11, 2020).

themselves. As NAIJ has acknowledged, IJs "hold special and public positions of trust," and their "reputations can be damaged by the release of inaccurate information to the public that has not been properly scrutinized." *See supra* at 17 n.7. The Policy's review process is therefore necessary to prevent these real potential harms. *See, e.g.*, *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993) (explaining that a high-level government employee "does not have much protection under the First Amendment when he speaks or acts in a hostile way toward his employer").

4. The Policy Ensures That Speaking Engagements Do Not Damage the Judicial Integrity of IJs

Finally, the Policy's review process also promotes EOIR's important interest in protecting the judicial integrity of its IJs. "Public perception of judicial integrity is . . . a state interest of the highest order." *Williams-Yulee*, 575 U.S. at 433 (citation omitted). Although members of the executive branch, IJs are "judicial officers" who, like members of the judicial branch, "have a responsibility to function as neutral and impartial arbiters." *Abdulrahman v. Ashcroft*, 330 F.3d 587, 596 (3d Cir. 2003 (citation omitted)); *see also* 8 C.F.R. § 1003.10(b).

The Policy's review process ensures that IJ speaking engagements do not threaten judicial integrity by "remind[ing] of the importance of impartiality and avoiding the appearance of impropriety, favoritism, or preferential treatment." PEX G at 3; Alder-Reid Decl. ¶ 14. As NAIJ acknowledges, an IJ's dual roles as impartial arbiter and "contribut[or] to public understanding of immigration law and policy through speaking engagements" are "closely related." Compl. ¶¶ 14-15. Given the close relation of those dual roles, EOIR has a significant interest in reviewing whether a particular speaking engagement, whether personal- or official-capacity, might impact an IJ's role as an impartial arbiter—a consideration that also draws many parallels to the various ethical concerns at play with IJ speaking engagements. McHenry Decl. ¶¶ 96, 98, 125; *see supra* Part I.B.iii.1. The public's current heightened interest in immigration issues and immigration courts, Compl. ¶¶ 4-5, 16,

48, only enhances the usual risk that acceptance of a particular speaking engagement, or an ill-considered statement at an event, could damage an IJ's impartiality or appearance of impartiality.

iv. The Policy's Sweep is Reasonably Necessary to Protect EOIR's Effectiveness

There is also no basis to NAIJ's argument that the Policy sweeps broader than "reasonably necessary to protect" its interests in agency effectiveness. *Weaver*, 87 F.3d at 1439 (quoting *NTEU*, 513 U.S. at 474). *First*, the Policy's application to all bargaining unit IJs represented by NAIJ is reasonably necessary to protect EOIR's interests. Any bargaining unit IJ could implicate EOIR's anti-disruption interests at a speaking engagement, whether by violating ethics or personnel rules, missing time from work, conveying inconsistent messaging, or creating an appearance of partiality. NAIJ objects that the Policy applies to an IJ's alleged personal capacity speech, but as discussed above, EOIR's interests are implicated when an IJ speaks on immigration-related issues regardless of whether an IJ self-labels that speech "personal." *See supra* Part I.B.i. As for genuinely personal capacity IJ speech, while EOIR approves the vast majority of such requests, the agency still has valid interests in ensuring compliance with ethics and personnel laws, and in ensuring that engagements will not leave EOIR insufficiently staffed. *See supra* Parts I.B.iii.1&2.

Second, the Policy's reach is limited enough where many current and former IJs, among others, are able to add to the ongoing national debate over the immigration laws and courts without undergoing the Policy's review process.

Third, no prospective review process could satisfy NAIJ's demand that the Policy apply only to "speech that reasonably could be expected to disrupt" operations. Mot. at 19. For example, in *Weaver*, the D.C. Circuit found that an agency's prepublication review process was "reasonably necessary" because "only review before publication enables the government to take preemptive rather than merely reactive steps in response." 87 F.3d at 1442; *cf. Buckley v. Valeo*, 424 U.S. 1, 29-30 (1976) (upholding prophylactic campaign contribution limits because suspect contributions are hard

to identify in advance, and the limits "safeguard[] against the appearance of impropriety"). The Policy's prospective scheme has the added benefit of clarifying for an IJ the uncertainty of whether a particular speaking engagement would run afoul of the agency's substantive laws and policies before a violation can occur. *See Letter Carriers*, 413 U.S. at 580.

v. The Policy Is Not Subject to a Heightened Standard of Review

Finally, NAIJ objects that the Policy lacks "substantive and procedural safeguards" such as "narrow, objective, and definite standards" and definite "time limits." Mot. at 19-21. But the "safeguards" NAIJ demands are not required here. While courts have required regulations imposing licensing requirements on speech to have "narrow, objective, and definite standards," *outside* the government-employment context, they have not done so "[i]n the context of the *Pickering/NTEU* balance." *Harman v. City of New York*, 140 F.3d 111, 120 (2d Cir. 1998); *see also Weaver*, 87 F.3d at 1443 ("We have found no case holding that a review process . . . in the context of an employment relationship is constitutionally invalid for want of a specific deadline on action.").

NAIJ's cited cases all arise in the clearly inapposite context of government licensing requirements for speech *by private parties*.[11] *See Weaver*, 87 F.3d at 1443 ("[C]ourts have uniformly assessed prior restraints in the setting of government employment by standards less demanding than those used for traditional prior restraints."). Indeed, courts have upheld agency pre-publication review processes without applying the more demanding standard NAIJ urges. *See, e.g.*, *id.* at 1141-43 ("reject[ing] the idea that prior review in the employment context must proceed under a pre-set time limit"); *Edgar v. Coates*, 2020 WL 1890509, *19-20 (D. Md. Apr. 16, 2020) (declining to apply the traditional prior restraint framework). This Court should do the same.

[11] *See Am. Entertainers LLC v. City of Rocky Mount*, 888 F.3d 707, 711, 720 (4th Cir. 2018) (city ordinance requiring licenses for "sexually oriented businesses"); *Chesapeake B & M, Inc. v. Harford Cty.*, 58 F.3d 1005, 1007, 1016 (4th Cir. 1995) (county law governing licenses for adult bookstores).

But even if the Court were to disagree, the Policy still passes constitutional muster because, as explained below, it sets forth a clear standard for reviewing speaking requests, and the 2018 MOU sets forth safeguards against "indefinite delay." *Chesapeake B&M, Inc.*, 58 F.3d at 1011.

C. The Policy Is Not Unconstitutionally Vague

NAIJ claims that Policy is unconstitutionally vague under the First and Fifth Amendments, Compl. ¶¶ 56-57, but does not allege that there is any ambiguity as to the *type* of speech that is subject to pre-approval (*i.e.*, speaking engagements and written works intended for publication), or what constitutes "personal" versus "official capacity" speech. Rather, NAIJ's sole argument is that EOIR's standards for reviewing speaking requests "are ill-defined and subjective in application." Mot. at 23. That has no merit.[12]

i. The Policy's Standard of Review for Speaking Requests Is Reasonably Clear

A regulation is unconstitutionally vague if it fails to "provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal," *Buckley,* 424 U.S. at 77, or fails to provide "explicit standards for those who apply" it, *Grayned*, 408 U.S. at 108. "[P]erfect clarity and precise guidance have never been required," however. *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 749 (4th Cir. 2010). Rather, when considering a vagueness challenge to speech restrictions, "a court must ask whether the [restrictions] 'are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.'" *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973)).

Far from being "exceedingly broad and indefinite," the Policy directs employees to the specific substantive guidelines for review of speaking requests. PEX G at 3-4. NAIJ offers no

[12] It is dubious that the void-for-vagueness doctrine even applies here because the Policy does not prohibit or punish any speech. *Cf. United States v. Williams,* 553 U.S. 285, 304 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment."); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (explaining that vague laws violate due process because they "trap the innocent by not providing fair warning").

reason why this standard is vague. Its own cited case, *American Entertainers*, makes clear that, even in the licensing context, a regulation is valid when there are "concrete standards" to "guide the decisionmaker's discretion." 888 F.3d at 720-21. Here, the Policy expressly incorporates the Hatch Act, the Justice Manual, and the Ethics Guide. *See Letter Carriers*, 413 U.S. at 576 (upholding Hatch Act provision because its interpretation was limited by reference to "regulations specifying the conduct that would be prohibited or permitted"). Which laws and policies are "applicable," then, should be obvious as a "matter of common sense" to NAIJ members, as they are laid out in the Policy and summarized in the Ethics Guide. Should any NAIJ member find the Policy unclear, moreover, the Policy provides a mechanism for seeking guidance, *see* PEX G at 6, further counseling against a finding that the Policy is void for vagueness. *See Letter Carriers*, 413 U.S. at 580.[13]

ii. The Policy's Standard of Review Does Not Confer EOIR Unbridled Discretion

Because the language of the Policy is reasonably clear, there is no basis to conclude that the standard for reviewing speaking requests *invites* selective or discriminatory enforcement. *See Schwartzmiller v. Gardner*, 752 F.2d 1341, 1345-46 (9th Cir. 1984). Contrary to NAIJ's assertions, the Policy does not confer reviewers with unbridled discretion to deny speaking requests. *See* Owen Decl. ¶¶ 12-17 (explaining how supervisors' review is guided by consideration of agency laws and policies). The Policy sufficiently specifies *which* agency laws or policies apply to IJs' speech. *Contra Am. Entertainers LLC*, 888 F.3d at 721 (provision "swe[pt] too broadly by requiring the police chief to choose on a case-by-case basis which particular laws to consider in evaluating applications"). And these concrete standards provide clear guideposts for review. *Contra Harman*, 140 F.3d at 120 (policy

[13] NAIJ's argument is even less persuasive to the extent that it claims the Policy must enumerate *every* applicable law or regulation. Courts do not require laws to offer "perfect clarity and precise guidance." *Imaginary Images, Inc.*, 612 F.3d at 749. Rather, the relevant language is considered *in context* when assessing whether it gives fair notice. *See, e.g.*, *Grayned*, 408 U.S. at 112; *Arnett v. Kennedy*, 416 U.S. 134, 159-160 (1974). The context of outside speaking here provides fair notice that such speech must follow ethics and professionalism rules and departmental policies on media contacts.

gave broad discretion "to determine the appropriate manner in which to handle media contacts" so long as it is "consistent with the efficient and effective operation of the Agency").

NAIJ's claim ultimately boils down to a disagreement with EOIR's classification of speech on immigration issues as "official" and the attendant restrictions this entails. *See, e.g.*, Mot. at 9; Compl. ¶¶ 40-44; Tabaddor Decl. ¶ 25. But that disagreement does not mean that the Policy, which describes the logistics of the review process, is unconstitutionally vague.

II. NAIJ HAS NOT SHOWN ACTUAL AND IMMINENT IRREPARABLE HARM

NAIJ argues, in less than a page, that it has shown irreparable harm, resting on a statement by a three-Justice plurality in *Elrod v. Burns*, 427 U.S. 347 (1976), that "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." Mot. at 24. NAIJ's anemic effort fails to make a "clear showing" of irreparable harm.

Although the Fourth Circuit has held that, as to alleged constitutional violations, "a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits," *W.V. Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009), NAIJ has not established likely success on the merits of its claims for the reasons discussed above. Its reflexive reliance on the "linkage" between irreparable harm and likely success on the merits, Mot. at 24, is therefore misplaced. *See, e.g.*, *Toure v. Hott*, 2020 WL 2092639, at *13 (E.D. Va. Apr. 29, 2020). Likewise, "merely asserting a constitutional claim . . . 'is insufficient to automatically trigger a finding of irreparable harm." *Capital Associated Indus., Inc. v. Cooper*, 129 F. Supp. 3d 281, 296 (M.D.N.C. 2015); *see also Edmonds v. Gilmore*, 988 F. Supp. 948, 956 (E.D. Va. 1997) (no irreparable harm despite alleged First Amendment violation). NAIJ must actually "*show* that [its] First Amendment interests

are either threatened or in fact being impaired at the time relief is sought." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (emphasis added).[14]

Here, NAIJ's conclusory assertions of harm fail to make the necessary showing. Mot. at 24. It identifies no actual harm resulting from the Policy's mere classification of "official capacity" speech, because all requests for speaking engagements go through the preapproval process regardless of classification. *See* PEX B at 4; PEX G at 3. It offers no elaboration of the purported harm brought about by the Policy's preapproval process—presumably because, as NAIJ admits, EOIR has *always* had a preapproval requirement for outside speaking since the beginning of its existence. Compl. ¶¶ 19, 39; Mot. at 3; Tabbador Decl. ¶ 8; McHenry Decl ¶¶ 41, 44. And, its generic allegations of the "many" immigration judges whose speaking requests were denied or who have been chilled from submitting requests are just the sort of "conclusory assertion[s]" that do not establish irreparable harm. *See Am. Postal Workers*, 766 F.2d at 722.

Moreover, if there is any urgency for the relief NAIJ seeks—and it has articulated none—any such claimed emergency is belied by NAIJ's own substantial delay in seeking relief. "Since an application for preliminary injunction is based upon an urgent need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is not required." *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989); *see also Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (affirming denial of preliminary injunction where plaintiffs waited six years to file); 11A Wright & Miller, Fed. Prac. & Proc. § 2948.1 (3d ed.) ("A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction."); *Eagle On All. v. Jewell*, 2013 WL 6188998, at *9 (E.D. Va. Nov. 22, 2013). This is true even in cases alleging First Amendment violations. *See, e.g.*,

[14] *See also, e.g.*, *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989); *Am. Postal Workers Union v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985) (rejecting "conclusory assertion" of a chilling effect).

Steakhouse, Inc. v. City of Raleigh, N.C., 166 F.3d 634, 638 (4th Cir. 1999) (in light of plaintiff's delay, finding it "curious to hear [plaintiff] now complain about the loss of its asserted rights for 'even [a] minimal period[] of time."); *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1062 (7th Cir. 2016) (three-month delay undercut claim of irreparable harm from alleged First Amendment violation); *Edmonds*, 988 F. Supp. at 956 (same, for four-month delay).

NAIJ's substantial delay fatally undermines its claimed irreparable injury. It now asserts imminent irreparable harm from the review process detailed in the 2017 memorandum (reissued without material change in 2020)—a document that NAIJ admits every immigration judge received in September 2017, *see* Tabbador Decl. ¶¶ 11, 21—yet apparently experienced no such *irreparable* harm at any time in the three years prior. Like in *Capital Associated*, 129 F. Supp. 3d at 297, a First Amendment case where a business association moved for a preliminary injunction against a state law that had been in existence in some form for decades, NAIJ only now seeks emergency relief against a policy that has been in existence for years (not to mention the even longer-running existence of a general preapproval requirement at EOIR, *see* Compl. ¶¶ 19, 39; Tabbador Decl. ¶ 8; McHenry Decl. ¶¶ 41, 44). Like in *Capital Associated*, this Court should find that NAIJ "is not before the Court in exigent circumstances."[15] 129 F. Supp. 3d at 297.

III. THE BALANCE OF EQUITIES WEIGHS AGAINST AN INJUNCTION

NAIJ also has not shown "that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Here, NAIJ again claims that the Policy

[15] NAIJ overstates the difference between the 2017 and 2020 memoranda. Mot. at 6. The 2020 memorandum does not newly prohibit any speech, as NAIJ claims; like the 2017 memorandum, it describes the preapproval process, which did not materially change. PEX B at 2; PEX G at 2. The 2020 memorandum does not newly apply to writing and media contact; EOIR always has required preapproval for outside speaking, including writing and media contact. McHenry Decl. ¶ 41. In any event, NAIJ *still* delayed another six months after receiving the 2020 memorandum to seek its claimed "emergency" relief. *See* Tabbador Decl. ¶ 21; *Jones*, 842 F.3d at 1062 (three-month delay).

operates as a prior restraint, Mot. at 25, but while the Policy operates prospectively, it neither prohibits nor substantially stifles speech. *See supra* Part I.B.ii.1&2.

The alleged public interest in "hearing from immigration judges," Mot. at 25, also does not tip the balance in NAIJ's favor. While the public may have an interest in immigration, that interest does not entitle it to information that would violate ethics laws, the Hatch Act, or other DOJ policies. PEX G at 2. And, even if the public somehow had an interest in *specifically* hearing from IJs in their personal capacity without their titles about "immigration law or policy issues," or "agency policies and programs," *id.*, that information is already available from NAIJ officials and retired IJs who regularly contribute to the ongoing public discourse about immigration. *See supra* Part I.B.ii.3.

On the other side of the balance, the government's interest in preserving EOIR's ability to have sitting IJs speak on behalf of the agency in one voice and to preserve judicial integrity during this time of intense scrutiny of immigration policy is substantial (and wholly unaddressed in NAIJ's assessment of the equities). *See supra* Part 1.B.iii.3&4. The harm of enjoining the Policy is especially acute here because it would eliminate the clear review process EOIR set forth, while doing nothing to redress NAIJ's actual alleged injury. *See supra* Part I.A. This would render it "operationally difficult, if not impossible, to provide appropriate and consistent advice to IJs," McHenry Decl. ¶¶ 139, 140, and may, in fact, impose a greater burden on speech.

CONCLUSION

For the foregoing reasons, the Court should deny NAIJ's motion.[16]

[16] In the event the Court grants NAIJ's motion, any preliminary injunction should be no broader than necessary. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Thus, any injunction should be limited to the Policy's pre-approval process and the attendant requirement that IJs speaking or writing on immigration issues must do so in their "official capacity," since NAIJ has not challenged the Policy's other provisions governing travel, reimbursement for speaking, etc.

Dated: July 20, 2020

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